Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. 159

JOHN F. GILCHRIST, LEON C. [illegible] AND CHARLES C. LOCKWOOD, CONSTITUTIONS OF THE TRANSIT COMMISSION, ETC., ET AL., APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED [illegible]

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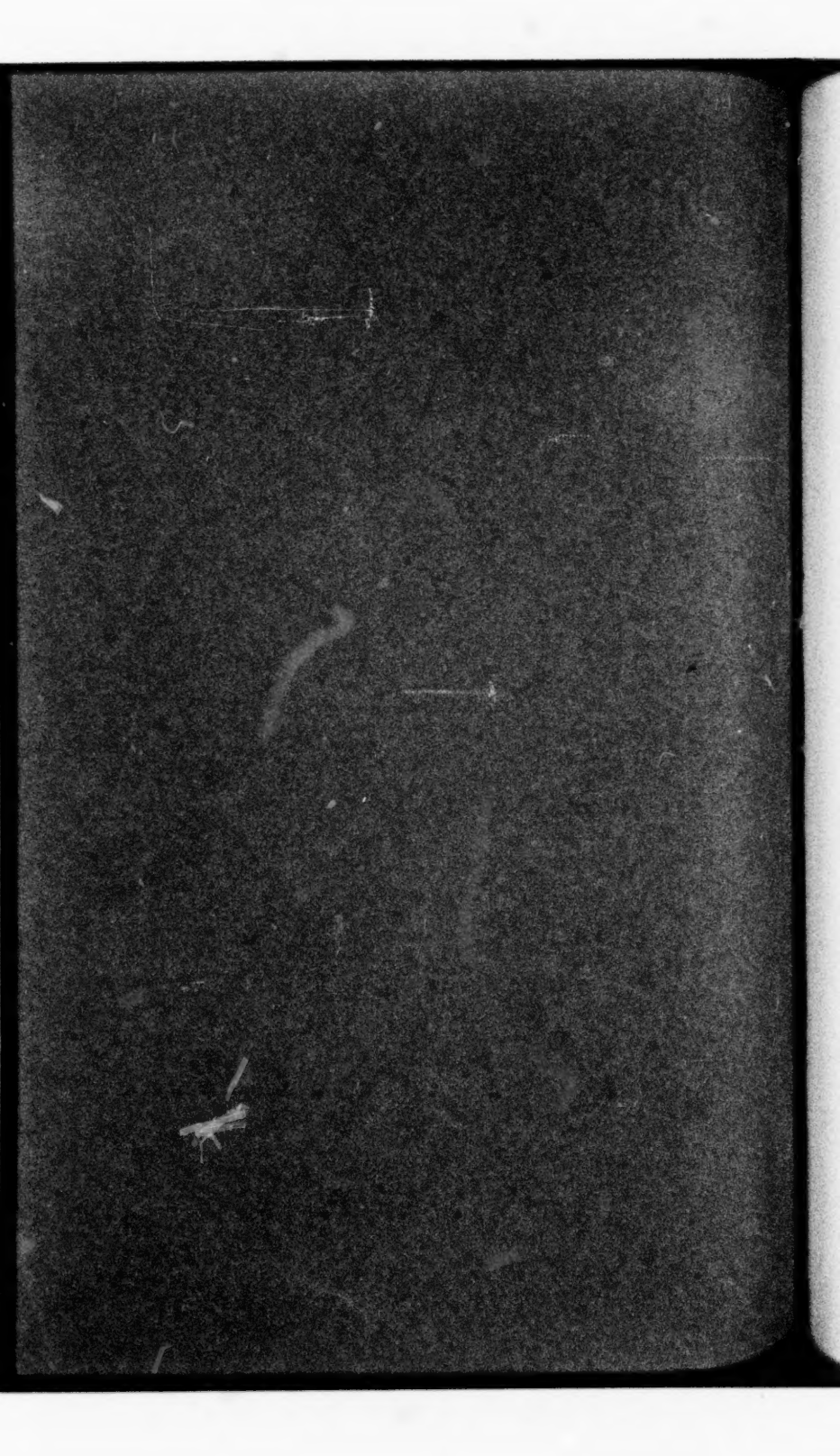

(33,468)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

Interborough Rapid Transit Co., Plaintiff,

against

John F. Gilchrist et al., Defendants

Præcipe for Subpœna

To Alexander Gilchrist, Jr., Clerk U. S. District Court, Southern District of New York:

You will please issue a subpœna to the defendants in the above entitled action.

James L. Quackenbush, Solicitor for Plaintiff. Office and Post Office address: ——, New York City.

New York, February 14, 1928.

[fol. 3] In United States District Court

Subpœna

The President of the United States of America to John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division, of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; Manhattan Railway Company, and the City of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the

said Court in a suit in Equity by Interborough Rapid Transit Company and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars ($250).

Witness Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 14th day of February, in the year One Thousand Nine Hundred and Twenty-eight and of the Independence of the United States the One Hundred and fifty-second.

Alex Gilchrist, Clerk. James L. Quackenbush, Pl'ff's. Sol'r. (Seal of U. S. Dist. Ct. So. Dist. N. Y.)

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

Alex Gilchrist, Clerk. (Seal.)

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[fol. 5] In United States District Court, Southern District of New York

In Equity. No. —.

Interborough Rapid Transit Company, Plaintiff,

against

John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, Constituting the Transit Commission, the Same being the Metropolitan Division of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; The Manhattan Railway Company, and The City of New York, Defendants

Complaint

The plaintiff complains and alleges, on information and belief:

For Its First Cause of Action

The Parties

1. The plaintiff is a domestic railroad corporation, having been incorporated on or about May 1, 1902, pursuant to the provisions of the Railroad Law of the State of New York and Chapter 4 of the Laws of 1891 of the State of New York as amended, and having its principal office in

the Borough of Manhattan, City and County and State of New York, in the Southern District of New York. The plaintiff is a "common carrier" and a "street railroad corporation," as such terms, respectively, are defined by the Public Service Commission Law of the State of New York, hereinafter mentioned. As a common carrier of persons [fol. 6] and property for hire, the plaintiff operates and manages, and for many years past has operated and managed, certain rapid transit railroads lying exclusively within the City of New York, parts of which are owned and leased to it by the defendant The City of New York, other parts of which are owned and leased to it by the defendant Manhattan Railway Company, and still other parts of which are owned by the plaintiff, all of which are parts of a comprehensive system of elevated and subway rapid transit railroads. The aggregate length of such railroads operated by the plaintiff is over 117 miles of route, and over 388 miles of single track, and the number of passengers transported thereon during the year ended June 30, 1927, was about 1,173,646,256. As such common carrier, the plaintiff is, and at all times since July 1, 1907, has been subject to the provisions of the Public Service Commission Law of the State of New York, hereinafter mentioned.

II. The defendant Manhattan Railway Company is a domestic railroad corporation, having been incorporated on or about December 29, 1875, pursuant to the provisions of the Rapid Transit Act, Chapter 606 of the Laws of 1875, with authority to construct, maintain and operate certain elevated railroads along routes laid out and designated by the Rapid Transit Commission duly acting under the authority of that Act. It has its principal office in the Borough of Manhattan, in the City, County and State of New York. It is a "common carrier" and a "street railroad corporation," as such terms, respectively, are defined by the said Public Service Commission Law. As a common carrier of persons and property for hire, the defendant Manhattan Railway Company owns, and for many years past has owned, certain elevated rapid transit railroads lying exclusively within the City of New York, leased by it to the plaintiff and operated by the plaintiff as a part of its system of elevated and subway rapid transit railroads. As such com-

mon carrier, the defendant Manhattan Railway Company is, and at all times since July 1, 1907, has been, subject to the provisions of the Public Service Commission Law of the State of New York.

III. The defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood constitute the Transit Commis-[fol. 7] sion, being the Metropolitan Division of the Department of Public Service of the State of New York, and the defendant William A. Prendergast is the Chairman of the Public Service Commission and the head of the said Department of Public Service, and when acting in such capacity is known as the Chairman of the Department of Public Service. The defendants were duly and severally appointed, and are now acting in their said respective capacities, under and by virtue of Chapter 343 of the Laws of 1926 of the State of New York, known as the State Departments Law, also known as Chapter 78 of the Consolidated Laws, in effect January 1, 1927, as amended by Chapter 350 of the Laws of 1926, also in effect January 1, 1927, and the provisions of Chapter 48 of the Consolidated Laws, known as the Public Service Commission Law, which was originally enacted as Chapter 429 of the Laws of 1907, in effect July 1, 1907, and which was made Chapter 48 of the Consolidated Laws by Chapter 480 of the Laws of 1910, in effect June 14, 1910, as the said Acts have been amended and supplemented by several acts of the Legislature of the State of New York. The defendants are citizens of and reside in the State of New York, and at least one of the defendants resides within the Southern District of New York.

IV. The defendant The City of New York is a municipal corporation created and existing under and by virtue of Chapter 378 of the Laws of 1897 of the State of New York, also known as the Greater New York Charter, as amended and supplemented by several Acts of the Legislature of the State of New York; and it claims to have some interest in the subject-matter of this action. The plaintiff does not allege that the defendant The City of New York is a necessary or proper party to the determination of the issues in this action, but names The City of New York as a defendant in view of the facts and circumstances hereinafter set out.

Outstanding Capitalization and Securities of the Plaintiff and the Defendant Manhattan Railway Company

V. As of June 30, 1927, the plaintiff had issued and outstanding 350,000 shares of its common capital stock of the par value of $100 each, or a total of $35,000,000 par value of common capital stock; first and refunding mortgage 5 per cent. gold bonds due January 1, 1966, of the principal amount of $162,700,000; ten-year 7 per cent. notes due Sep- [fol. 8] tember 1, 1932, ten-year 6 per cent. notes due October 1, 1932, and three-year secured convertible 7 per cent. and 8 per cent. gold notes, of the principle amount of $44,331,560; equipment trust certificates Series A at 6 per cent., Series B at 6½ per cent., and Series C at 6 per cent., of the principal amount of $2,890,000, in addition to other notes, lease obligations, accounts payable, current liabilities, trustee's liability, reserves, and other evidences of indebtedness deposited as collateral security, amounting to $159,028,813, making the aggregate of such liabilities $403,950,373. The amount of such liabilities has not been substantially reduced since June 30, 1927.

As of June 30, 1927, the charges to the plaintiff's fixed capital (as that term is defined by the Uniform System of Accounts prescribed by the Public Service Commission for the First District and in accordance with which the plaintiff's accounts have been and are kept) was, for the Subway Division of the rapid transit railroads operated by it, $181,375,787, and for the Manhattan Division of the rapid transit railroad lines operated by it, $44,116,549, or a total of such fixed capital of the plaintiff of $225,492,336, in addition to current assets, construction and equipment funds, investments and other assets amounting to $187,820,384, or a total amount of $413,312,720. Since June 30, 1927, the amount of such assets has not been substantially reduced.

As of January 31, 1928, and substantially since then, the defendant Manhattan Railway Company had outstanding consolidated common capital stock of the par value of $60,000,000; Manhattan consolidated 4 per cent. bonds of the principal amount of $40,671,000; Manhattan second mortgage bonds of the principal amount of $4,523,000, and other liabilities amounting to $1,851,159, making the aggregate of such liabilities $107,045,159. As of January 31, 1928, the fixed capital of the defendant Manhattan Railway Company

amounted to $112,943,654, in addition to other resources of $1,726,502, making the aggregate of such resources $114,670,157.

The Defendant Manhattan Railway Company's History and Its Succession to Ownership of Elevated Railroads

VI. Pursuant to agreement on or about August 1, 1884, the New York Elevated Railroad Company (successor by conveyance to the West Side Elevated [Patented] Railway Company [of New York City], formerly the West Side & [fol. 9] Yonkers Patented Railway Company), and the Metropolitan Elevated Railway Company (formerly The Gilbert Elevated Railway Company) became merged with the defendant Manhattan Railway Company; and on or about April 1, 1891, the Suburban Rapid Transit Company (successor to the New York, Fordham and Bronx Railway Company) became merged with the defendant Manhattan Railway Company; and, by virtue of such mergers and the several Acts and agreements in connection therewith, the defendant Manhattan Railway Company became vested with all rights, franchises, consents, privileges and property of those companies, including the ownership and operation of certain elevated railroads in the Boroughs of Manhattan and The Bronx, New York City, constructed by the companies so merged, or by the latter, including the various railroad lines on the Manhattan Division of the plaintiff.

Lease of Elevated Railroads by the Defendant Manhattan Railway Company to the Plaintiff

VII. On or about January 1, 1903, the defendant Manhattan Railway Company duly executed and delivered a lease of all its rights, franchises, consents and property in the elevated railroads to the plaintiff, which became effective April 1, 1903, and runs for a period of 999 years from November 1, 1875; and, by virtue of the aforesaid Acts, agreements and leases, the plaintiff, as lessee, entered into the possession of, and has since been engaged in the operation and management of, the elevated railroads in the Boroughs of Manhattan and The Bronx, New York City.

Rental Payable under Manhattan Railway Lease

VIII. By the terms of such lease, mentioned in the preceding paragraph of this complaint, the lessee (plaintiff) paid to the lessor (the defendant Manhattan Railway Company), as rental, prior to the 1922 Readjustment hereinafter mentioned, the following:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Company	$1,627,320 00
Interest upon Second Mortgage Bonds of the Manhattan Company	180,920 00
Cash rental	35,000 00
7% guaranteed dividend rental on $60,000,000 of Manhattan Railway Company stock	4,200,000 00
Total	$6,043,240 00

[fol. 10] Incidental to a certain Interborough-Manhattan Readjustment Plan of 1922, agreements were made by the plaintiff: (a) With the defendant Manhattan Railway Company, increasing the amount paid annually as cash rental to $50,000; and (b) with the holders of over 90 per cent. of the outstanding capital stock of the defendant Manhattan Railway Company, whereby, as to such stock, the guaranteed dividend rental rate of 7 per cent. per annum was reduced to 3 per cent. for the year ending June 30, 1923, 4 per cent. for the year ending June 30, 1924, and 5 per cent. thereafter, with the further provision that payment at such reduced rates should be made, cumulatively, only if and when earned either by the Interborough (plaintiff's) system as a whole, or by the Manhattan (defendant Manhattan Railway Company's) leased lines, in accordance with a formula contained in such agreements. For the year ending June 30, 1927, the revised rental so payable was as follows:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Railway Company	$1,627,320 00
Interest upon Second Mortgage Bonds of the Manhattan Railway Company	180,920 00
Cash rental	50,000 00

7% dividend rental on certain stock of the Manhattan Railway Company not participating in the plan	303,898 00
5% dividend rental on the remainder of Manhattan Railway Company stock participating in the plan	2,782,858 00
Total	$4,944,996 00

The said Plan of Readjustment was adopted with the full concurrence and approval of the said Transit Commission or its predecessor.

Separate and Unconditional Consent Given by Defendant The City of New York under Section 18, Article III, of New York State Constitution

IX. The defendant The City of New York *unconditionally* granted its consent, under Section 18, Article III of the Constitution of the State of New York, to the construction and operation of such of the elevated railroads owned by the defendant Manhattan Railway Company and leased by it to the plaintiff for operation as above set forth, as were constructed after the said constitutional provision took effect.

[fol. 11] Statutory Provisions for Fare of Five Cents or in Excess of Five Cents Applicable to Elevated Railroads of the Plaintiff

X. (a) By Chapter 489 of the Laws of 1867, authorizing the West Side & Yonkers Patented Railway Company (later changed to West Side [Patented] Railway Company [of New York City], and subsequently succeeded by New York Elevated Railroad Company) to proceed with the construction of an elevated railroad in the Counties of New York and Westchester, it was authorized and provided, in Section 8 thereof that—

"The said company shall be authorized to demand and receive from each passenger within the limits of the City of New York the rates of fare not exceeding, for any distance, less than two miles, five cents; for every mile or fractional part of a mile in addition thereto, one cent.

Provided that when said railway is completed and in operation between Battery Place and the vicinity of the Harlem River the said company may, at its option, adopt a uniform rate not exceeding ten cents for all distances upon Manhattan Island; and may also collect said last-named rate for a period of five years from and after the passage of this Act."

By Chapter 855 of the Laws of 1868, entitled "An Act supplementary to chapter 489 of the laws of 1867, and to provide for the collection and application of Revenue in the County of New York, in certain cases," it is provided as follows:

"§ 3. It shall be the duty of the Constructing Company aforesaid, before opening its railway to public use, to file with the Comptroller of the city of New York, in form to be approved by the Mayor of the city of New York, its bond in the penal sum of $100,000, conditioned upon the true and faithful payment of the revenue, in amount and manner specified in the preceding section, and the payment thereof shall be the legal compensation in full for the use and occupancy of the streets by said railway as provided by law, and shall constitute an agreement in the nature of a contract between said City and Constructing Company, entitling the latter or its successors to the privileges and rates of fare heretofore or herein legalized, which shall not be changed without the mutual consent of the parties [fol. 12] thereto as aforesaid; and the Mayor, in behalf of said city, may, in case of any default in payment as aforesaid, sue for and collect at law any arrearages in such payment, and the claims of the city therefor shall constitute a lien on the railway of said company, having priority over all others. Provided, that it shall not be lawful for the corporate or other authorities to authorize or permit any structures or thing which by crossing or overhanging the track of such Elevated Railway, or otherwise, shall impede or endanger its use for its public transit purposes."

By Chapter 595 of the Laws of 1875, entitled "An Act to authorize and require the New York Elevated Company to continue and complete its railroad in the city of New

York, and to regulate the construction, operation and management thereof," it is provided as follows:

"§ 6. The said company may demand and receive from each passenger on its railroad not exceeding ten cents for any distance of five miles or less, and, with the assent required by section three of chapter eight hundred and fifty-five of the laws of eighteen hundred and sixty-eight, not exceeding two cents for each additional mile or fractional part thereof."

(b) By Chapter 885 of the Laws of 1872, incorporating The Gilbert Elevated Railroad Company (later changed to the Metropolitan Elevated Railway Company) for the purpose of constructing an elevated railway through the streets of the City of New York to be designated by the Board of Rapid Transit Commissioners, The Gilbert Elevated Railway Company was authorized to collect and receive not exceeding ten cents for any distance less than four miles and for additional distances two cents per mile or any fraction or part of a mile, but between the hours of 5 and 8 A. M. and 5 and 8 P. M. said cars and trains shall be run in which the fare shall not exceed one-half of the above-named rate.

(c) The articles of incorporation of the defendant Manhattan Railway Company organized on or about December 29, 1875, pursuant to the Rapid Transit Act (Chapter 606 of the Laws of 1875), authorize and provide for a rate of fare for any distance under five miles not to exceed ten cents, and not to exceed two cents per mile for each mile or fraction of a mile in excess of a mile over five [fol. 13] miles, until the fare shall amount to, but not to exceed, fifteen cents for a through passage from and between the Battery, or any point to the north thereof, and the intersection of the Third Avenue and Harlem River, and from and between the Battery, or any point to the north thereof, and the High Bridge (running upon whether the easterly or the westerly side of the City), not to exceed seventeen cents for a through passenger. For the entire distance, or any part of it, from and between the Battery and either East or West 59th Street, it was provided that the fare shall not exceed ten cents; but in what

are designated as "commission" cars or trains to be run during certain hours "for the accommodation of the public and of the laboring classes, the rate of fare shall not exceed five cents from and between the Battery or any point to the north thereof, and either East or West 59th Street, and shall not exceed five cents for any distance, not exceeding five miles, and shall not exceed seven cents for a through passenger from and between the Battery or any point to the north thereof and the Harlem River, and shall not exceed eight cents for a through passenger on any of said 'commission' trains or cars from and between the Battery, or any point to the north thereof, and the High Bridge."

(d) The articles of association of the New York, Fordham & Bronx Railway Company, prescribed October 10, 1881, by the Board of Commissioners pursuant to the Rapid Transit Act of 1875, authorize and provide for a maximum rate of fare of ten cents per passenger for conveyance over all or any portion of the route of the Company, except during "commission" hours, for which the rate was fixed at five cents per passenger.

(e) The articles of association for the Suburban Rapid Transit Company, prescribed May, 1880, by the Commissioners under the Rapid Transit Act of 1875, authorized and fixed a maximum rate of fare for any distance between 129th Street and the Bronx River of ten cents per passenger, except during "commission" hours, for which the rate was fixed at six cents.

(f) Section 229 of the Railroad Law of the State of New York (Laws of 1910, Chapter 481; formerly Rapid Transit Act of 1875, Laws of 1875, Chapter 606) provided in March of 1913, and still provides, in part, as follows:

"§ 229. Powers.—Subject to the provisions of the public Service Commissions law, every such corporation shall [fol. 14] have power, in addition to the powers conferred by the general and stock corporation laws and by subdivisions two, five and seven of section eight of this chapter:

"1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compensation therefor."

Statutory Limitation of Rate of Fare on Certain Elevated Railroads to Five Cents

XI. By Chapter 743 of the Laws of 1894, entitled "An Act to facilitate travel upon elevated railroads in the City of New York," it was enacted by way of statutory limitation upon the rate of fare upon certain elevated lines of the defendant Manhattan Railway Company:

"Section 1. Any passenger upon the Manhattan elevated railway who has paid the fare required for passage from any point on said railway east of Broadway, between the Battery and One Hundred and Twenty-ninth Street, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, on the suburban rapid transit railway or on any railway owned or operated by the Manhattan railway company, within the city of New York, in connection with said Manhattan elevated railway from One Hundred and Twenty-ninth Street, or other termini of the lines of said Manhattan elevated railway south of the Harlem river, to any station on the route of said suburban rapid transit railroad, or such other elevated railroad as may be operated by the Manhattan railway company north of the Harlem river, without the payment of additional fare; and any passenger on the suburban rapid transit railroad, or any elevated railway owned or operated by the Manhattan railway company in connection with the Manhattan elevated railroad, within the city of New York, running southward to One Hundred and Twenty-ninth street, or other termini of the Manhattan railroad, who has paid the fare required on said suburban rapid transit railroad to One Hundred and Twenty-ninth street in the city of New York, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, over the Manhattan elevated railway to any station on its route east of Broad-[fol. 15] way, between One Hundred and Twenty-ninth street and the Battery, without the payment of additional fare."

Powers Transferred to the Transit Commission

XII. By Section 430 of the said State Departments Law, it is provided that there shall be in the State government of New York State a Department of Public Service; that

the Chairman of the Public Service Commission shall be the head of such department and when acting in such capacity shall be known as the Chairman of the Department of Public Service, and that there shall be in the Department of Public Service a division to be known as the State Division and a division to be known as the Metropolitan Division.

By Section 431 of the said State Departments Law, it is provided:

"There are hereby assigned to the Department of Public Service all the functions of the Public Service Commission and of the Transit Commission, as now existing, and of the office of Public Service Commissioner and of Transit Commissioner; and all their powers and duties as now prescribed by law, whether in terms vested in either of such Commissions or in such Commissioners, are hereby transferred to and hereafter shall be exercised and performed in the Department of Public Service by or through the head of the Department of Public Service or the State Division or the Metropolitan Division, respectively, as prescribed by law."

By Section 433 of the said State Departments Law, it is provided that the head of the Metropolitan Division shall be a Transit Commission, to consist of three Commissioners, who shall be appointed as therein provided, and that the Metropolitan Division, by the Transit Commission and Commissioners, shall have, exercise and perform the jurisdiction, supervision, functions, powers and duties of the Transit Commission and Commissioners, as provided by law when the article (to wit, Article XVI, providing for the Department of Public Service, added by Chapter 350 of the Laws of 1926, in effect January 1, 1927) takes effect.

[fol. 16] By Section 436 of the said State Departments Law, it is provided:

"The provisions of the Public Service Commission law in their application to the existing Public Service Commission, in so far as they are not inconsistent with this article and in so far as they may be made applicable, shall apply to the State Division and to the Public Service Commission

provided for by this article. The provisions of such law, in their application to the existing Transit Commission, in so far as they are not inconsistent with this article and in so far as they may be made applicable, shall apply to the Metropolitan Division and to the Transit Commission provided for by this article."

Statutory Provisions as to Rates to Be Established and Charged by the Plaintiff as a Common Carrier and Street Railroad Corporation.

XIII. By Section 26 of the said Public Service Commission Law it is provided that

"All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered to or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter."

By Section 28 of the said Public Service Commission Law, it is provided as follows:

"§ 28. Tariff Schedules; Publication.—Every common carrier shall file with the Commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any [fol. 17] other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be car-

ried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the Commission and shall conform in the case of railroad corporations as nearly as may be to the form of schedule required by the Interstate Commerce Commission under the Act of Congress entitled 'An Act to Regulate Commerce,' ap- [fol. 18] proved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. The Commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions."

By Section 29 of the said Public Service Commission Law, it is provided as follows:

"§ 29. Changes in Schedule; Notice Required; Power of Suspension by the Commission.—Unless the Commission otherwise orders, no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the Commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The Commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the Commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without [fol. 19] answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare,

charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. The commission may as authorized by subdivision one of section forty-nine establish temporary rates for any period of suspension under this section. At any hearing involving a rate the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate, if on motion of the Commission or in a complaint filed with the Commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the Commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 33, subdivision 1, of the said Public Service Commission Law, provides as follows:

"§ 33. Transportation Prohibited Until Publication of Schedules; Rates as Fixed to Be Charged; Passes Prohibited.—1. No common carrier subject to the provision [fol. 20] of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such

transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

Statutory Provision as to Rates to Be Fixed by Transit Commission

By Section 49, subdivision 1 of the said Public Service Commission Law, it is provided, in part, as follows:

"§ 49. Rates and Service to be Fixed by the Commission.—1. Whenever either Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the Commission shall with due regard among other things to the estimated prospective earning capacity of such property at the [fol. 21] rate of fare at the time fixed and existent and to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute, and shall fix the same by order to be served upon all com-

mon carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be obseved. At any hearing involving a rate, the burden of proof to show that the change in rate if proposed by the common carrier, or that the exising rate, if on motion of the Commission or in a complaint filed with the Commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the Commission may give to the hearing and decision of such qeustions preference over all other questions pending before it and decide the same as speedily as possible."

Sections 26, 28 and 29, Section 33, subdivision 1, and Section 49, subdivision 1, of the Public Service Commission Law, in the respects and portions thereof above quoted, read and provided in substance as above set out, throughout March of 1913 and theretofore.

Provisions of Rapid Transit Act as to Rate of Fare on Rapid Transit Railroads

XIV. By Chapter 4 of the Laws of 1891, entitled "An Act to Provide for Rapid Transit Railways in Cities of over One Million Inhabitants," in effect January 31, 1891, also known as the Rapid Transit Act, as amended and supplemented by various acts of the Legislature of the State of New York, provision was made for the establishment of rapid transit railroads, in cities having over one million inhabitants, for the conveyance and transportation of persons and property, either by private construction, equipment and operation, or by municipal construction and either municipal or private equipment and construction. [fol. 22] The said Rapid Transit Act contained, in March of 1913, and still contains, the following provision relative to municipal railroads (originally numbered Section 63 and since renumbered Section 58):

"Any railroad or railroads, so constructed by and at the City's expense shall be and remain the absolute property of the City so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such rea-

sonable rules and regulations as may be imposed and provided for by the Board of Rapid Transit Railroad Commissioners in said city or by the Public Service Commission" (former Sec. 63, as added by Laws of 1894, Chap. 752; Sec. 9, and amended by Laws of 1895, Chap. 519; Sec. 30, and Laws of 1909, Chap. 498, Sec. 19, and renumbered by Laws of 1915, Chap. 604).

The said Rapid Transit Act contained, in March of 1913, and still contains, the following provision relative to contracts for equipment, maintenance and operation of municipal railroads:

"§ 27. Contract for Equipment, Maintenance, and Operation of Road.— • • •

"3. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said Commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said Commission, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the Public Service Commission may, in its discretion, prescribe periods for the operation of the different parts of said railroad so that at one period of time in the future the Commission may be enabled to make a single operating contract or lease of the entire road" (former Sec. 34-a, as added by Laws of 1906, [fol. 23] Chap. 472; Sec. 6, and amended by Laws of 1909, Chap. 498; Sec. 10, Laws of 1910, Chap. 504, and Laws of 1912, Chap. 226, Secs. 6-14).

The said Rapid Transit Act, in its provisions relating to extensions, etc., of non-municipal railroads, contained in March of 1913, and still contains, no authorization or requirement for the fixing of a rate of fare applicable to extensions or additional tracking of railroads not municipally owned and operated.

Provisions of Railroad Law as to Rate of Fare

XV. Section 57 of the Railroad Law of the State of New York (being Chapter 481 of the Laws of 1910, formerly Railroad Law of 1890, Section 37, as amended by Chapter 676 of the Laws of 1892) provided in March of 1913, and still provides:

"§ 57. Rates of Fare.—Subject to the provisions of the Public Service Commissions Law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile: • • •

"5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents."

Limitation Imposed Upon Plaintiff by Provisions of Public Service Commission Law and Orders of the Regulatory Commissions to Five-Cent Fare Established in Tariff Schedule

XVI. (a) On or about August 28, 1908, the Public Service Commission for the First District made an order, identified as Order No. 708, directing that the regulations contained in a certain Tariff Circular No. 1 be adopted by the said Commission prescribing from and after September 1, 1908, the form, and governing the construction and filing of schedules of fares for passenger service of street railroad corporations subject to the jurisdiction of said Commission; and that such street railroad corporations file, in conformity with said circular and on or before September 15, 1908, schedules, effective upon filing, showing fares, transfers and all regulations relating thereto actually in effect [fol. 24] for thirty days prior to September 15, 1908, changes therefrom to be filed in accordance with the regulations with full notice unless otherwise ordered.

(b) On or about April 15, 1913, the said Public Service Commission for the First District made an order, in its Case No. 1670, directing that the regulations contained in Tariff Circular No. 3 (which superseded said Tariff Cir-

cular No. 1), annexed to and made part of the said order, be adopted by the said Commission, prescribing from and after June 1, 1913, the form governing the construction and filing of schedules, fares and charges for the transportation of passengers by street railroad corporations subject to the jurisdiction of the said Commission; and that such street railroad corporations shall file, in conformity with said tariff circular, schedules showing rates, fares and charges for the transportation of passengers and all regulations relating thereto and shall file changes therefrom in accordance with the regulations with full notice unless otherwise ordered; and further directing that the provisions of the said Order No. 708 made by the Commission on August 28, 1908, and of Tariff Circular No. 1 be abrogated from and after June 1, 1913, and that the order shall take effect on April 25, 1913, and it shall continue in effect until changed or abrogated by the Commission.

(c) On or about February 18, 1918, the said Public Service Commission for the First District made an order in its Case No. 1670, providing, in part, as follows:

"An order having been adopted by the Commission on April 25, 1913, governing the construction and filing of schedules of rates of street railroad corporations, which said order superseded the order adopted by the Commission on August 28, 1908, and it appearing to the Commission that said order of April 25, 1913, should be changed and revised, it is

"Ordered that every street railroad corporation subject to the jurisdiction of this Commission, from the date of this Order to and including the 31st day of May, 1918, shall comply either with the requirements of the said Order of April 25, 1913, or with the requirements of this Order, and on and after the 1st day of June, 1918, every such street railroad corporation shall comply with the requirements of this Order.

[fol. 25] "Further ordered that said Order of April 25, 1913, shall be abrogated on and after June 1, 1918.

"Further ordered that the regulations herein below set forth be, and hereby are, prescribed as to the form, construction and filing of schedules, fares and charges for the

transportation of passengers and their property by street railroad corporations subject to the jurisdiction of this Commission.

"Effective Date

"Section 23. This order shall take effect February 18, 1918, and shall continue in force until abrogated or modified by the Commission.

"Notice of Acceptance

"Section 24. Every street railroad corporation within the jurisdiction of the Public Service Commission for the First District shall notify the Commission within ten days after service of this Order whether the terms of this Order are accepted and will be obeyed."

The regulations set forth in the said order of February 18, 1918, in Section 19 thereof, under the caption "Filing of Schedules," contained and contains the following provision, among others:

"(i) If publication is not according to these regulations this may be considered by the Commission sufficient cause for rejection of schedule or sheet when tendered for filing."

(d) In compliance with the direction of the said order of the Commission of February 18, 1918, the plaintiff duly notified the said Commission, within the time prescribed by the said order, that it accepted and would obey the terms of said order.

(e) It has been judicially determined by the Courts of the State of New York that orders and regulations prescribed by the said Public Service Commission for the First District, or by its successors in office, such as those governing the form, construction and filing of schedules of fares and charges for the transportation of passengers and their property by street railroad corporations, have the force of law.

[fol. 26] (f) In compliance with and in pursuance of the said provisions of the Public Service Commission Law, the said several orders of the Public Service Commission, and the said tariff regulations adopted thereby, the plaintiff duly published, posted and filed with the said Transit Commission, or its predecessors in office, both prior to and after

March 19, 1913, tariff schedules showing the rates, fares and charges for the transportation of passengers and all regulations relating thereto applicable to the rapid transit railroad lines operated by the plaintiff; and more particularly a tariff schedule identified as "I. R. T. No. 2—Cancelling No. 1," being Local Passenger Tariff No. 2; applicable within the Boroughs of Brooklyn, Manhattan, The Bronx, and Queens, New York City; issued under Order of Public Service Commission, First District, State of New York: Case No. 1670, Modifying Order of date February 18, 1918; issued August 15, 1925, by Frank Hedley, President and General Manager, 165 Broadway, Borough of Manhattan, City of New York; posted August 15, 1925, and effective September 15, 1925.

(g) In and by said Tariff Schedule I. R. T. Co. No. 2, and particularly by the sheets thereof identified as First Revised Sheets Nos. 2 and 3-A, issued August 15, 1925, and effective September 15, 1925, the rate of fare on the rapid transit railroad lines operated by the plaintiff, between any two stations of the same division (as therein described), or between a station of one division and a station of the other division as provided in the "Transfer Points" (as therein described), was fixed and prescribed at five cents per passenger.

(h) By operation of the provisions of the said Public Service Commission Law and of the said orders made by the said Public Service Commission for the First District, the plaintiff was required and obligated, under the penalties provided by the said law, to observe and charge, demand and collect, a rate of fare on its rapid transit railroads of five cents per passenger and was prohibited under like penalties, from charging, demanding, collecting or receiving a greater or different compensation for transportation of passengers than five cents per passenger.

[fol. 27] Inadequacy of the Revenues under the Five-cent Fare Limitation on the Plaintiff's Manhattan Division (Elevated Lines) to Provide a Reasonable Return.

XVII. By reason of the facts and circumstances hereinafter stated, the said rate of fare of five cents per passenger on the plaintiff's elevated lines has become, was during at

least 1926 and 1927, now is, and will continue to be for the future, unreasonable, inadequate and confiscatory of the property used and useful in the business of transporting passengers upon the said elevated lines; and the said five cent fare has deprived and does now deprive and will continue to deprive, the plaintiff of a reasonable return upon the fair present value of such property, contrary to the Constitution of the State of New York and of the United States, and hereinafter more fully alleged and shown.

(a) Herein below is set forth a summary of the plaintiff's estimate of the present value of the specified properties provided by the plaintiff and devoted to the public service in the operation of Manhattan Division (elevated lines), the maximum amount of earnings from such operation actually available as a return thereon, and the deficiency in the actual earnings below the reasonable and required return thereon. The actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action.

The properties embraced in the summary consist, in the main, of the construction and equipment provided under the Elevated Railroad Extension and Improvement Certificates of 1913 and the property of the Manhattan Railway Company, exclusive of property necessarily removed in order to perform the work required under those Certificates; together with a pro rata proportion of the cost of materials and supplies, as shown by the plaintiff's accounts and records, and of cash working capital (based on one month's operating expenses of the Manhattan Division). For the purpose of this computation, there has been deducted, without prejudice, from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for each of the other periods stated in the summary, without conceding the correctness or propriety of such a deduction. [fol. 28] The said properties on the Manhattan Division are all owned by the plaintiff or the Manhattan Railway Company.

The stated amounts of present value are exclusive of the cost of the records pertaining to the elevated lines; the increases in the value of land since 1921; the going value; the cost of portions of the elevated lines as they existed in March, 1913, which were replaced and superseded in the making of the extensions and improvements thereon; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included, at original cost.

Manhattan Division

Computation Based on Plaintiff's Present Value Figures

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$212,193,515	$2,020,812	0 95	$16,975,481	$14,954,669
1922	191,566,893	3,012,439	1 57	15,325,351	12,312,912
1923	210,093,109	3,213,526	1 53	16,807,449	13,593,923
1924	212,189,743	3,586,458	1 69	16,975,179	13,388,721
1925	208,341,577	3,454,012	1 66	16,667,326	13,213,314
1926	208,514,309	3,936,397	1 89	16,681,145	12,744,748
1927	208,873,038	3,168,788	1 52	16,709,843	13,541,055
Total deficiency below an 8% return on present value during seven-year period					$93,749,342

The deficiency in earnings on the Manhattan Division (elevated lines', under the existing five-cent fare, below an 8% return upon such present value of the properties so used by the Interborough Company and devoted by it to the public service, for the years 1921 to 1927, inclusive, aggregates at least $93,749,342.

(b) The following summary sets forth the corresponding computations upon the minimum present value of the elevated railroad properties, comprising the Manhattan Division, based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting the expenditures estimated by Commission engineers for reconditioning the property. The full actual present value of the properties, upon the basis of the Transit Commission's engineers' own figures is substantially greater than the sum here shown, when all proper elements are taken into account.

The plaintiff accordingly submits this summary and com- [fol. 29] putation without prejudice, and with reservation of right to prove the full and complete figures on the trial of this action.

Manhattan Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Costs

	Minimum present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$168,924,294	$2,020,812	1.20	$13,513,944	$11,493,132
1922	161,087,229	3,012,439	1.87	12,886,978	9,874,539
1923	175,048,910	3,213,526	1.84	14,003,913	10,790,387
1924	175,144,743	3,586,458	2.05	14,011,579	10,425,121
1925	175,199,577	3,454,012	1.97	14,015,966	10,561,954
1926	179,450,399	3,930,397	2.19	14,356,025	10,419,628
1927	179,777,038	3,168,788	1.76	14,382,163	11,213,375
Total deficiency below an 8% return on minimum value during seven-year period					$74,778,136

Even upon the basis of such minimum present value of the elevated railroad properties, according to the estimates of reproduction cost thereof made by the Commission's engineers, the deficiency in earnings below an eight per cent return for the years 1921 to 1927, inclusive, aggregates at least $74,778,136.

If operating expenses were increased, as the result of wage increases, additional service and additional maintenance, to the extent hereinafter shown, and if additional fixed charges were incurred on account of additions and improvements ordered or threatened by the Transit Commission, as detailed in a subsequent table, the deficiency in earnings below an eight per cent. return, indicated in the two foregoing computations, would be correspondingly greater.

XVIII. A return of eight per cent. per annum upon the present value of the property used by the plaintiff in the public service is a reasonable return, and is the rate expected and usually realized in the locality where such property is located, upon the present value of investments in

the property devoted to the public service, with due regard to the risks attending them.

[fol. 30] Confiscatory Effect and Unconstitutionality of the Five-cent Rate Limitation Upon the Plaintiff's Elevated Lines

(Manhattan Division)

XIX. The said maximum rate of five cents now chargeable by the plaintiff upon its said elevated lines (Manhattan Division) has been for more than seven years, and now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered, and during said period has been, and now is, and will continue to be, unjust, unreasonable and confiscatory of this plaintiff's property, and has been, and is, and will continue to be, insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the plaintiff in the operation of the said elevated lines and devoted to the public service, and the enforcement of such maximum fare of five cents contravenes the guarantees of the Fourteenth Amendment of the Constitution of the United States, and of Section 6 of Article I of the Constitution of the State of New York.

The return received by the plaintiff from the existing maximum rate of fare chargeable by it upon the said elevated lines has not been, and is not now, sufficient to maintain and support the credit of the plaintiff and to enable it to secure capital funds for the purpose of providing for new construction and equipment, either through the sale at a reasonable discount of its long term first mortgage bonds or of any other marketable security.

It will be impossible for this plaintiff to procure necessary additional capital because of the narrow margin by which the present fixed charges of the plaintiff are presently, and in the near future will be, earned under existing traffic conditions on the said five-cent fare, and because of the unascertainable effect on this plaintiff's operations and the earnings of the said elevated lines through the prospective completion and opening of the new municipal subway system, which will closely parallel the plaintiff's elevated lines in substantial part.

Because of the failure of the net revenue received by the plaintiff from the operation of the aforesaid elevated railroad lines to yield a fair or reasonable average return on the value of the property used and useful in the service, the plaintiff has been unable, and at the existing rate of fare will be unable, to make proper reservation out of its income [fol. 31] for surplus and contingencies, as authorized by the Public Service Commission Law of the State of New York.

Penalty Provisions of Public Service Commission Law

XX. By Sections 57 and 58, respectively, of the said Public Service Commission Law, it is provided as follows:

"§ 57. Summary Proceedings.—Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs

effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

[fol. 32] "§ 58. Penalties for Other Than Common Carriers.—1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the state of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section twenty-four of this chapter.

"2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter, or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

"3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation."

Irreparable Damage Threatened to the Plaintiff

XXI. As such railroad common carrier, the plaintiff transports daily, on the average, about 1,082,245 of passengers on the Manhattan Division of the railroads operated by it. The number of passengers carried by it during the year ended June 30, 1927, was 359,019,660 on the Manhattan Division. Many of such passengers are non-residents of the City of New York, or are transient visitors from other parts of the State of New York or from other States [fol. 33] of the Union. There is no means by which the plaintiff can collect from the passengers transported by it any part of a fare charged by it unless paid in cash, or by a token issued in exchange for cash, upon or before the transportation of such passengers. If the plaintiff should make a charge to any passenger in excess of a fare of five cents without the protection of this Court, the plaintiff is informed and believes that such passenger would refuse to pay such charge; and, if the plaintiff should remove such passengers who refuse to pay such charge from its cars or should refuse to admit them thereto, the plaintiff is advised and believes that it would be at once subjected to a multiplicity of suits from such passengers, to compel transportation or for damages for breach of duty to transport, as well as to prosecution for the fines and penalties prescribed by the Public Service Commission Law for failure to furnish transportation. If the plaintiff should make a charge in excess of a fare of five cents per passenger, the aggregate of the penalties so incurred in one year would amount to enormous sums and the damage to the plaintiff would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure by the plaintiff to desist from charging a fare of more than five cents would involve a risk of absolute ruin to the plaintiff and the entire destruction and confiscation of its property by reason of the enormous fines to which it would be exposed. The plaintiff is, therefore, without adequate remedy at law for recourse for the wrong suffered by said confiscatory rate of fare of five cents, and such injury to the plaintiff is irreparable, except for the intervention of a Court of equity.

XXII. The Mayor of the defendant The City of New York has announced, through the public press, that the City will fight and prevent the taking effect of the said increased fares "to the last ditch," and various other officials of the defendant The City of New York have announced similar intentions and policy, by way of active steps to enforce the continuance indefinitely of the said confiscatory fare of five cents per passenger. Announcement has been made that legal proceedings to compel the continuance of the said confiscatory rate will be taken. On February 6, 1928, after conferences with various of the defendants, the Corporation Counsel of the defendant The City of New York announced that "We have fully determined what steps the City will take. They will be such as to protect the interests of the City of New York and the car riders and to maintain the five-cent fare. I am positive that the attempt of the Interborough to raise the fare will be prevented. The City will move at an opportune time, [fol. 34] and that will be in a short period." The necessity that the plaintiff have relief from the present five-cent fare has several times, during 1927 and theretofore, been before the Board of Estimate and Apportionment of The City of New York, in various forms and phases, and the said Board and the members thereof have in each instance made clear their unwillingness to permit the increase, in any manner whatsoever, of the fare chargeable by the plaintiff, and have reiterated their policy and intention to refuse and deny to the plaintiff relief from its present confiscatory rate. According to the public press, the defendant members of the Transit Commission, with their special counsel, have been in daily and protracted conferences with the various City officials whose intention to contest, obstruct and prevent the discontinuance of the said confiscatory rate; and the members of the Transit Commission and their special counsel have continued and participated in these conferences designed to discuss and develop ways and means of opposing and preventing any increase of the said five-cent fare. The plaintiff believes that summary proceedings by the defendant Transit Commission, to enforce against the plaintiff the provisions complained of, are imminent.

Concerning the official policies above summarized, with the carrying out of which the plaintiff is threatened, as above shown, the plaintiff alleges that they evince (in the language of the United States Supreme Court—Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 591-592)

"an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them."

As herein above more fully shown, the plaintiff suffers daily confiscation from the enforced continuance of inadequate rates and confiscatory limitations on rates, on its said lines.

No Adequate Remedy Except in Equity

XXIII. The plaintiff is advised and believes, and, therefore, avers and claims, that there is no remedy, except in equity, to test adequately the validity of the limitation of [fol. 35] the fare to be charged by the plaintiff to a rate of five cents per passenger; and that, in the absence of such remedy in equity, the penalties provided in the said statutes would be unreasonable and confiscatory, and would deprive the plaintiff of its liberty of contract and of its property without due process of law and without just compensation, and would likewise deny to it the equal protection of the laws, in contravention of Section 10 of Article I of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State of New York; on which account the plaintiff invokes the jurisdiction of this Court, to protect it against the aforesaid threatened invasion by the defendants of its inherent rights under and guaranteed by the said Federal Constitution and the State Constitution.

Jurisdictional Allegation as to Value of Property Involved

XXIV. The value of the business and property of the plaintiff which is involved in this cause of action is, as hereinbefore more fully shown, greatly in excess of $3,000.

And for a Second Cause of Action

XXV. The plaintiff here realleges each of the matters and things stated and set out in paragraphs marked I to XXIV, both inclusive, of this complaint, with the same force and effect as if the same were each herein again repeated and set out.

Certificates Granted for Elevated Railroad Additional Tracks and Extensions

XXVI. On March 19, 1913, the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment of the City of New York, duly granted to the Manhattan Railway Company and to the plaintiff, respectively, the right to construct certain additional tracks, facilities and extensions to the elevated railroads, the same to be constructed, maintained and operated by and at the expense of the respective grantees. The rights under the certificate to the Manhattan Railway Company were formally added to the property leased to the plaintiff for operation.

[fol. 36] Compensation Payable to Defendant The City of New York for Elevated Railroad Additional Tracks and Extensions

XXVII. The Certificate for Additional Tracks, so granted to the Manhattan Railway Company, provided that, as compensation, there should be payable by the Manhattan Railway Company to the City, annually, from the gross receipts of each station served by express trains upon each line of the railroads, a sum equal to 2 per cent. of the excess of such gross receipts over the gross receipts of the same station for the year ending June 30, 1911, and that such compensation should be readjusted at the end of twenty-five years and thereafter at intervals of twenty years.

The Certificate for Elevated Railroad Extensions, so granted to the plaintiff, provided that, as compensation, there should be payable by the plaintiff to the City, out of the pooled net profits upon all elevated lines operated by the Interborough Company, in excess of the average an-

nual net profits of the existing Manhattan Railroad for the two years ending June 30, 1910, and June 30, 1911, one-half of the amount remaining of the excess of net profits after deducting therefrom the rental for additional tracks, taxes, rentals payable to the Manhattan Company, operating expenses, maintenance, depreciation, average of net profits of Manhattan Railroad, interest and amortization of bonds for railroads or additional tracks, interest on bonds for power houses, etc., and interest and amortization of cost of additions. Upon the expiration of the full term of either authorization, the plant and property constructed pursuant to the certificate, except Additions, should become the property of the City without other or further compensation.

Separate and Unconditional Consent Given by Defendant The City of New York under Section 18, Article III, of New York State Constitution

XXVIII. Separate from the said certificates for elevated railroad extensions, the defendant The City of New York unconditionally granted its consent, under Section 18, Article III of the Constitution of the State of New York, to the construction and operation of the elevated railroads therein described.

[fol. 37] Rate Stipulation in Elevated Extension Certificate

XXIX. The Elevated Extension Certificate of March 19, 1913, granted to the plaintiff, provided and provides:

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are

provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction."

The Additional Track Certificate of March 19, 1913, granted to the defendant Manhattan Railway Company, contains no provision whatever fixing a rate of fare to be charged thereon.

Fare Provisions in Elevated Railroad Extension Certificate Subject to Regulatory Authority

XXX. The said certificate of March 19, 1913, for elevated extensions, was executed by the Public Service Commission for the First District, acting for and in behalf of the defendant The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891 as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enactment of the said Public Service Commission Law, by Chapter 429 of the Laws of 1907, and the revision and amendment thereof by Chapter 480 of the Laws of 1910, and the acts supplemental therein and amendatory thereof. The said Public Service Commission Law [fol. 38] conferred power, and prescribed the manner of the exercise thereof, to regulate and fix reasonable rates of fare to be charged upon all elevated and other street railroads in the City of New York. The said elevated extension certificate was executed pursuant to the authority of Chapter 4 of the Laws of 1891 as amended; was approved by the Board of Estimate and Apportionment, as aforesaid, acting exclusively in the exercise of its statutory function as fiscal supervisor of the defendant The City of New York; is wholly statutory in character, and does not, nor does any part thereof, constitute the constitutional consent of the local authorities of the City of New York to the construction and operation of the railroads therein provided for. The constitutional consents of the defendant The City of New York to the construction and operation of the several railroads authorized by the said certificate

were granted separately and apart from the certificate, in the form of resolutions adopted by the Board of Estimate and Apportionment and approved by the Mayor, acting as the duly constituted local authorities of the defendant The City of New York; and were not granted upon any condition whatsoever fixing the rates of fare to be charged in the operation of the railroads thereby consented to. The rates, fares and charges chargeable by the plaintiff for the transportation of persons upon its elevated railroads, or any part thereof, are not, in any case, fixed as a condition of a constitutional consent of the local authorities to the construction or operation of any part of said railroads.

It is the law of the State of New York, as judicially construed and determined by the decisions of the Courts thereof, that the elevated railroads described in the said certificate are subject to regulation at all times by such power as the State possesses.

It is also the law of the State of New York, as judicially construed and determined by the Courts thereof, that the rate regulatory provisions of the law entered by implication into the terms of the certificates, agreements and authorizations covering the elevated railroads; that they formed part of the obligations of those instruments, and that they were notice to the parties thereto that those instruments were coupled with a provision that the Legislature, in the exercise of its powers, either itself, or acting through another, might regulate the rates thus fixed, and, particularly, with the provision of the statute that a common carrier such as the plaintiff was empowered to abro- [fol. 39] gate the same as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service, upon notice, filing and publication as provided by law.

Unforeseen Conditions Which Have Supervened to Render the Five-cent Fare Inadequate, Unreasonable, Confiscatory, and Invalid as to the Plaintiff's Elevated Lines

XXXI. After the execution of the elevated extension certificate, the expenses of operating the rapid transit railroads vastly increased, owing to radical economic changes produced by the World War, which were wholly unforeseen

by the parties to the instruments at the time of their execution, and the value of the five-cent rate of fare fixed by the certificate became greatly impaired; and, since the beginning of the operation of the enlarged system of rapid transit railroads, and for an indefinite future period of the operation of the railroads, the said five-cent fare has failed, and will continue to fail, to be sufficient to defray the several charges and provide the return which it was expressly contemplated by the certificate should be defrayed and provided from year to year during the term of the grant of rights to the plaintiff and the defendant Manhattan Railway Company. The plaintiff here repeats and realleges each of the allegations of Paragraphs XLIV and XLV of this complaint, with the same force and effect as if each of the same were here set forth in full.

Seven-cent Fare Established by the Plaintiff Pursuant to Legislative Power Delegated to It

XXXII. A rate of fare of seven cents per passenger, on each the Subway Division and the Manhattan Division operated by the plaintiff, constitutes no more than a just and reasonable rate of fare on each division, respectively, and will yield no more than a fair and reasonable return upon the value of the properties actually used by it in the public service in its operation and devoted to the public service, and no more than a reasonable compensation for the service so rendered.

XXXIII. (a) As a common carrier subject to the provisions of the Public Service Commission Law of the State of New York, the plaintiff therefore by action duly taken by its directors and officers, in pursuance of the authority and powers conferred by law, fixed, determined and estab- [fol. 40] lished a fare of seven cents per passenger as the rate hereafter to be charged and collected, instead of a fare of five cents from each passenger, upon each the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the Company, and accordingly filed, published and posted tariff sheets (copies of which are hereto annexed and made a part hereof, marked, respectively, Schedules "J," "K," "L," "M" and "N"), establishing such fare of seven cents per passenger, issued February 1, 1928, and effective March 3, 1928, as follows:

I. R. T. Co. No. 2—Thirteenth Revised Sheet No. 1—Cancelling Twelfth Revised Sheet No. 1, effective January 21, 1928.

I. R. T. Co. No. 2—Original Sheet No. 2A.

I. R. T. Co. No. 2—Original Sheet No. 2B.

I. R. T. Co. No. 2—Second Revised Sheet No. 3—Cancelling First Revised Sheet No. 3, effective September 15, 1925.

I. R. T. Co. No. 2—Second Revised Sheet No. 3A—Cancelling First Revised Sheet No. 3A, effective September 15, 1925.

(b) The said Transit Commission took no action whatever rejecting the said tariff sheets, when tendered for filing, under the provisions of the regulation in Section 19, subdivision (i) of the said order of the said Public Service Commission for the First District, in its Case No. 1670, made February 18, 1918, that, if publication is not according to the regulations prescribed by the said order, such fact might be considered by the Commission sufficient cause for rejection of schedule or sheet when tendered for filing.

(c) By virtue of the provisions of the said Public Service Commission Law, and particularly of Section 33, subdivision I thereof, the plaintiff, as a common carrier, is [fol. 41] prohibited, under penalty, from charging, demanding, collecting or receiving a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges (to wit, of seven cents per passenger on the said Subway Division and seven cents per passenger on the said Manhattan Division) applicable to such transportation, as specified in its said tariff schedule sheets filed and effective March 3, 1928.

The Plaintiff's Application to the Transit Commission for Immediate Relief

XXXIV. (a) As such common carrier, the plaintiff, on February 1, 1928, duly filed an application to the said Transit Commission, under Section 29 of the Public Service Commission Law, in accordance with the well established practice of the Transit Commission and the Public Service

Commission, asking that the said Transit Commission, pursuant to the powers which have been vested in it by law, approve the said Thirteenth Revised Sheet No. 1 to I. R. T. No. 2, Original Sheet No. 2-A, Original Sheet No. 2-B, Second Revised Sheet No. 3, and Second Revised Sheet No. 3-A, cancelling Twelfth Revised Sheet No. 1 (effective January 21, 1928) and First Revised Sheet No. 3 and First Revised Sheet No. 3-A (effective September 15, 1925); and that it grant permission to the plaintiff to put the said tariff sheets into effect as to each the subway and the elevated divisions upon not more than five days' notice after publication at stations and filing with the Commission. Such application was based, substantially, upon the same grounds as those herein alleged concerning the five-cent rate of fare, and requested immediate relief by the Commission for the following reasons, among others:

"III. It is urgently necessary that such increased fares go into effect forthwith for the following reasons, among others:

"(1) The Interborough Company imperatively requires quick relief from its financial stringency, as appears more fully from the statements of receipts and expenditures and other pertinent facts, and for the purposes hereinafter set forth.

"(2) The Interborough Company has been suffering for some years, and now is suffering daily, from continuing confiscation of property under the maximum rate of five cents per passenger, and, by such a fare limitation upon it, [fol. 42] the property devoted by it to the service of the public is taken for public use without just compensation; it is deprived of such property without due process of law, and it is deprived of the equal protection of the laws, all in contravention of the Constitution of the United States and the Constitution of the State of New York.

"(3) The five-cent maximum fare charged by the Interborough Company on the rapid transit lines operated by it has been for a number of years, and is now, insufficient and inadequate to provide a fair return upon the property used by it and devoted to the public service, over and above all expenses of operation, including the cost of maintenance and taxes, and is unjust and unreasonable as well as con-

fiscatory of the property used by the Company in the public service.

"(4) The rate of return earned by it upon the property devoted by the Interborough Company to the public service, under the present fare, is not sufficient to support and maintain the credit of the Interborough Company and to enable it to raise money necessary for the proper discharge of its public duties; as, for example, to sell at a reasonable discount its long term first mortgage bonds and secure thereby capital funds for the purpose of providing for new construction and equipment on the railroad lines operated by it.

"(5) The Interborough Company requires additional revenue in order to meet reasonable and proper demands of its employees for improvement in wages and operating conditions; to provide and insure adequate and efficient service upon the lines operated by it; to increase the expenditures for maintenance, repair and replacement of construction and equipment; to meet the fixed charges upon additional investment required for construction and equipment; to meet the practical situation produced by various orders of the Transit Commission, made or announced as in prospect, which undertake to require and compel approximately $40,000,000 of additional capital expenditures by the Interborough Rapid Transit Company, with increased fixed charges thereon, and which would impose additional operating expenses, without assurance of increased volume of business and earnings, and which could not in fact be financed or carried out at the present time under the existing five-cent fare; to make reservations for retirement or depreciation of property; to make adequate and proper provision for unliquidated accident and damage liability incident to past [fol. 43] operation, and to create out of current revenues an effective reserve to cover such liability currently; and to assure proper provision for surplus and contingencies as provided by the Public Service Commission Law and by the Contracts and Certificates of 1913."

(b) Although such petition for relief from daily confiscation, as therein shown, was duly filed with the Transit Commission on February 1, 1928, no action was taken and announced thereon during the said five days, which period has expired. Steps to oppose, obstruct, delay and prevent

the going into effect of the plaintiff's said schedules and increased fares have been taken by the defendant City of New York and by the defendant members of the Transit Commission, as elsewhere herein shown.

(c) The facts as to the confiscation of the plaintiff's property are as shown in previous paragraphs of this complaint.

And for a Third Cause of Action

XXXV. The plaintiff here realleges each of the matters and things stated and set out in the paragraphs of this complaint marked I, III to V, X subdivision (f), XII to XVI, XVIII, XX, each inclusive, of this complaint, with the same force and effect as if each of the same were herein again repeated and set out.

Proprietary Capacity of the Defendant The City of New York, as Owner and Lessor of Rapid Transit Railroads, Subject to All the Regulatory Incidences of an Ordinary Railroad

XXXVI. The defendant The City of New York built, acquired and owns certain rapid transit railroads and certain equipment used thereon, in the City of New York, more fully described in this complaint, and has leased the same for operation by the plaintiff, or the latter's assignors, at a specified rental, and for a specified term, and containing various terms, under or in connection with certain written agreements hereinafter mentioned and known, respectively, as Contract No. 1 made February 21, 1900, Contract No. 2 made July 21, 1902, and Contract No. 3 made March 19, 1913. [fol. 44] It has been judicially determined by the highest Court, as well as by other Courts, of the State of New York, that, so far as the construction, operation and leasing of those rapid transit railroads are concerned, the defendant The City of New York is a railroad corporation; that they were built by and belong to the defendant The City of New York in a proprietary capacity, and not in a governmental capacity; that the defendant The City of New York is authorized to lease its railroad, either for a specified sum of money or a specified proportion of income, earnings or profits, or it may operate the road itself and charge such

rates of fare for the transportation of persons and property as may be fixed by its own boards and officers, subject to the requirement contained in Section 30 of the Rapid Transit Act of 1891, that in the event of such operation the rates of fare so fixed "shall be adjusted, fixed and readjusted always with a view to securing as nearly as may be sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation," and that such rapid transit railroads are a business enterprise the same as if they were owned by an ordinary railroad corporation, and, as such, the operation of the railroads and the charges thereon are subject to the exercise of the regulatory powers of the State to the extent and in the manner provided by law.

It has also been judicially determined by such Courts that the subject of rapid transit for the City of New York has, for many years, been a matter of public interest, affecting not only the people of that city, but of the whole State; that rapid transit has been, and is, generally regarded as a State affair; that all of the legislation bearing on the subject has for many years recognized that a duty rested upon the Legislature to provide for rapid transit, such duty to be performed by itself or by an agent designated for the purpose, and that it was a function which the State, in its sovereign capacity, had a right to exercise irrespective of the City authorities, since it concerned the whole State just as much as the maintenance of highways or the management of other public utilities.

[fol. 45] Construction of Manhattan-Bronx and Brooklyn-Manhattan Rapid Transit Railroads and Lease from the Defendant The City of New York to the Plaintiff (or Its Assignors) under Contracts Nos. 1 and 2

XXVII. (a) On or about February 21, 1900, the defendant The City of New York, acting by the Board of Rapid Transit Railroad Commissioners for The City of New

York, entered into a contract, known as Contract No. 1, with John B. McDonald for the construction by him, at the expense of the City, and for the lease to him for operation for a term of years, of a certain railroad known as the Manhattan-Bronx Rapid Transit Railroad, along a route from a point near the Federal Post Office, facing the City Hall Park, in the Borough of Manhattan, and extending under Lafayette Street, Fourth Avenue, 42nd Street and Broadway, to and into the Borough of The Bronx, with an agreement on his part to equip, maintain and operate the same during said term. The equipment so supplied is the property of the contractor, subject to the City's right to purchase at the end of the term. The contract has from time to time been modified and supplemented.

(b) On or about July 21, 1902, the defendant The City of New York, acting by the Board of Rapid Transit Railroad Commissioners for the City of New York, and with the consent and approval of the Board of Estimate and Apportionment of the City of New York, entered into a contract, known as Contract No. 2, with the Rapid Transit Subway Construction Company for the reconstruction by it, at the expense of the City, and for the lease to it for a term of years, of a certain railroad known as Brooklyn-Manhattan Rapid Transit Railroad, connecting at the southerly end of the said Manhattan-Bronx Rapid Transit Railroad, so as to form a continuous railroad, over a route running southerly from the Post Office in the Boresugh of Manhattan, under the East River, and then to the Flatbush Avenue Station of the Long Island Railroad, in Brooklyn, with an agreement on its part to equip, maintain and operate the same during said term. The equipment so supplied is the property of the contractor, subject to the City's right to purchase at the end of the term. The contract has from time to time been modified and supplemented.

(c) On or about July 10, 1902, and August 10, 1905, John B. McDonald and the Rapid Transit Subway Construction Company, respectively, assigned, with the written consent [fol. 46] of the Board of Rapid Transit Railroad Commissioners, to the plaintiff, so much of Contract No. 1 and Contract No. 2 as applied to the lease of the railroads. On or about July 11, 1911, so much of Contract No. 1 as applied

to construction was duly assigned to Rapid Transit Subway Construction Company. On or about January 30, 1913, so much of Contract No. 1 and so much of Contract No. 2 as applied to construction were respectively duly assigned to the plaintiff.

Rental Payable to City of New York under Leases of Contracts Nos. 1 and 2

XXXVIII. (a) Contract No. 1 contained an agreement for the lease by the City to the contractor of the railroad for a term of fifty years, at a rental to be paid by the contractor to the City, consisting, in general, of (1) an annual sum equal to the annual interest payable by the City upon all bonds which shall be issued by it in order to provide means for construction; and (2) a further annual sum equal to one per cent. upon the whole amount of the said bonds, with certain abatements during the first ten years.

(b) Contract No. 2 contained an agreement for the lease by the City to the contractor of the railroad, at a rental to be paid by the contractor to the City, consisting, in general, of (1) an annual sum equal to the annual interest payable by the City upon all bonds issued by it in order to provide means for construction; (2) a further annual sum which shall be equal to one per cent. upon the whole amount of the said bonds, with certain abatements during the first ten years; and (3) a further annual sum equal to the amount of the annual interest payable by the City upon bonds issued to provide means to pay for the acquisition of rights of way.

Construction, Equipment, and Lease to Plaintiff of Rapid Transit Railroad Extensions under Contract No. 3

XXXIX. On March 19, 1913, the defendant The City of New York, acting by the Public Service Commission for the First District, entered into a contract with the plaintiff (therein referred to as "the Lessee") for the construction by the City, and the equipment, maintenance and operation by the Lessee, of certain additional rapid transit railroads, [fol. 47] along routes known, respectively, as Seventh Avenue-Lexington Avenue Line, Eastern Parkway Line, Steinway Tunnel Line, and White Plains Road Line.

Contract No. 3 provided, among other things, for the construction by the City of the railroad under separate construction contracts, a contribution by the Lessee toward the cost of construction thereof, the equipment of the Railroad by the Lessee, at its own expense, and the lease by the City of the Railroad and the equipment to the Lessee, for operation in conjunction with the Existing Railroads and Existing Equipment (under Contract No. 1 and Contract No. 2) for a single fare, and for a term beginning January 1, 1917, and expiring December 31, 1965 (subsequently extended to December 31, 1967), subject, however, to earlier termination as therein provided. The original terms of the leases under Contract No. 1 and Contract No. 2 were modified and synchronized with the expiration of the lease of the Railroad under Contract No. 3.

Rental Payable to Defendant The City of New York Under Lease of Contract No. 3

XL. Contract No. 3 provided that the Lessee should also pay, so long as the Existing Railroads were operated in conjunction with the Railroad under the lease, as additional rental under Contract No. 1 and Contract No. 2, an amount equal to one-eighth of one per cent. upon all bonds issued by the City since January 1, 1910, or thereafter issued up to the date of the beginning of the lease for the purpose of construction under Contract No. 1 and Contract No. 2.

As and for "Rental" to be paid under the lease, the contract provided:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid and in further consideration of the covenants and agreements by the Lessee to modify the term or terms of Contract No. 1 and Contract No. 2, upon the commencement of operation of the portions of the Railroad specified in Article XLVII, the gross receipts from whatever source [fol. 48] derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined

during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads,"

the amount of which should be determined substantially as follows:

From the revenue, the Lessee should deduct, in the order named: Rentals under Contracts Nos. 1 and 2, for the full modified terms of the leases; Other rentals payable by the Lessee; Taxes; Operating expenses, exclusive of maintenance; Maintenance, to an amount equal to twelve per cent. of the revenue, exclusive of depreciation; Depreciation fund charges; Existing average income from the operation of the Existing Railroads of $6,335,000 per annum; six per cent. per annum on the Lessee's contribution toward the cost of construction of the Railroad and the cost of equipment of the Railroad, to cover, also, the amortization within the term of the lease of such contribution and such cost; the annual interest payable by the Lessee for Additional Equipment, together with one per cent; per annum of the cost for amortization; the annual interest payable by the Lessee upon the Lessee's share of the cost of construction of Additions, together with one per cent. per annum for amortization; 8.76 per cent. per annum on the portion of the City's cost of construction of the Railroad, exclusive of Additions; the annual interest actually payable upon the City's share of the cost of construction of Additions, together with one per cent. of such share for amortization; one per cent. of the revenue into a contingent reserve fund; fifty per cent. of the remainder each to the City and the Lessee.

Provisions in Leases as to Rate of Fare

XLI. (a) Contract No. 1 of February 21, 1900, between the defendant The City of New York and John B. McDonald, provides, in "Chapter III—The Lease," as follows:

"The Contractor shall during the term of the lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but no more. The Contractor may [fol. 49] provide additional convenience for such passen-

gers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional convenience furnished him, provided that the amount to be charged therefor and the character of such additional convenience shall from time to time be subject to the approval of the Board."

(b) Contract No. 2 of July 21, 1902, between the defendant The City of New York and the Rapid Transit Subway Construction Company, provides, in "Chapter III.—The Lease," as follows:

"The Contractor shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional conveniences, furnished him, provided that the amount to be charged therefor and the character of such additional conveniences shall from time to time be subject to the approval of the Board."

(c) The foregoing provisions of Contract No. 1 and Contract No. 2 fixing a five-cent rate of fare were superseded by the provisions of Contract No. 3 providing for a rate of fare to be charged in the operation of new and existing railroads as one complete system, as hereinafter set forth.

(d) Contract No. 3 of March 19, 1913, between the defendant The City of New York and the Interborough Rapid Transit Company, contains the following provisions, in "Part Third.—The Lease":

Chapter IV, under the title "Additions" (Article LXX), provides, in part, as follows:

"The principal object of the City in making this contract is to secure for the public convenience an adequate, comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the Existing Railroads. By the foregoing pro-[fol. 50] visions of the Lease, the Lessee has covenanted, among other things, to operate the Railroad and the Exist-

ing Railroads carefully and skilfully, according to the highest standards of railway operation; to supply adequate Equipment; to run trains so as to furnish adequate service; to use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. These covenants on the part of the Lessee are among the principal moving considerations to the City in making this contract, and any breach thereof thereof will entitle the City to the remedies provided in this contract."

Chapter III, under the title "Character of Service, Rate of Fare, etc." (Article LIX), provides as follows:

"The Lessee shall operate the Railroad and the existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) or (1) any part or parts of the Railroad, and (2) any part or parts of the Existing Railroads and (3) between any part or parts of the Railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare."

Chapter II, under the title "Rental" (Article XLIX), provides, in part, as follows:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid and in further consideration of the covenants and agreements by the Lessee to modify the term or terms of Contract No. 1 and Contract No. 2, upon the commencement of [fol. 51] operation of the portions of the Railroad specified in Article XLVII, the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf

in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads."

Chapter I, under the title "Length of Term, etc." (Article XLVII), provides, in part, as follows:

"The City hereby leases the Railroad and the Equipment to the Lessee, for operation in conjunction with the Existing Railroads and Existing Equipment for a single fare."

Chapter III, under the title "Character of Service, Rate of Fare, etc." (Article LXII), provides as follows:

"The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but not more."

Separate and Unconditional Consent Given by Defendant The City of New York under Section 18, Article III, of New York State Constitution

XLII. Separate from the said Contracts Nos. 1, 2 and 3, the defendant The City of New York unconditionally granted its consent, under Section 18, Article III, of the Constitution of the State of New York, to the construction and operation of the railroads therein described.

Fare Provisions in Rapid Transit Contracts Subject to Regulatory Authority

XLIII. The said Contract No. 3 of March 19, 1913, for the construction and lease of subway extensions, was executed by the Public Service Commission for the First Dis-[fol. 52] trict, acting for and in behalf of the defendant The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891 as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enactment of the said Public Service Commission Law, by Chapter 429 of the Laws of 1907, and the revision and amendment thereof by Chapter 480 of the Laws of 1910,

and the acts supplemental thereto and amendatory thereof. The said Public Service Commission Law conferred power, and prescribed the manner of the exercise thereof, to regulate and fix reasonable rates of fare to be charged upon all subway, elevated and other street railroads in the City of New York. Said Contracts Nos. 1, 2 and 3 were each executed pursuant to the authority of Chapter 4 of the Laws of 1891 as amended; were approved by the Board of Estimate and Apportionment, as aforesaid, acting exclusively in the exercise of its statutory function as fiscal supervisor of the defendant The City of New York; are wholly statutory in character, and do not, nor does any part thereof, constitute the constitutional consent of the local authorities of the City of New York to the construction and operation of the railroads therein provided for. The constitutional consents of the defendant The City of New York to the construction and operation of the several railroads authorized by the said contracts were granted separately and apart from the certificate and contracts, in the form of resolutions adopted by the Board of Estimate and Apportionment and approved by the Mayor, acting as the duly constituted local authorities of the defendant The City of New York; and were not granted upon any condition whatsoever fixing the rates of fare to be charged in the operation of the railroads thereby consented to. The rates, fares and charges chargeable by the plaintiff for the transportation of persons upon its subway railroads, or any part thereof, are not, in any case, fixed as a condition of a constitutional consent of the local authorities to the construction or operation of any part of said railroads.

It is the law of the State of New York, as judicially construed and determined by the decisions of the Courts thereof, that the rapid transit railroads described in Contracts Nos. 1, 2 and 3 belong to The City of New York in its proprietary capacity, the same as if they were owned by an ordinary railroad corporation, and are subject to regulation at all times by such power as the State possesses.

It is also the law of the State of New York, as judicially construed and determined by the Courts thereof, that the rate regulatory provisions of the law entered by implica-[fol. 53] tion into the terms of the leases, agreements and authorizations covering the subway rapid transit railroads;

that they formed part of the obligations of those instruments, and that they were notice to the parties thereto that those instruments were coupled with a provision that the Legislature, in the exercise of its powers, either itself, or acting through another, might regulate the rates thus fixed, and, particularly, with the provision of the statute that a common carrier such as the plaintiff was empowered to abrogate the same as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service, upon notice, filing and publication as provided by law.

Unforeseen Conditions Which Have Supervened to Render the Five-cent Fare Inadequate, Unreasonable, Confiscatory, and Invalid as to the Plaintiff.

XLIV. In order to carry out the single comprehensive plan of 1913 for the improvement and extension of municipal and non-municipal rapid transit railroads, and with the knowledge and approval of the Public Service Commission for the First District or of its successors, the plaintiff formulated and adjusted its capital obligations and fixed charges incidental thereto, in order to provide the necessary funds with which to carry out such plan and the obligations incurred thereunder by the plaintiff. In and by such plan, it was contemplated that the revenues to be derived from the operation of the enlarged system of rapid transit railroads would be sufficient to meet certain charges incurred by the defendant The City of New York and the plaintiff, and to provide a fair and reasonable return upon the investment in all of the properties provided by the defendant The City of New York and the plaintiff. After the execution of the lease and certificates, the expenses of operating the rapid transit railroads vastly increased, owing to radical economic changes produced by the World War, which were wholly unforeseen by the parties to the instruments at the time of their execution, and the value of the five-cent rate of fare fixed by the said Contract No. 3 and the elevated extensions certificate became greatly impaired. Since the beginning of the operation of the enlarged system of rapid transit railroads, and for an indefinite future period of the operation of the railroads, the said five-cent fare has failed, and will continue to fail, to be sufficient to defray the several charges and provide the return which it was expressly con-

[fol. 54] templated by the said Contract No. 3 and certificates should be defrayed and provided from year to year during the term of the lease to the plaintiff and the grant of rights to it and the defendant Manhattan Railway Company.

Circumstances as to Complete Change of Conditions Since the Making of the Leases and Certificate Containing Five-cent Fare Limitation.

XLV. Since March of 1913 there has been a complete and uncontemplated change in many factors pertinent to the stipulations then deemed to be proper and in the public interest and vitally affecting the reasonableness and propriety of the continuance of the fare limitations inserted in the rapid transit railroad leases then consummated and in the elevated extension certificate then granted. Certain of these changes and conditions have come about by affirmative acts and changed policy of the defendant The City of New York, contrary to the contemplation and purposes for which the said leases and limitations were accepted and entered into by the plaintiff. Those of a more general character will first be referred to herein:

(A) A new price level has followed in the wake of the World War. This was in no way contemplated by the parties or provided for at the time the 1913 leases and certificates were accepted and entered into. The change in pertinent facts and circumstances has been drastic and complete. Wages have increased at least one hundred per cent., and the cost of materials still more. The general level of commodity prices is now about seventy per cent. higher than in 1913. The price of practically everything which the plaintiff has to buy has been advanced accordingly. For example, for the year ended June 30, 1913, the average price paid by the plaintiff for coal was $3.23 per ton; for the year ended June 30, 1926, it was $5.51 per ton; for the year ended June 30, 1927, it was $5.63 per ton, and the price paid at the present time is about the same. The Federal, State and municipal taxes for the year ended June 30, 1927, were approximately thirty-five per cent. greater in amount than for the year 1913. The purchasing power of the nickel and the dollar has greatly decreased; the cost of money for all [fol. 55] capital purposes of the plaintiff has greatly in-

creased. The plaintiff is receiving, for the essential transportation service which it renders at 1928 costs of wages, materials, taxes, and carrying charges on new capital, a rate of fare with a purchasing power fixed in 1913, according to 1913 wages, costs and conditions. The Courts and Commissions have repeatedly taken judicial notice of these changes and of the consequent necessity that the rates and prices paid for public services shall reflect present costs and the present purchasing power of the dollar. The manifest disposition of the United States Supreme Court, the New York Court of Appeals, and the various Special Statutory Courts in the Southern and Eastern Districts of New York has been to take cognizance of what has transpired in the economic life of America since 1913, and to construe the applicable law in such a manner as to preserve the means of reasonable modernization and adaptation as to rate provisions of pre-war contracts which involve or affect the rendition of essential public services. Assumption of the continued immutability of rate provisions of such agreements made before the present price level has prevented vital improvements in public services and provoked most serious social consequences.

(B) As a result of these unforeseen changes in the price level and the greatly increased costs of labor and materials, the rates of fares charged on rapid transit and street surface railroads throughout the United States have, during the past few years, been generally and substantially advanced above the five-cent fare in force in 1913, and this has been done despite limitations contained in franchises, leases and agreements. The rates of passenger fare on steam railroads have been substantially advanced since 1913. On the rapid transit railroads in Boston, the fare is now 10 cents; in Chicago, 10 cents; in Philadelphia, 8 cents. In the 272 cities of the United States with a population of 25,000 or more, the average rate of fare on street surface railroads now slightly exceeds eight cents per passenger. In the following cities of New York State, other than the City of New York, the situation as to rates of fare in force, pursuant to the above-quoted provisions of the Public Service Commission Law, notwithstanding the limitation to five cents by pre-war franchises, leases and agreements, is as follows:

Table showing street railroad fares in force under quoted provisions of Public Service Commission Law of the State of New York

City	Population	Company	Present fare		Effective	Former fare	
			Cash rate	Ticket or token rate		Cash rate	Ticket or token rate
Albany	117,820	United Traction Co	10¢	13 for $1	July 1, 1927	7¢	
Amsterdam	35,200	Fonda, Johnstown & Gloversville R. R	8¢	4 for 30¢	Jan. 1, 1922	8¢	
Auburn	36,742	Auburn & Syracuse R. R	7¢		Jan. 1922	8¢	14 for $1
Binghamton	71,915	Binghamton Ry. Co	7¢		Feb. 1, 1925	6¢	
Buffalo	539,016	International Ry. Co	10¢	3 for 25¢	July 1, 1927	8¢	2 for 15¢
Elmira	48,359	Elmira Water, Lt. & R. R. Co	7¢		May 10, 1925	6¢	
Jamestown	43,414	Jamestown St. Ry. Co	10¢	3 for 25¢ 10 for 75¢ Weekly Pass $1	Nov. 2, 1926	8¢	5 for 35¢
Kingston	26,969	Kingston Consolidated R. R. Co	8¢		June 9, 1924	7¢	4 for 25¢
Poughkeepsie	35,670	Poughkeepsie & Wappinger Falls Electric Ry	10¢	6 for 50¢	May 3, 1925	9¢	
Rochester	316,786	N. Y. State Rys	8¢	4 for 30¢	Jan. 1, 1926	7¢	4 for 26¢
Rome	28,447	N. Y. State Rys	10¢	3 for 25¢	Jan. 1927	7¢	5 for 35¢
Schenectady	92,786	Schenectady Ry	7¢		Aug. 1, 1920	6¢	
Syracuse	182,003	N. Y. State Rys	10¢	4 for 30¢ 6 for 45¢	Apr. 1, 1927	10¢	10 for 75¢
Troy	72,223	United Traction Co	10¢	13 for $1	July 1, 1917	7¢	
Utica	101,604	N. Y. State Rys	10¢	10 for 75¢	Aug. 18, 1926	7¢	
Watertown	32,836	Beach River Traction Co	10¢	7 for 50¢	Jan. 1927	7¢	16 for $1

[fol. 57] (C) The making of the 1913 leases and contracts clearly contemplated that the municipal entity which, as a proprietor and railroad corporation, leased railroad properties owned by it to the plaintiff for operation for the period therein fixed would not itself become an operator of competing rapid transit properties and an active competitor of the lines leased to the plaintiff by agreements, some of which contain the five-cent fare limitation. The 1913 leases and agreements erected an elaborate and comprehensive plan for future subway construction and facilities to be provided as need therefor arose, and to be operated by the plaintiff. As more fully shown in the opinion of Commissioner John F. O'Ryan, then a member of the Transit Commission, referred to in the paragraph marked XLVII in this complaint, the defendant The City of New York has not at all fulfilled its duties and obligations under the 1913 plan and agreements, and has wholly neglected and failed to carry out the progressive provisions then made for the future. At the least, it was then contemplated that the City should not become a competitor of the plaintiff's rapid transit service except in the manner, and upon the contingencies and payments, provided for in the 1913 agreements, viz., the "recapture" by the City of indicated portions of the routes, payment therefor to the plaintiff on a stipulated basis, and subsequent municipal operation on a basis which would be substantially non-competitive with the lines remaining for operation by the plaintiff. Nevertheless, without such "recapture" and payment, and with municipal policies meanwhile pursued which have forfeited and barred any rights of "recapture" by the defendant The City of New York of any portion of the lines operated by the plaintiff, vast municipal funds and diligent municipal efforts are being devoted, at the present time, to the building of new rapid transit lines proposed to be operated by The City of New York, in its proprietary capacity, and with the advantage of exemptions enjoyed by it, in competition with the subway and elevated lines leased to the plaintiff. It has been conservatively estimated that the City's new Eighth Avenue Subway, projected and started subsequently to 1913 and contrary to the underlying plan of the 1913 agreements, will take from the existing lines of the plaintiff at least 110,000,000 passengers per year, thereby further reducing

its net earnings from the five-cent fare and rendering such stipulated fare still more inadequate and confiscatory, all by affirmative and wilful act of the City of New York. This change in basic municipal policy was in no way con- [fol. 58] templated by the parties at the time the 1913 leases and certificates were accepted and entered into; on the contrary, there were definite provisions whereby future expansion and construction would be dealt with under the contracts, and such additional lines and facilities operated by the plaintiff as lessee.

(D) This imminence of municipal competition, with the certainty of further diminution and destruction of the plaintiff's already inadequate revenues and net earnings, appears from the facts as shown by the Transit Record for December, 1927, and January, 1928, published by the Board of Transportation of the City of New York, as to the progress of work on construction contracts, respectively, as of November 30, 1927, and December 31, 1927. Omitting the Brooklyn and Queens contracts and the 53rd Street Line, the table hereinbelow shows the progress of work on the different sections of the municipal Eighth Avenue Subway. The existing West Side subway line of the plaintiff and the proposed competing line of the City are close together; they cross at Columbus Circle, are a block apart southward to 8th Street, where they again cross and continue southwardly, a block apart, to lower Manhattan, thus traversing practically the entire length of Manhattan Island. From Bank Street, in lower Manhattan, northward to and beyond 207th Street, the sections were from seventy-nine per cent. to ninety-eight per cent. completed as of December 31, 1927. As the last part of any subway construction contract is a restoration of sub-surface structures and pavement, these percentages mean that the structure itself is so substantially completed that tracklaying could practically have been started some time ago, with the possibility of at least a "shuttle" operation within a short time, furnishing service from the vicinity of Dyckman Street to a point even below 18th Street. The following table shows the substantial completion of its competing municipal railroad:

Rt.	Sec.	Contractor	Limits	Per cent of cost completed November 30, 1927	Per cent of cost completed December 31, 1927
101	3-4	Rosoff Sub. Const. Co.	Church St.-6th Ave., Park Place to 3rd St.	29	33
102	1	Moranti & Raymond, Inc.	8th Ave., Bank to 18th St.	79	81
102	2	Geo. H. Flinn	8th Ave., 18th to 28th St.	92	94
102	3	Rosoff Sub. Const. Co.	8th Ave., 28th to 38th St.	84	86
102	4	C. H. Locher	8th Ave., 38th to 48th St.	83	85
102	5	Heyman & Goodman, Inc.	8th Ave., 48th to 58th St.	88	91
102	6	Frederick L. Cranford, Inc.	8th Ave.-Central Park West 58th to 68th St.	83	85
78	1	J. F. Cogan Co.	Central Park West, 68th to 79th St.	87	88
78	1-A	A. A. Johnson Corp.	Central Park West, 79th to 89th St.	88	90
78	2	T. A. Gillespie Co.	Central Park West, 88th to 101st St.	93	95
78	2-A	Rosenthan Eng. Contr. Co.	8th Ave.-Central Park West, 101st to 111th St.	82	83
78	3	Heyman Goodman Co.	8th Ave., 111th to 122nd St.	96	97
78	3-A	Rosoff Sub. Const. Co.	St. Nicholas Ave., 122nd to 132nd St.	95	95
78	3	George J. Atwell	St. Nicholas Ave., 132nd to 141st St.	91	92
78	4-A	La Rocca Const. Corp.	St. Nicholas Ave., 141st to 149th St.	65	69
78	5	Rodgers & Hagerty	St. Nicholas Ave., 149th to 160th St.	94	94
78	6	Rodgers & Hagerty	St. Nicholas Ave.-Broadway, 160th to 173rd St.	89	90
78	6-C	Slattery Eng. & Const. Co.	Broadway, 173rd to 177th St. (an ingognificant spur)	35	45
78	7	Michael Del Balso	Ft. Washington Ave., 174th to 183rd St.	85	87
78	8	Silas B. Mason	Ft. Washington Ave., 183rd St. to Overlook Terrace	95	96
105	1	Arthur McMullen Co.	Broadway, Overlook Terrace to Cummings St.	93	94
105	2	Silas B. Mason	Broadway, Cummings to 211th St.	91	92
105	3	D. C. Serber	207th St., Broadway to 10th Ave., (except one section which is 69 per cent completed)	97	98

(E) The anomalous, unjust and oppressive policy of the defendant The City of New York thus appears clearly from the following, and suggests strongly the propriety that the changed circumstances and conditions, and the [fol. 60] affirmative acts of the City itself, should also be deemed to liberate the plaintiff from the fare limitations contained in the 1913 lease and certificate and to enable the Interborough Company to meet the new conditions confronting its business enterprise:

(1) The City launches a program of active competition with the lines leased to and operated by the plaintiff, and is employing vast public funds obtained from the taxpayers for that purpose, threatening further inadequacy of revenues and net earnings;

(2) In the exercise of the State's regulatory powers, the Transit Commission is insisting that the plaintiff purchase 432 or other substantial number of additional cars for use on its subway lines and install signals upon the local tracks of both subway and elevated lines (the direction to the latter effect having been accepted by the plaintiff); and in its proprietary capacity, the City is insisting and requiring that the plaintiff extend the subway local platforms and provide the additional rolling-stock and extension of power facilities incidental thereto; which vast additions and extensions to the operating properties of the plaintiff would require it to raise approximately $40,000,000 of new capital therefor; such additions and extensions being unwarranted by the plaintiff's present revenues and operating conditions, as well as burdensome, when the City's approaching competition is considered; and

(3) The City is insisting upon the continuance, in 1928 and thereafter, of the rate of fare fixed and adjusted according to 1913 wages, costs and conditions.

(F) The defendant City thus introduces into the situation, in 1927 and 1928, a municipal competition unintended in 1913, but insists nevertheless that its competitor shall make vast capital expenditures despite inadequate revenues and earnings, and insists, furthermore, that its competitor shall be further hampered and crippled by being compelled to continue the fare fixed on the basis of 1913

costs and conditions, when no municipal competition was intended. A railroad corporation, or other proprietor, which has leased its lines and properties to an existing railroad enterprise may not fairly be permitted to change [fol. 61] its mind and policy, build new and competing lines to be operated by itself, and nevertheless continue to dictate the capital expenditures of its lessee and control the policy of its lessee as to rates of fare.

(G) Although the defendant The City of New York procured the execution of the said Contract No. 3 and the said certificates and the investment of great sums of money by this plaintiff in the business of providing rapid transit, and notwithstanding and in violation of the obligations imposed upon the said City by reason of the said contract and certificates and by the requirements of good faith inherent in the said lease and grants, the defendant The City of New York, its agents, representatives and officers, have wilfully, maliciously, flagrantly and continuously violated the terms of the said grants and the obligations thereof, by threatening the impairment and destruction of the said grants, the investment therein made, and the rights thereunder possessed by this plaintiff, by undertaking the construction of competitive lines of transit, which the said City, its agents, representatives and officers have publicly proclaimed will be operated upon a basis wholly unremunerative and resulting in enormous deficits to the said City, and with the purpose of so impairing the obligations of the said lease and certificates as to compel their surrender by this plaintiff, and the surrender of the plaintiff's property, to the said City, upon inequitable and confiscatory terms. With like intent, the defendant City has vigorously sought to procure from the said Transit Commission orders requiring radical modifications in the scope and character of the said Contract No. 3, involving the expenditure of upward of $40,000,000, well knowing that the said expenditure would be financially ruinous to this plaintiff, while simultaneously aiding, abetting and procuring the negotiation and imposition of requirements abrogating the said contract and certificates, all to the great harm, injury and damage of this plaintiff, and the daily continuing and irreparable impairment of its rights, credit and property. The defendant The City of New York, by reason of its said

wilful bad faith and malicious impairment of the said lease, is wholly debarred from the interposition of any alleged condition, provision or requirement of the said lease and certificate as a defense against the lawful right of this plaintiff to a just, reasonable and compensatory rate of fare upon any of the lines of rapid transit railroad operated by it as aforesaid.

[fol. 62] Continuance of the Five-cent Fare Limitation Imposed Upon the Plaintiff by Provisions of Public Service Commission Law and the Orders of the Regulatory Commissions Denying Increase in Fare

XLVI. (a) On or about May 28, 1920, pursuant to the provisions of the Public Service Commission Law, the plaintiff, as a common carrier subject to the jurisdiction of the Public Service Commission, duly presented to and filed with Lewis Nixon, then constituting the Public Service Commission for the First District, its complaint, verified on May 28, 1920, showing that the maximum fare of five cents, chargeable by it as a common carrier, was insufficient to yield reasonable compensation for the service rendered by it in the operation of the subway lines of the plaintiff, and was unjust and unreasonable, and an application by petition dated and verified on May 28, 1920, for a hearing and determination under Section 49 of the said Public Service Commission Law as to a just and reasonable rate of fare on the said subway lines, which complaint and petition were supported by a showing of facts and reasons therefor.

Thereupon the said Public Service Commission for the First District held a hearing upon the said application, and thereafter on May 28, 1920, made a final order in its Case No. 2500 ordering that the said complaint be dismissed and that the petition of the plaintiff be denied for want of jurisdiction to determine and fix a rate of fare different from that fixed by the said Contract No. 3, hereinbefore more fully described, to wit, five cents per passenger. Thereafter the plaintiff duly applied to the said Public Service Commission for the First District for a rehearing, pursuant to Section 22 of the said Public Service Commission Law, in respect to each and all of the matters

determined by the final order of the said Commission made on May 28, 1920, dismissing the complaint and denying the petition of the plaintiff, and thereupon on the 28th day of May, 1920, the said Public Service Commission for the First District made a further order in its Case No. 2500 denying said application of the plaintiff for a rehearing.

(b) On or about March 22, 1922, the plaintiff presented to and filed with the said Transit Commission a complaint and application, verified March 22, 1922, showing that the maximum fare of five cents chargeable by it on its subway and elevated rapid transit railroads in the City of New [fol. 63] York, including each the Subway Division and the Manhattan Division, had been for more than three years, and was then, insufficient to yield reasonable compensation for the service rendered and had been, and was, unjust and unreasonable, and that, for the purpose of protesting and insuring safe, adequate and efficient service upon the lines operated by the plaintiff, and for the preservation of the plaintiff's system as an entity, the public interest required an immediate, reasonable, temporary increase in the existing five-cent rate of fare chargeable by the plaintiff, pending the final determination of the rate as therein prayed for. The said complaint and petition requested that the said Transit Commission, pursuant to the powers vested in it by law, fix and determine the just and reasonable rate, fare and charge collectible by it at a figure which will yield a reasonable average return upon the property actually used by the plaintiff in the public service, and that, in the meantime, it authorize an immediate temporary increase in the rate, fare and charge collectible by the plaintiff upon such terms, conditions and safeguards as the Commission might deem proper.

Thereupon, on March 28, 1922, the said Transit Commission made an order in its Case No. 2632, directing that the said application of the plaintiff, verified March 22, 1922, be in all respects denied for lack of jurisdiction.

(c) The said Public Service Commission for the First District and the said Transit Commission each has construed and interpreted the provisions of the said Public Service Commission Law so as to require and compel the plaintiff, by the said orders of dismissal made by the said

Commissions, respectively, to observe and charge upon each the Subway Division and the Elevated Division of the rapid transit lines operated by it a rate of fare of five cents per passenger, and no more; and by reason of the tariff schedules theretofore published, posted and filed by the plaintiff establishing a rate of fare of five cents per passenger on each of the said divisions of its rapid transit railroad lines, the provisions of the said Public Service Commission Law and the said orders made by the said Commissions, respectively, relative to tariff schedules from which the plaintiff may not deviate and to the dismissal of the said applications or complaint, operated to require and compel the plaintiff to observe such fare of five cents per passenger and to prohibit the plaintiff from charging any rate of fare in excess of such rate of five cents per passenger.

[fol. 64] The Transit Commission's Order for Construction by the Plaintiff of Subway Platform Extensions

XLVII. On July 31, 1923, George McAneny, LeRoy T. Harkness and John F. O'Ryan, then constituting the Transit Commission, adopted a resolution, in its proceeding identified as R. T. 4807, that a hearing be held before it on August 9, 1923, in respect of the question whether the platforms of certain local stations of the Manhattan-Bronx Rapid Transit Company of the Existing Railroads (as defined and described in the said contract, known as Contract No. 3, dated March 19, 1913, between the City of New York and the plaintiff) should be lengthened to 480 feet, for the purpose of permitting operation of ten-car trains at such local stations.

Thereafter hearings were held by the said Commission on many dates to and including February 5, 1926, when the said hearing was closed.

During its course, the said hearing was extended so as to include not only the question whether such platforms of local stations of said Manhattan-Bronx Rapid Transit Railroad should be so lengthened, but also the question whether all station platforms of all stations of the railroad and existing railroads (as defined and described in said Contract No. 3) should, where not then of lengths equal

to or exceeding 480 feet, be lengthened so as to be 480 feet in length.

Thereafter such proceedings were had that, at a meeting of the said Transit Commission held April 21, 1926, at which there were present the said George McAneny, LeRoy T. Harkness and John F. O'Ryan, as Commissioners, the said Transit Commission, by a vote of two to one, made and adopted an order in its said proceeding R. T. 4007 (of which a copy is hereto annexed and made a part thereof, marked Schedule "H"), ordering and directing the plaintiff, Lessee under said Contract No. 3, to cause the station platforms at the various stations of the said Railroad and Existing Railroads specified in the said order to be lengthened in accordance with the schedule thereto annexed, as Additions to the Railroad and Existing Railroads, so that they will be 480 feet in length.

At or about the time of the making of the said order of April 21, 1926, the several Commissioners constituting the said Transit Commission filed their respective opinions, [fol. 65] that of John F. O'Ryan, Commissioner, recommending that such order of April 21, 1926, be not made.

Thereafter the said Transit Commission, as now constituted or as previously constituted, made orders extending the effective date of the said order of April 21, 1926, and on October 26, 1927, the said present Transit Commission adopted an order directing that the hearing in the said proceeding R. T. 4007 be reopened, and thereupon further proceedings were had therein by the said present Transit Commission. In the course of such further proceedings, the said Transit Commission arbitrarily refused to permit the plaintiff to put in evidence before it various engineering and operating studies and surveys which the plaintiff had meanwhile been able to carry forward and complete, and of which copies had been furnished to the said Transit Commission. These studies and surveys showed, or tended to show, that the proposed lengthening of station platforms would not in fact afford substantial relief from existing conditions of traffic congestion and would not be advisable as an operating matter. The defendant members of the present Transit Commission declined to receive such further evidence; but, nevertheless, at a meeting thereof on

December 31, 1927, at which there were present the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, an order was made by it in its proceeding R. T. 4007, which order is identified as "Supplemental Order 'A,'" directing that the plaintiff, lessee under the said Contract No. 3, shall lengthen or cause to be lengthened for specified distances and in specified directions the station platforms of four stations of the Manhattan-Bronx Rapid Transit Railroad, to wit, the northbound platform and the southbound platform of each the Canal Street station, the Spring Street station, the Bleecker Street station and the Astor Place station. The said order was therefore made unreasonably, arbitrarily, and in denial to the plaintiff of a fair hearing and due process of law, guaranteed by the State and Federal Constitutions. A copy of the said order of December 31, 1927, in the proceeding R. T. 4007 is hereto annexed and made part hereof, marked Schedule "I."

XLVIII. The said orders and decisions of the said Transit Commission in the proceeding R. T. 4007 were and are unauthorized by the said Public Service Commission Law, the said Rapid Transit Act, any other Act of the Legislature of the State of New York, or the said Rapid [fol. 66] Transit Railroad Contract No. 3 of March 19, 1913. There was no competent evidence before the said Commission to support the findings contained in the said orders and decisions by the said Commission, and the said Commission had no power to make such orders or decisions. The said orders and decisions were and are capricious and arbitrary. There was no competent proof of all the facts necessary to be proved in order to authorize the said Transit Commission to make the determinations as set forth in the said orders and decisions. The said orders and decisions were and are unjust and unwarranted, and the authority conferred upon the said Transit Commission was not pursued in the mode required by law or by the said Contract No. 3 in order to authorize it to make said orders and decisions. There was no competent proof of all of the facts necessary to be proved in order to authorize the said Transit Commission to make the said determination, as set forth in the said orders and decisions. Upon all of the evidence before the said Transit Commis-

sion, there was such a preponderance of proof against the existence of the facts found by the said Commission as the basis for its said orders and decisions, that the said orders and decisions of the Commission were and are against the weight of the evidence adduced before the Commission. The said orders and decisions, if enforceable against the plaintiff, were and are in violation of the provisions of the Constitutions of the State of New York and of the United States and impair the obligations of the franchise contracts of the plaintiff with the State of New York and deprive the plaintiff of its property and rights without due process of law and without just compensation and deny to it the equal protection of the laws.

The Transit Commission's Proceeding Threatening to Require the Plaintiff to Provide 432 Additional Subway Cars

XLIX. At a meeting of the said Transit Commission, held February 24, 1927, at which there were present the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, the said Commission made an order in its Case No. 2851, entitled "In the Matter of the Hearing on motion of the Commission upon the regulations, practices, equipment, appliances and service of Interborough Rapid Transit Company on the Lexington-Fourth Avenue and Broadway-Seventh Avenue Lines operated by the said company," directing that a hearing be held regarding the subject-matter thereof, to the end that the said Transit [fol. 67] Commission may determine whether or not the regulations, practices, headways and methods of operation and service given upon the Lexington-Fourth Avenue and Broadway-Seventh Avenue Lines are unreasonable, improper or inadequate and may determine the just, reasonable, proper and adequate regulations, practices, headways and service thereafter to be enforced, to be observed and to be in use in the transportation of persons on the said lines, and to fix and prescribe the same by order to be made by the said Commission and to be served upon the plaintiff. Thereafter hearings were held by and before the said Transit Commission or one or more of the members thereof, and the taking of evidence was closed.

At and during the said hearing, the said Commission was represented by special counsel, who has been employed by the said Commission gratuitously, and who arbitrarily and with bias and prejudice against the plaintiff conducted the examination of witnesses and made addresses to the said Commission or one or more of the Commissioners as though he were acting as a prosecutor in behalf of the People in a criminal proceeding. Both before the close of the said hearings and thereafter, and without due deliberation or the prerequisite findings under the statute, or any formal order such as is required by the provisions of the Public Service Commission Law in order to make the directions of the Transit Commission effective and enforceable as against the plaintiff, the said special counsel for the said Transit Commission announced in the public press that the said Commission would make an order requiring this plaintiff to acquire 432 additional cars for operation on its subway division.

Such threatened order, if made by the said Transit Commission, would be unauthorized by the said Public Service Commission Law or by any other legislative act of the State of New York. There is no competent evidence before the Transit Commission to support any finding that such cars were or will be necessary for the public service or that the service and facilities of the plaintiff are inadequate, and the said Transit Commission has no power to make such an order. Such an order by the said Transit Commission would be capricious and arbitrary. There is no competent proof of all of the facts necessary to be proved in order to authorize the said Transit Commission to make such an order. Upon all of the evidence before the Transit Commission there is such a preponderance of proof against the [fol. 68] existence of facts necessary to be found by said Transit Commission as the basis for such an order, that such an order would be against the weight of the evidence adduced before the Commission. Such an order would be unjust and unwarranted, and the authority conferred upon the said Transit Commission has not been pursued in the mode acquired by law to authorize it to make such an order. Such an order would be in violation of the provisions of the Constitutions of the State of New York and of the United States and would impair the obligations of the fran-

chise contract of the plaintiff with the State of New York, and would deprive the plaintiff of its property and rights without due process of law and without just compensation, and would deny it the equal protection of the laws.

Inadequacy and Confiscatory Effect of the Five-cent Fare on the Plaintiff's Subway Division

L. (a) Herein below is set forth a summary of the plaintiff's estimate of the present value of the properties used and useful in the operation of the Subway Division of the plaintiff and devoted to the public service, under Contracts Nos. 1, 2 and 3, including the property provided by the plaintiff and by the City of New York, the actual earnings from such operation available as a return thereon, and the deficiency in earnings below the reasonable and required rate of return thereon. The actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action.

The properties covered by the estimate consist, in the main, of the construction and equipment provided under Contracts Nos. 1, 2 and 3, by the plaintiff and by the City of New York together with a pro rata proportion of the cost of materials and supplies as shown by the plaintiff's books of account or records, and cash working capital based upon one month's operating expenses of the subway lines, the actual cost of the Belmont Tunnel in excess of the amount allowed as a part of the "Cost" under Contract No. 3, and such undistributed structural costs or overheads applicable to such properties as have virtually been conceded to be reasonable by the engineers of the Transit Commission. The estimate of the value of the property provided by the City of New York under Contracts Nos. 1, 2 [fol. 69] and 3 is based principally upon the estimate of reproduction cost thereof made by the engineers of the Transit Commission. For the purposes of the computation, there has been deducted from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being

made for each of the other periods stated in the summary, without conceding the correctness or propriety of such a deduction.

The estimate of present value is exclusive of the cost of the records pertaining to the subway lines; the increases in the value of land since 1921; the going value; the value of franchises, and other intangible elements of value.

Subway Division

Computation based on plaintiff's present value figures of property provided by it, and Commission figures for city-provided property

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$612,390,236	$13,807,622	2.25	$48,991,219	$35,183,597
1922	563,302,635	14,962,509	2.66	45,064,211	30,101,702
1923	651,394,242	14,432,382	2.22	52,111,539	37,679,157
1924	656,790,774	15,849,724	2.41	52,543,262	36,693,538
1925	659,775,428	16,950,434	2.57	52,782,034	35,831,600
1926	686,210,288	19,762,325	2.88	54,896,823	35,134,498
1927	689,920,610	19,453,973	2.82	55,193,649	35,739,676
Total deficiency below an 8% return on present value during seven-year period					$246,363,768

The deficiency in earnings on the Subway Division, under the existing five-cent fare, below an eight per cent. return upon such present value of the properties so used by the Interborough Company and devoted by it to the public service, for the years 1921 to 1927, inclusive, aggregates at least $246,363,768.

(b) The following summary sets forth the corresponding computations of the minimum present value of the properties comprising the plaintiff's subway division based principally upon estimates of the reproduction costs made by [fol. 70] engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property.

The actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action:

Subway Division

Computation based on Transit Commission's Engineers' figures of reproduction cost

	Minimum present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$586,659,314	$13,807,622	2.35	$46,932,745	$33,125,123
1922	552,369,593	14,962,509	2.71	44,189,567	29,227,058
1923	599,688,342	14,432,382	2.41	47,975,067	33,542,685
1924	604,713,774	15,849,724	2.62	48,377,102	32,527,378
1925	614,653,428	16,950,434	2.76	49,172,274	32,221,840
1926	648,111,288	19,762,325	3.05	51,848,903	32,086,578
1927	651,776,610	19,453,973	2.98	52,142,129	32,688,156
Total deficiency below an 8% return on minimum value during seven-year period					$225,418,818

Even upon the basis of such minimum present value of the subway properties, based upon the estimates of reproduction cost thereof made by the Commission's engineers, the deficiency in earnings below an eight per cent. return, for the years 1921 to 1927, inclusive, aggregates at least $225,418,818.

If operating expenses were increased, as the result of wage increases, additional service and additional maintenance, to the extent hereinafter shown, and if additional fixed charges were incurred on account of additions and improvements ordered or threatened by the Transit Commission, as detailed in a subsequent table, the deficiency in earnings below an eight per cent. return, indicated in the two foregoing computations, would be correspondingly greater.

[fol. 71] Early Prospective Requirements of the Plaintiff for Increases in Operating Expenses and Fixed Charges

LI. (a) As of October 1, 1927, the known obligations of the plaintiff to complete Equipment required to be provided by it under Contract No. 3, to meet the instalments still due on cars heretofore purchased by it for operation on the rapid transit railroad lines, and to provide the signals on local tracks of the Subway Division to be installed prior to June 30, 1930, for which the plaintiff has no capital funds available, are payable as follows:

	During fiscal year ending			
	Prior to June 30, 1928	June 30, 1929	June 30, 1930	Total
To complete equipment, Contract No. 3	$1,201,657	$1,217,918		$2,419,575
Installment on cars	1,300,000	1,020,000	$570,000	2,890,000
Signals	286,816	410,000	480,000	1,176,816
	$2,788,473	$2,647,918	$1,050,000	$6,486,391

(b) If the Transit Commission issues, as it has been announced it will do, an order to the plaintiff to furnish 432 additional subway cars and makes effective the order already issued to lengthen all of the subway local platforms, the estimate of the additional capital obligations is as follows:

305 motor cars at $23,000 each	$7,015,000
127 trailer cars at $14,500 each	1,841,000
Total cost of 432 motor and trailer cars	$8,856,000
The plaintiff's Superintendent of Motive Power estimates that even though we should cease to supply to the surface lines, the additional power equipment required in connection with these cars would cost	2,000,000
Total cost of cars and necessary power equipment	$10,856,000
Cost of the plaintiff's one-half of the construction of the platform extension work	7,265,000
Cost of 382 cars to provide ten-car local trains	9,000,000
Cost of other equipment including power machinery on account of the platform extension work	8,000,000
Total requirements for 432 additional cars, lengthening of all subway local platforms and the provision of additional cars and other equipment in connection therewith	$35,121,000
Estimated cost of subway signals to be installed after June 30, 1930	4,345,000
Total	$39,466,000

This result is based upon separate estimates of the requirements for lengthening of local platforms and for the provision, prior to the completion of that work, of 432 addi- [fol. 72] tional cars. If the two projects should be considered together, there may be effected a reduction in the total estimated cost as shown, possibly as much as $8,000,000, depending upon the total number of cars required, and the provision for additional power.

(c) In addition, there is a further requirement, under an existing order of the Transit Commission, for the installation of signal, in 1936 and 1937, on local tracks on the elevated lines at an estimated cost of $6,960,000, for which the plaintiff has no funds provided.

(d) The foregoing additional capital expenditures (including the funding of certain improvements paid for out of earnings prior to October 1, 1927) will necessarily increase the plaintiff's interest and amortization charges, as follows:

1929—Funding of cost of additions and improvements made from earnings to October 1, 1927		$4,500,000
Estimated capital expenditures for existing obligations, October 1, 1927 to June 30, 1928		2,788,000
Estimated cost of 432 cars and the necessary power equipment		10,856,000
Total for 1929		$18,144,000
Rounded out at	$18,000,000	
Interest and sinking fund thereon	1,080,000	
1930—Estimated capital expenditures for existing obligations		2,648,000
Total for 1930		$20,792,000
Rounded out at	$21,000,000	
Interest and sinking fund thereon	1,260,000	
1931—Estimated capital expenditures for existing obligations		1,050,000
Cost of Company's one-half of the construction of the platform extensions		7,265,000
Estimated cost of equipment in connection with platform extension work after allowing $8,000,000 for possible duplication		9,000,000
Estimated cost of signals after June 30, 1931		11,305,000
Manhattan Division	$6,960,000	
Subway Division	4,345,000	
Total for 1931		$49,412,000
Rounded out at	$49,000,000	
Interest and sinking fund thereon	2,940,000	

(e) The known facts afford no ground for expecting that the prices of material and the wages paid for labor by the plaintiff will, on the whole, be reduced from those now prevailing. On the contrary, there will be required increases in operating expenses for the following major items and amounts:

[fol. 73] Summary Showing Increased Operating Expenses of Plaintiff in Immediate Prospect

	First annual period			Second annual period			Third annual period		
	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total
Additional wages	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000
Additional service	540,000	2,220,000	2,760,000	567,000	2,700,000	3,267,000	567,000	2,700,000	3,267,000
Additional maintenance	500,000	500,000	1,000,000	500,000	500,000	1,000,000	500,000	500,000	1,000,000
Total	$1,640,000	$5,120,000	$7,760,000	$2,667,000	$5,600,000	$8,267,000	$2,667,000	$5,600,000	$8,267,000

[fol. 74] (f) The following is a summary of prospective increases in operating expenses and fixed charges to be incurred by the plaintiff upon the making of the improvements in working conditions, property and operation, as aforesaid:

Summary of Increased Operating Expenses and Fixed Charges

	First annual period	Second annual period	Third annual period
Operating expenses	$7,760,000	$8,267,000	$8,267,000
Interest and sinking fund	1,080,000	1,260,000	2,940,000
Total	$8,840,000	$9,527,000	$11,207,000

Confiscatory Effect and Unconstitutionality of the Five-cent Rate Limitation upon the Plaintiff's Lines

LII. The maximum rate of five cents now chargeable by the plaintiff on its Subway Division has been at least during 1926 and 1927, and now is, and will be, insufficient to yield a reasonable compensation for the service rendered, and during said period has been, and now is, and will continue to be, unjust, unreasonable and confiscatory of this plaintiff's property, and has been, and is, and will continue to be, insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the plaintiff in the public service in its operation and devoted to the public service, and the enforcement of such maximum fare of five cents contravenes the guarantees of the Fourteenth Amendment of the Constitution of the United States, and of Section 6 of Article I of the Constitution of the State of New York.

The return received by the plaintiff from the existing maximum rate of fare chargeable by it, has not been, and is not now, sufficient to maintain and support the credit of the plaintiff and to enable it to secure capital funds for the purpose of providing for new construction and equipment, either through the sale at a reasonable discount of its long term first mortgage bonds or of any other marketable security.

It will be impossible for this plaintiff to procure necessary additional capital because of the narrow margin by which the present fixed charges of the plaintiff are pres-

ently, and in the near future will be, earned under existing traffic conditions on a five-cent fare; because of action taken [fol. 75] or threatened by or on behalf of the Transit Commission to impose requirements for additional expenditures by this plaintiff aggregating ultimately nearly $40,000,000, and because of the unascertainable effect on this plaintiff's operations and earnings of the opening of the new municipal subway system.

Because of the failure of the net revenue received by the plaintiff from the operation of the aforesaid rapid transit railroad lines to yield a fair or reasonable average return on the value of the property used and useful in the service, the plaintiff has been unable, and at the existing rate of fare will be unable, to make proper reservation out of its income for surplus and contingencies, as authorized by the Public Service Commission Law of the State of New York.

Seven-cent Fare Established by the Plaintiff Pursuant to Legislative Power Delegated to It—The Plaintiff's Application to the Transit Commission for Immediate Relief

LIII. The plaintiff here realleges each of the matters and things stated and set out in the paragraphs marked XXXII to XXXIV, both inclusive, of this complaint, with the same force and effect as if each of the same were herein again repeated and set out.

Irreparable Damage Threatened to the Plaintiff

LIV. As such common carrier, the plaintiff transports daily, on the average, about 3,215,469 of passengers on the Subway Division and Manhattan Division of the rapid transit railroads operated by it. The number of passengers carried by it during the year ended June 30, 1927, was about 1,173,646,256, of which 359,019,660 were transported on the Manhattan Division and 814, 626, 596 were transported on the Subway Division. Many of such passengers are non-residents of the City of New York, or are transient visitors from other parts of the State of New York or from other States of the Union. There is no means by which the plaintiff can collect from the passengers transported by it any part of a fare charged by it unless paid in cash, or

by a token issued in exchange for cash, upon or before the transportation of such passengers. If the plaintiff should make a charge to any passenger in excess of a fare of five cents without the protection of this Court, the plaintiff is informed and believes that such passenger would refuse to [fol. 76] pay such charge; and, if the plaintiff should remove such passengers who refuse to pay such charge from its cars or should refuse to admit them thereto, the plaintiff is advised and believes that it would be at once subjected to a multiplicity of suits from such passengers, to compel transportation or for damages for breach of duty to transport, as well as to prosecution for the fines and penalties prescribed by the Public Service Commission Law for failure to furnish transportation. If the plaintiff should make a charge in excess of a fare of five cents per passenger, the aggregate of the penalties so incurred in one year would amount to enormous sums and the damage to the plaintiff would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure by the plaintiff to desist from charging a fare of more than five cents would involve a risk of absolute ruin to the plaintiff and the entire destruction and confiscation of its property by reason of the enormous fines to which it would be exposed. The plaintiff is, therefore, without adequate remedy at law for recourse for the wrong suffered by said confiscatory rate of fare of five cents and such injury to the plaintiff is irreparable, except for the intervention of a court of equity.

The plaintiff also repeats and realleges, as applicable to the fare chargeable by it on the said Subway Division, each and every allegation set forth in paragraph XXII of this complaint, as though here set forth in full.

No Adequate Remedy Except in Equity

LV. The plaintiff is advised and believes, and, therefore, avers and claims, that there is no remedy, except in equity, to test adequately the validity of the limitation of the fare to be charged by the plaintiff to a rate of five cents per passenger, and the orders and proceedings of the said Transit Commission in relation to the fare chargeable by the plaintiff or to the construction of station platform ex-

tensions by the plaintiff or to the providing additional cars for operation; and that, in the absence of such remedy in equity, the penalties provided in said acts, contracts and certificates would be unreasonable and confiscatory, and would deprive the plaintiff of its liberty of contract, and of its property without due process of law and without just compensation, and would likewise deny to it the equal protection of the laws, in contravention of Section 10 of Arti- [fol. 77] cle I and of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State of New York; on which account the plaintiff invokes the jurisdiction of this Court, to protect it against the aforesaid threatened invasion by the defendants of its inherent rights under and guaranteed by the said Federal Constitution and the said State Constitution.

Jurisdictional Allegation as to Value of Property Involved

LVI. The value of the business and property of the plaintiff which is involved in this suit is, as hereinbefore more fully shown, greatly in excess of $3,000.

and for a fourth cause of action

LVII. The plaintiff here realleges each of the matters and things stated and set out in paragraph I to LVI, both inclusive, of this complaint, with the same force and effect as if each of the same were herein again repeated and set out.

Summary of Actual Revenues, Expenses and Income from Operation of Rapid Transit Railroad Properties

LVIII. Summaries of the actual revenues, expenses and income in the operation by the plaintiff of the rapid transit railroads, in each of the years ending June 30, 1921, to 1927, both inclusive; the income deductions, including rentals paid by the plaintiff under the leases from the Manhattan Railway Company and the defendant The City of New York; the amounts available as return on the respective properties; and the balance of such income are set forth in the schedules hereto annexed and made part hereof, marked, respectively, Schedules "A," "B," "C," "D," "E," "F," and "G."

Inadequacy and Confiscatory Effect of Five-cent Fare Upon the Plaintiff's System Properties—Subway and Elevated Divisions

LIX. (a) The elevated and subway rapid transit railroad lines operated by the plaintiff have distinguishing characteristics of routes, construction, equipment, operating conditions and traffic; but they have been operated as, and constitute, a unified transportation system. They supplement each other in the facilities for transportation afforded to the public under the plan of comprehensive [fol. 78] rapid transit improvements adopted by the Public Service Commission for the First District and approved by the defendant The City of New York, in 1913, under the so-called "Dual System of Rapid Transit." The dismemberment of this transportation system would result in great inconvenience and loss to the public, by reason of separate operation as well as of the curtailment of essential and continuous service along routes using both elevated and subway lines or by transfer at interconnecting stations of the two divisions.

(b) Through elevated railroad service is operated as follows: (1) on the Sixth and Ninth Avenue lines over the Jerome Avenue extension to the subway lines north of 167th Street to Fordham Road and Woodlawn; (2) on the Second Avenue line over the West Farm extension of the subway lines to Freeman Street; (3) on the Third Avenue line over the White Plains Road extension subway lines north of Gun Hill Road to the terminal at East 241st street; and (4) on the Second Avenue line from South Ferry via Queensboro Bridge and the Astoria branch of the Queensboro subway to Ditmars Boulevard, Astoria, and from South Ferry via Queensboro Bridge and the Flushing branch of the Queensboro subway to Willetts Point Boulevard, near Flushing, which connect the subway extensions with the elevated lines of the Manhattan Railway Company. At certain stations where the elevated railroad division and the subway division interconnect, passengers are permitted to transfer between the two divisions.

(c) Such through service is provided in accordance with the intent of the City, as is shown, among other provisions,

by article IX of the Certificate of March 19, 1913, granted to the Interborough Company for Elevated Extensions, as follows:

"The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith, between the City and Interborough Rapid Transit Company, and over any extensions of such parts, and the Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads, to the end that through service may be provided over such parts, over the Railroads and over the Manhattan Railroad."

[fol. 79] (d) With the approval of the Public Service Commission for the First District and its successors, and as specifically provided and contemplated by Contract No. 3 (Art. XXXVIII), the plants for the generation, conversion and distribution of electrical energy originally designed and laid out for the operation of the subway and elevated lines separately, have been so joined and intermingled, to secure maximum efficiency and economy, that to-day the subway lines could not be operated without utilizing electrical power generated in the power house belonging to the defendant Manhattan Railway Company, and, on the other hand, the elevated lines could not be operated independently of the power plant provided for subway operation.

LX. (a) Herein below are set forth the present value of the rapid transit railroad properties—both subway and elevated lines—the maximum amount of earnings available as a return thereon, the per cent. or rate of return actually earned, and the deficiency in earnings below the reasonable and required rate of return of eight per cent. upon such present value. The actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action.

The amount of such present value, as to property provided by the plaintiff, is based upon estimates of reproduction cost made by engineers for the plaintiff, and embraces the property provided by the plaintiff under Contracts Nos. 1, 2 and 3, and the Elevated Extension and Improvement Certificates of 1913, and the original Manhattan Railway property (exclusive of property nicessarily removed in order to perform the work required under said certificates), and, as to the property provided by the defendant The City of New York under Contracts Nos. 1, 2 and 3, is based principally upon estimates made by engineers of the Transit Commission; together with the cost of material and supplies as shown by the plaintiff's records, cash working capital based upon one month's operating expenses, actual cost of the Belmont Tunnel in excessof the amount allowed as a part of the cost of Contract No. 3, and certain items of undistributed structural costs or overheads aggregating $6,173,000, as set forth on Sheet No. 2 of Exhibit 40 of the 1927 transit investigation, the propriety of allowing which items is not disputed by the Transit Commission's engineers. For the purpose of the computation, there has been deducted from the reproduction cost the expenditures estimated by the Commission's engineers as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for each of the other periods stated in the summary without conceding the correctness or propriety of such deduction.

The stated amounts of present value are exclusive of the cost of the plaintiff's records; the increases in the value of land since 1921; the going value; the accumulated deficits in the preferentials; the cost of portions of rapid transit properties as they existed in March, 1913, which were replaced and superseded in the reconstruction of the Manhattan Railroad; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included at original cost.

The summary of the present value of rapid transit properties above described, the amount of the actual earnings available as return, the per cent. of return actually earned,

and the deficiency in earnings below a fair return on such present value, is as follows:

Interborough System

Computation Based on Plaintiff's Present-value Figures of Property Provided by the Companies, and on Commission Figures for Property Provided by the City

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below an 8% return at least
1921	$824,583,751	$15,828,434	1.92	$65,966,700	$50,138,266
1922	754,869,528	17,974,948	2.38	60,389,562	42,414,614
1923	861,487,351	17,645,908	2.05	68,918,988	51,273,080
1924	868,980,817	19,436,182	2.24	69,518,441	50,082,259
1925	868,117,005	20,404,446	2.35	69,449,360	49,044,914
1926	894,724,597	23,698,721	2.65	71,577,968	47,879,247
1927	898,793,648	22,622,761	2.52	71,903,492	49,280,731
Total deficiency below an 8% return on present value during seven-year period					$340,113,111

The deficiency in earnings below an eight per cent. return upon such present value of the rapid transit railroad properties for the years 1921 to 1927, inclusive, aggregates at least $340,113,111.

It should be noted that the above amounts, computed as available for return on property, in the respective years, [fol. 81] were determined without making any allowance for reserves for depreciation and for unliquidated accident and damage claims and other contingencies.

The properties in the said Interborough System for the year 1927, as shown in the preceding table, may be classified as follows:

Property provided by Manhattan Railway Company	$142,894,000
Property owned by plaintiff	140,579,474
Other property provided by plaintiff	272,940,174
Property provided by City	342,380,000
Total present value, as above, at least	$898,793,648

(b) The following summary sets forth the corresponding computations of the minimum present value of the rapid transit railroad properties, including the subway

properties and the elevated properties, based principally upon estimates of the reproduction cost made by engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property.

The actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action:

Interborough System

Computation Based on Transit Commission's Engineers' Reproduction Cost Figures

	Minimum present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$755,583,608	$15,828,434	2.09	$60,446,689	$44,618,255
1922	713,456,822	17,974,948	2.52	57,076,546	39,101,598
1923	774,737,252	17,645,908	2.228	61,978,980	44,333,072
1924	779,858,517	19,436,182	2.49	62,388,681	42,952,499
1925	789,853,005	20,404,446	2.58	63,188,240	42,783,794
1926	827,561,597	23,698,721	2.86	66,204,928	42,506,207
1927	831,553,648	22,622,761	2.72	66,524,292	43,901,531
Total deficiency below an 8% return on present value during seven-year period					$300,196,956

[fol. 82] Even upon the basis of such minimum present value of the rapid transit railroad properties, according to the estimates of reproduction thereof made by the Commission's engineers, the deficiency in earnings below an 8 per cent. return, for the years 1921 to 1927, inclusive, aggregates at least $300,196,956.

Deficiency in Earnings under the Five-cent Fare upon Even the Investment in the Rapid Transit Railroad Properties Operated by the Plaintiff

LXI. (a) For the purpose of illustrating the wide margin by which the five-cent fare is inadequate to allow a fair return upon even the actual investment in the rapid transit railroad properties used by the plaintiff in the service of the public, and without waiving any right to earn a fair return upon the present value of such properties, there is set forth herein below a computation of the

original cost of the above specified rapid transit railroad properties, on the subway lines and the elevated lines (for the Company-provided property, as shown by the books of account of the Interborough Company and/or the Manhattan Company; and for the City-provided property as determined by the engineers of the Transit Commission), together with materials and supplies and cash working capital as above stated; the per cent. of return actually earned thereon, and the deficiency in earnings below the required rate of return of 8 per cent.:

Interborough System

Computation Based on Companies' Investment and Transit Commission's Engineers' Original Cost Figures for City Property

	Investment	Earnings available as a return	Per cent of return actually earned on such investment	Earnings required for 8% return on such investment at least	Deficiency in earnings below 8% return at least
1921	$473,295,413	$15,828,434	3.34	$37,863,633	$22,035,199
1922	478,445,039	17,974,948	3.76	38,275,603	20,300,655
1923	485,113,378	17,645,908	3.64	38,809,070	21,163,162
1924	499,480,479	19,436,182	3.89	39,958,438	20,522,256
1925	510,681,474	20,404,446	4.00	40,854,518	20,450,072
1926	519,422,309	23,698,721	4.56	41,553,776	17,855,055
1927	523,409,419	22,622,761	4.32	41,872,754	19,249,993
Total deficiency below an 8% return on investment during seven-year period					$141,576,392

[fol. 83] Upon the basis of such investment the deficiency in earnings below an 8 per cent. return for the years 1921 to 1927, inclusive, aggregates at least $141,576,392.

The above amounts, computed as available for return on the investment, in the respective years, were determined without making any allowance for reserves for depreciation and for unliquidated accident and damage claims and other contingencies.

(b) Reducing the above computation of the investment to the incontestable basis furnished in the calculations of "original cost" based principally upon estimates made by engineers of the Transit Commission, the resultant amounts, corresponding to the amounts set forth in the preceding summary of deficiency in earnings, are as follows:

Interborough System

Computation Based on Transit Commission's Engineers' Original Cost Figures

	Original as above cost	Earnings available as a return	Per cent of return actually earned on such cost	Earnings required for 8% return on such cost at least	Deficiency in earnings below 8% return at least
1921	$429,017,190	$15,828,434	3.69	$34,321,375	$18,492,941
1922	435,664,596	17,974,948	4.13	34,853,168	16,878,220
1923	443,129,675	17,645,908	3.98	35,450,374	17,804,466
1924	458,326,750	19,436,182	4.24	36,666,140	17,229,958
1925	469,637,773	20,404,446	4.34	37,571,022	17,166,576
1926	476,437,748	23,698,721	4.97	38,115,020	14,416,299
1927	480,424,959	22,622,761	4.71	38,433,997	15,811,236
Total deficiency below an 8% return on cost during seven-year period					$117,799,696

The deficiency in earnings below an 8 per cent. return upon such original cost, even as calculated by the Commission's engineers, for the years 1921 to 1927, inclusive, aggregates at least $117,799,696.

Additional fixed charges on account of improvements and additions ordered or threatened by the Transit Commission, additional cost of service, maintenance and additional wages, as more fully elsewhere herein set forth, will produce a deficiency in earnings below an 8 per cent. return correspondingly greater than that shown in each of the three foregoing computations.

[fol. 84] LXII. Upon no possible hypothesis as to the value of the property used by the plaintiff on the rapid transit railroads have the earnings under the five-cent fare been adequate to meet operating costs and to provide a return for fixed charges and compensation for the use of the property; and such inadequacy continues now, and will continue to a substantially greater degree if and when the additional operating costs and fixed charges shown in paragraph LI of this complaint were incurred. The property owned and provided by the plaintiff, shown in the preceding paragraphs of this complaint, is being substantially confiscated, as there more fully set out.

Confiscatory Effect and Unconstitutionality of the Five-cent Rate Limitation upon the Plaintiff's System Lines

LXII. The maximum rate of five cents now chargeable by the plaintiff has been at least during 1926 and 1927, and

now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered, and during said period has been, and now is, and will continue to be, unjust, unreasonable and confiscatory of this plaintiff's property, and has been, and is, and will continue to be, insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the plaintiff in the public service in its operation and devoted to the public service, and the enforcement of such maximum fare of five cents contravenes the guarantees of the Fourteenth Amendment of the Constitution of the United States, and of Section 6 of Article I of the Constitution of the State of New York.

The return received by the plaintiff from the existing maximum rate of fare chargeable by it, has not been, and is not now, sufficient to maintain and support the credit of the plaintiff and to enable it to secure capital funds for the purpose of providing for new construction and equipment, either through the sale at a reasonable discount of its long term first mortgage bonds or of any other marketable security.

It will be impossible for this plaintiff to procure necessary additional capital because of the narrow margin by which the present fixed charges of the plaintiff are presently, and in the near future will be, earned under existing traffic conditions on a five-cent fare; because of action taken or threatened by or on behalf of the Transit Commission to impose requirements for additional expenditures by this plaintiff aggregating ultimately nearly $40,000,000, and because of the unascertainable effect on this plaintiff's [fol. 85] operations and earnings of the opening of the new municipal subway system.

Because of the failure of the net revenue received by the plaintiff from the operation of the aforesaid rapid transit railroad lines to yield a fair or reasonable average return on the value of the property used and useful in the service, the plaintiff has been unable, and at the existing rate of fare will be unable, to make proper reservation out of its income for surplus and contingencies, as authorized by the Public Service Commission Law of the State of New York.

Irreparable Damage Threatened to the Plaintiff

LXIV. The Mayor of the defendant The City of New York has announced, through the public press, that the City will fight and prevent the taking effect of the said increased fares "to the last ditch," and various other officials of the defendant The City of New York have announced similar intentions and policy, by way of active steps to enforce the continuance indefinitely of the said confiscatory fare of five cents per passenger and to obstruct, delay and prevent the taking effect of the said increased fares and schedules of the plaintiff as authorized by law. Announcement has been made that legal proceedings to compel the continuance of the said confiscatory rate and to obstruct and prevent what the plaintiff believes to be its duly filed and lawfully established rate are contemplated by the defendant The City of New York, and there have been renewed threats or intimations, from official sources, of recapture or seizure of the plaintiff's lines and properties by the City. On February 6, 1928, after conferences with various of the defendants, the Corporation Counsel of the defendant The City of New York announced that "We have fully determined what steps the City will take. They will be such as to protect the interests of the City of New York and the car riders and to maintain the five-cent fare. I am positive that the attempt of the Interborough to raise the fare will be prevented. The City will move at an opportune time, and that will be in a short period." The necessity that the plaintiff have relief from the present five-cent fare has several times, during 1927 and theretofore, been before the Board of Estimate and Apportionment of The City of New York, in various forms and phases, and the said Board and the members thereof have in each instance made clear their unwillingness to permit the increase, in any manner whatosever, of the fare chargeable by the plaintiff, and have reiterated their policy [fol. 86] and intention to refuse and deny to the plaintiff relief from its present confiscatory rate. The decision and intention of the defendant members of the Transit Commission to bring various actions, suits and proceedings against the plaintiff, to direct and compel the continuance of the confiscatory fare of five-cents, has been repeatedly announced and stated in the public press, and never denied

by any of the defendants. According to the public press, the defendant members of the Transit Commission, with their special counsel, have been in daily and protracted conferences with the various City officials whose intention to contest, obstruct and prevent the discontinuance of the said confiscatory rate and the taking effect of the said schedules has been announced; and the members of the Transit Commission, in their own behalf and in conjunction with the defendant City, and their special counsel have continued and participated in these conferences designed to discuss and develop ways and means of opposing and preventing the taking effect of the said fares and schedules. All this has been done by members of the Transit Commission and by their special counsel, despite the fact that during all this time there was pending undetermined before them, in their judicial or quasi-judicial capacity, the plaintiff's application in respect of the said schedules, by reason whereof it appears that the defendant members of the Transit Commission and their special counsel are not acting open-mindedly and with judicial fairness as to such application and schedules, but have unfairly prejudged, predetermined and unduly delayed the same, in derogation of the plaintiff's rights and in denial of a fair consideration and hearing, and are consorting, co-operating and conspiring only with those who are opposed to the granting of the relief to which the plaintiff is legally and equitably entitled.

Concerning the official policies above summarized with the carrying out of which the plaintiff is threatened, as above shown, the plaintiff alleges that they evince (in the language of the United States Supreme Court—Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 591-592)

"an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them."

[fol. 87] As hereinbefore shown in detail, the plaintiff suffers daily confiscation from the enforced continuance of inadequate rates or confiscatory limitations on rates.

And for a Fifth Cause of Action

LXV. The plaintiff here realleges each of the matters and things stated and set out in paragraphs I to LXI, both inclusive, of this complaint, with the same force and effect as if each of the same were herein again repeated and set out.

LXVI. On or about February 10, 1928, the defendants constituting the said Transit Commission, acting *ex parte* and without any notice to the plaintiff, and without giving the plaintiff any opportunity to be heard, made an order, direction and determination, which they caused to be served upon the plaintiff, by an officer, attorney or agent of the said Transit Commission, thereunto duly authorized, reading, in part, as follows:

"I am instructed by the Transit Commission to advise you that it protests and denies your right to withdraw from the funds in your hands as the result of joint operation any money whatever for counsel fees, printing or other expenses in any way connected with the efforts of the Company to secure an increased fare, and that the Directors will be held personally liable for any such diversion of the funds of the Company. * * *

"I will be pleased to know at your early convenience whether you are prepared to accede to this point of view or whether it will become necessary for the Commission to take steps to secure the enforcement of its rights in this direction."

LXVII. Since January 1, 1928, and for many years prior thereto, the plaintiff has had a board of directors consisting of eighteen directors, duly elected as such by the stockholders of the plaintiff. Under and by virtue of the laws of the State of New York, the plaintiff's charter to be a corporation, and its by-laws, the directors of the plaintiff are the exclusive executive representatives of the corporation, and are charged with the administration of its internal

[fol. 88] affairs and the management and use of its assets. Neither the said Public Service Commission Law, nor any other law of the State of New York, was designed to make the said Transit Commission the financial managers of the plaintiff corporation, or empowered the said Transit Commission or any of its members, attorneys, officers or agents to substitute their judgment for that of the board of directors and stockholders of the plaintiff as to the wisdom of the conduct of the corporate affairs of the plaintiff or of the action or proceedings which should be taken by the plaintiff in order to protect the property and rights of the plaintiff, of the investors in its securities, and of its stockholders.

LXVIII. The said directors of the plaintiff have duly determined that, in order to protect the rights of the stockholders of the plaintiff as well as of the patrons of the rapid transit railroads operated by it and the rights of the defendant The City of New York under the said contracts to the payment of the rentals under the said lease, it was necessary and proper for the plaintiff to test, by a judicial inquiry, the validity of the legislative acts or orders legislative in their nature limiting the plaintiff to the said confiscatory five-cent fare or rate, or prohibiting the plaintiff from charging the said seven-cent rate or fare. To that end, the directors of the plaintiff have duly exercised their corporate right to employ counsel, accountants, real estate appraisers, engineers, and other persons requisite for a proper presentation of the plaintiff's claim of rights and evidence in support thereof. Plaintiff's existing obligations being as hereinbefore shown, it has not adequate financial means, and would be unable to secure the same, to defray the necessary expenses incidental to such test of the validity of the said rate, except from the revenues derived from the operation of the rapid transit railroad lines as aforesaid; and, if the plaintiff should be prevented by the defendants from applying to such necessary expenses part of the revenues so derived as may be determined by the Court in this action, the plaintiffs will be prevented from taking adequate proceedings to determine its lawful rights and the validity of the said confiscatory rates or fares, thereby impairing the obligation of its contract with its stockholders, and deny-

ing to the plaintiff and its stockholders the equal protection of the laws and depriving the plaintiff and its stockholders of its and their property without due process of law, all in contravention of the guarantees of the United States Constitution and of the New York State Constitution. The [fol. 89] reasonable costs and expenses of legal proceedings to determine the plaintiff's rights and to establish the plaintiff's right to charge an adequate and non-confiscatory fare, are proper and lawful item of corporate expenditure and operating expense under the Uniform System of Accounts as prescribed by the said Transit Commission and under the decisions of this Court, and are proper deductions from the revenue under Contract No. 3 and the Elevated Certificates.

LXIX. On the other hand, the defendant members of the said Transit Commission and the defendant The City of New York are each represented by Samuel Untermyer, an attorney and counsellor at law, who is serving as said special counsel to the said Commission, and who has large private financial means at his command, part of which, together with his legal services, he has been and is giving to the said Transit Commission and the said City, announced to be without any pecuniary compensation, for the purpose of opposing and frustrating the plaintiff in securing a judicial test of the validity of the said confiscatory fare or rates.

In furtherance of the said order, determination and direction of the said Transit Commission of February 10, 1928, and of the other acts aforesaid hostile to the plaintiff, the said special counsel has issued inflammatory statements to the public, calculated and tending to incite resistance and violence on the part of members of the public as well as of agents and representatives of the said Transit Commission and the said City, upon and against the properties used and operated by the plaintiff in or in connection with the said rapid transit railroad lines, as, for example, the following public statement issued by the said special counsel on February 12, 1928, and widely published in the public press of New York City on February 13, 1928, concerning and referring to the plaintiff, the said rapid transit railroad properties, and the said leases:

"The contract has for years been flagrantly violated in letter and spirit in almost every line, and yet such have been the skill and thoroughness of the company propaganda, *conducted for years with money literally picked from the City's pockets*, that, strangely enough, *there is today a considerable body of well-meaning people defending or excus-* [fol. 90] *ing the Interborough who if they knew the facts would be more disposed to tar and feather them.* I have insisted from the beginning that *we shall never get decent service until the properties are taken out of their hands.*

"So accustomed have the Interborough people become to rifling the City treasury to carry on their dishonest propaganda that *they are actually at this moment dipping into the City's funds* in the custody of the company to pay their counsel, experts and other expenses for the present application for a 7-cent fare. Hard as it is to believe, it is true" (italics ours).

LXX. Further to deter and prevent the plaintiff and its directors and officers, from exercising their lawful corporate rights to procure an orderly determination of the matters and things set out in this complaint and their lawful remedy of resort to the Courts to obtain an adjudication as to the said confiscatory rate and fare of five cents, the defendant members of the Transit Commission, or some of them, and the defendant The City of New York, through their officials, attorneys and agents and employees, have made and caused various and repeated announcements and statements in the public press, threatening the immediate seizure or "recapture" of the plaintiff's properties as a whole, including those as to which no contractural right of "recapture" has never been claimed to exist, with threats likewise of ousting the plaintiff, its officers and employees, from the plaintiff's properties, and from the plaintiff's operation of them in the public service. Such announcements and articles have been based upon threats or assertions that the plaintiff has subjected its properties and operations to such seizure by the defendant The City of New York, by venturing to initiate the proceedings authorized by law for an increase in its fares above the present confiscatory limitation and for the determination of the plain-

tiff corporate rights in the respects set out in this complaint.

LXXI. In and by the said order, direction and determination of the said Transit Commission of February 10, 1928, as well as by other acts and proceedings of the said Transit Commission and of its officers attorneys and agents, alone or in concert with the defendant The City of New York and the latter's officers, attorneys and agents, the said Transit statute and other legislative acts and regulations relating to the rates of fare chargeable by the plain- [fol. 91] tiff, and of the enforceability of the five-cent fare chargeable by the plaintiff, and of the enforceability of the five-cent fare as a rate limitation upon each the Elevated Division and the Subway Division of the rapid transit railroads operated by the plaintiff, has so burdened any challenge thereof in the Courts by the plaintiff, affected thereby, as necessarily to constrain the plaintiff to submit to such confiscatory rate of fare rather than take the chances of the penalties which might be inflicted upon the plaintiff, and has therefore deprived the plaintiff of the equal protection of the laws and its property is liable to be taken without due process of law, in contravention of the provisions of the Constitution of the United States and the Constitution of the State of New York.

Said acts of the said Transit Commission, if carried out, operate to deter the plaintiff, as an interested party, from testing the validity of the legislative rates, or orders legislative in their nature, limiting the plaintiff to a confiscatory charge or rate of fare of not more than five cents per passenger on the rapid transit railroad lines operated by it; and the consequences of the enforcement of the said acts of the said Transit Commission would be so great as to deter the plaintiff from asserting that which it believes to be its right, and would therefore deprive the plaintiff of the equal protection of the laws and operate to take the plaintiff's property without due process of law, in contravention of the provisions of the United States Constitution and the New York State Constitution.

The plaintiff's right to a judicial review of the said legislative rates or orders legislative in their nature must be substantial, adequate and safely available; but by the said acts of the Transit Commission, if enforced, that right

would be rendered merely nominal and illusory if the plaintiff, which is affected thereby, can appeal to the courts only at the risk of having to incur penalties so great that — would be better to yield to acts and orders of uncertain legality rather than to ask for the protection of the law.

[fol. 92] Prayer for Judgment

To the end that the plaintiff may have that relief which it can only obtain in a court of equity and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff, it hereby prays:

1. That it be adjudged and decreed that a maximum rate of five cents per passenger upon the rapid transit railroad lines operated by the plaintiff, or upon each the said Manhattan Division or the said Subway Division thereof, is illegal and void, because in contravention of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State of New York; and that the provisions of the said Chapter 743 of the Laws of 1894 of the State of New York, of the said Public Service Commission Law, of the said Railroad Law, of the said Rapid Transit Act, of the said other acts of the Legislature of the State of New York, of the said orders and directions of the said Public Service Commission, the said tariff schedule published by the plaintiff prior to February 1, 1928, of the said Contracts Nos. 1, 2 and 3, and of the related certificates for elevated extensions and improvements, in so far as they prohibit, or operate to prohibit, the plaintiff from charging or receiving for transportation of passengers a rate of fare in excess of five cents per passenger upon the said rapid transit railroad lines or upon the Manhattan Division or upon the said Subway Division, or in so far as they require or compel, or operate to require or compel, the plaintiff to charge such five-cent rate of fare, or in so far as the said Transit Commission or the said Public Service Commission have construed them so to prohibit, require or compel the plaintiff, are each likewise illegal and void.

2. That it be adjudged and decreed that the said orders and decisions of the said Transit Commission, requiring the plaintiff to construct and provide, at its own expense, extensions to the platforms of the subway stations, as aforesaid, are each likewise illegal and void.

3. That it be adjudged and decreed that the making of an order, determination or decision by the said Transit Commission, requiring the plaintiff to provide, at its own expense, 432 or other substantial number of additional cars for operation on the subway lines, as threatened by the said Transit Commission to be made, would likewise be illegal and void.

[fol. 93] 4. That it be adjudged and decreed that the said order of the said Transit Commission or any other order or direction by it or by the defendant The City of New York preventing or tending to prevent the plaintiff from resorting freely to test the validity of the said rates or fares, are likewise illegal and void.

5. That it be adjudged and decreed that the Public Service Commission Law, as amended and supplemented, or any other provision of law, or any regulation prescribed under any such law, or any order or direction made by the Transit Commission, or any tariff schedules published prior to February 1, 1928, in so far as they, or any of them, prohibit the plaintiff from putting into effect forthwith a rate of fare upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division which will afford to it just compensation therefor, or in so far as they, or any of them, compel the plaintiff to observe a rate of fare of not more than five cents per passenger, is likewise illegal and void.

6. That it be adjudged and decreed that the plaintiff has no adequate remedy at law for the injury which will result from the enforcement of said acts, contracts, orders and decisions and that such injury will be irreparable.

7. That it be adjudged and decreed that the plaintiff be granted injunctions, both temporary and permanent, against the defendants constituting the said Transit Commission, and The City of New York, and their successors, restraining them and each of them, and their respective

privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions, or tariff schedules, contracts or related certificates, or of either of them, or of any other provision of law:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division, of not more than five cents per passenger, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise;

[fol. 94] (2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, tariff schedules or certificates, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, a fare per passenger in excess of five cents;

(3) From in any way enforcing, or attempting to enforce, against the plaintiff the said order relating to the construction of subway platform extensions;

(4) From in any way enforcing the said order or direction of the said Transit Commission, or any other order or direction by it or by the defendant The City of New York, or bringing or prosecuting any action or proceeding to seize or take possession of the properties used or operated by the plaintiff in or in connection with said rapid transit railroads, or to take over the operation of the same, or to prevent the application of the revenues thereform, or otherwise preventing or deterring the plaintiff from testing the validity of said rates or fares and the acts, orders, regulations and provisions relative thereto;

(5) From making or in any way enforcing, or attempting to enforce, against the plaintiff any order requiring the plaintiff to provide 432 or other substantial number of additional cars for operation on the said subway lines;

(6) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, or the said Contracts Nos. 1, 2 and 3 and related certificates, against the plaintiff; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts or certificates or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven cents per passenger, upon the said rapid transit [fol. 95] railroads or upon each the Manhattan Division and the Subway Division;

(7) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, any rate which it may lawfully charge or receive; any provisions of said acts, orders, regulations, contracts or certificates or any regulations prescribed thereunder, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

7. That the rights of the parties hereto in the premises be declared and adjudged by appropriate decree.

8. That the plaintiff may have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

That Your Honors grant unto the plaintiff a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to said defendants, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to appear before Your Honors in this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to Your Honors may seem meet.

Interborough Rapid Transit Company, by Earl E. Starbard, Vice-President. James L. Quackenbush, Solicitor for Plaintiff, No. 165 Broadway, Borough of Manhattan, New York City. William L. Ransom, Jacob H. Goetz, of Counsel.

[fol. 96] *Duly sworn to by Earl E. Starbard. Jurat omitted in printing.*

SCHEDULE "A"

Year ended June 30, 1921

		Manhattan	Subway	System
1	Gross Income	$3,768,565 27	$13,142,159 06	$16,910,724 33
	Less			
2	Manhattan Cash Rental	$35,000 00	$.....	$35,000 00
3	Interest on Investment of Depreciation Reserve	.....	48,689 17	48,689 17
4	Amortization of Debt Discount and Expense	853 22	.....	853 22
5	Interest on Unfunded Debt	124,602 68	141,035 33	265,638 01
6	Other Rent Deductions	483,550 02	25 00	483,575 02
7	Excess Maintenance	524,243 37	*855,212 52	330,969 15
8	Total	$1,168,249 29	*965,463 02	$502,786 27
9	Balance	$2,600,315 98	$13,807,622 08	$16,407,938 06
10	Additional Manhattan Income Taxes	579,504 02	.....	579,504 02
11	Available for Charges on Company and City Property	$2,020,811 96	$13,807,622 08	$15,828,434 04
12	City Rental under Contracts Nos. 1 and 2	.....	2,435,768 09	2,435,768 09
13	Available for Charges on Company Property	$2,020,811 96	$11,371,853 99	$13,392,665 95
	Charges			
14	Interest on Bonds (Rental)	$1,808,252 67	$2,435,768 09	*
15	Manhattan Dividend Rental	4,200,000 00		
16	Interest on 5% Bonds	1,354,992 96	6,545,787 37	
17	Interest on 7% Notes	886,666 71	1,252,623 13	
18	Sinking Fund on 5% Bonds	469,021 69	1,588,682 93	
19	Interest on 6% Notes	.....	.....	
20	Interest on Equipment Trust Certificates	.....	.....	
21	Total	$8,718,934 03	$11,822,861 52	$20,541,795 55
22	Balance After Actual Maintenance (Item 9 less Item 21)	D $6,118,618 05	$1,984,760 56D	$4,133,857 49
23	Deduct Additional Manhattan Income Taxes	579,504 02	.....	579,504 02
24	Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $6,698,122 07	$1,984,760 56D	$4,713,361 51
	Passengers carried	374,293,051	639,385,780	1,013,678,831

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

SCHEDULE "B"

Year ended June 30, 1922

		Manhattan	Subway	System
1.	Gross Income	$4,705,567 27	$14,412,834 54	$19,118,401 81
	Less			
2	Manhattan Cash Rental	$35,000 00	$	$35,000 00
3	Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4	Amortization of Debt Discount and Expense	839 57		839 57
5	Interest on Unfunded Debt	215,487 67	111,857 78	327,345 45
6	Other Rent Deductions	336,790 58	18,452 25	355,242 83
7	Excess Maintenance	522,654 16	*728,784 30	*206,130 14
8.	Total	$1,110,771 98	$549,674 27	$561,097 71
9.	Balance	$3,594,795 29	$14,962,508 81	$18,557,304 10
10	Additional Manhattan Income Taxes	582,356 51		582,356 51
11	Available for Charges on Company and City Property	$3,012,438 78	$14,962,508 81	$17,974,947 59
12	City Rental under Contracts Nos. 1 and 2		2,482,633 04	2,482,633 04
13.	Available for Charges on Company Property	$3,012,438 78	$12,479,875 77	$15,492,314 55
	Charges			
14	Interest on Bonds (Rental)	$1,808,240 00	$2,482,633 04	
15	Manhattan Dividend Rental	4,200,000 00		
16	Interest on 5% Bonds	1,394,492 91	6,627,832 79	
17	Interest on 7% Notes	1,013,122 08	1,488,310 82	
18	Sinking Fund on 5% Bonds	480,979 29	1,622,360 50	
19	Interest on 6% Notes			
20	Interest on Equipment Trust Certificates			
21.	Total	$8,895,834 28	$12,221,137 15	$21,117,971 43
22	Balance After Actual Maintenance (Item 9 less Item 21)	D $5,300,038 99	$2,741,371 66D	$2,580,667 33
23	Deduct Additional Manhattan Income Taxes	582,356 51		582,356 51
24	Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $5,884,395 50	$2,741,371 66D	$3,143,023 84
	Passengers carried	348,517,216	644,975,474	993,492,690

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

SCHEDULE "C".

Year Ended June 30, 1923

	Manhattan	Subway	System
1. Gross Income	$4,647,353.94	$14,431,112.88	$19,078,466.82
Less:			
2. Manhattan Cash Rental	$50,000.00		$50,000.00
3. Interest on Investment of Depreciation Reserve		$48,800.00	48,800.00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	105,586.61	70,314.32	175,900.93
6. Other Rent Deductions	269,293.88	27,239.03	296,532.91
7. Excess Maintenance	584,820.41	*147,622.89	437,197.52
8. Total	$1,009,700.90	$1,269.54	$1,008,431.36
9. Balance	$3,637,653.04	$14,432,382.42	$18,070,035.46
10. Additional Manhattan Income Taxes	424,126.81		424,126.81
11. Available for Charges on Company and City Property	$3,213,526.23	$14,432,382.42	$17,645,908.65
12. City Rental under Contracts Nos. 1 and 2		2,584,034.93	2,584,034.93
13. Available for Charges on Company Property	$3,213,526.23	$11,848,347.49	$15,061,873.72
Charges:			
14. Interest on Bonds (Rental)	$1,808,240.00	$2,584,034.93	
15. Manhattan Dividend Rental	1,710,000.00		
16. Interest on 5% Bonds	1,403,267.18	6,628,823.16	
17. Interest on 7% Notes	936,680.69	1,366,395.28	
18. Sinking Fund on 5% Bonds	496,389.76	1,639,661.55	
19. Interest on 6% Notes	2,545.50	62,600.13	
20. Interest on Equipment Trust Certificates		389.66	
21. Total	$6,357,123.13	$12,281,904.71	$18,639,027.84
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $2,719,470.09	$2,150,477.71	D $568,992.38
23. Deduct Additional Manhattan Income Taxes	424,126.81		424,126.81
24. Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $3,143,596.90	$2,150,477.71	D $993,119.19
Passengers carried	348,524,700	676,650,431	1,025,175,131

* Expenditures under 17% of the Revenue on the Subway.

D—Deficit.

[fol. 100]

SCHEDULE "D"

Year Ended June 30, 1924

	Manhattan	Subway	System
1. Gross Income	$5,412,361 73	$16,159,231 23	$21,571,592 96
Less:			
2. Manhattan Cash Rental	$50,000 00		$50,000 00
3. Interest on Investment of Depreciation Reserve		$48,800 00	48,800 00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	68,726 26	109,816 89	178,543 15
6. Other Rent Deductions	238,485 27	26,174 40	264,659 67
7. Excess Maintenance	1,305,487 15	124,715 49	1,430,202 64
8. Total	$1,662,698 68	$309,506 78	$1,972,205 46
9. Balance	$3,749,663 05	$15,849,724 45	$19,599,387 50
10. Additional Manhattan Income Taxes	163,205 16		163,205 16
11. Available for Charges on Company and City Property	$3,586,457 89	$15,849,724 45	$19,436,182 34
12. City Rental under Contracts Nos. 1 and 2		2,610,999 06	2,610,999 06
13. Available for Charges on Company Property	$3,586,457 89	$13,238,725 39	$16,825,183 28
Charges:			
14. Interest on Bonds (Rental)	$1,808,240 00	$2,610,999 06	
15. Manhattan Dividend Rental	2,723,877 00		
16. Interest on 5% Bonds	1,438,169 21	6,628,823 15	
17. Interest on 7% Notes	954,919 96	1,291,500 00	
18. Sinking Fund on 5% Bonds	524,471 75	1,646,084 64	
19. Interest on 6% Notes	18,270 67	242,637 87	
20. Interest on Equipment Trust Certificates		70,420 00	
21. Total	$7,467,948 59	$12,490,464 72	$19,958,413 31
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $3,718,285 54	$3,359,259 73	D $359,025 81
23. Deduct Additional Manhattan Income Taxes	163,205 16		163,205 16
24. Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $3,881,490 70	$3,359,259 73	D $522,230 97
Passengers carried	359,410,056	714,933,187	17074,343,243

D—Deficit.

SCHEDULE "E"

Year Ended June 30, 1925

	Manhattan	Subway	System
1. Gross Income	$5,094,860.61	$17,228,355.58	$22,323,216.19
Less:			
2. Manhattan Cash Rental	$50,000.00	$	$50,000.00
3. Interest on Investment of Depreciation Reserve		48,800.00	48,800.00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	21,529.10	65,733.15	87,262.25
6. Other Rent Deductions	216,605.45	23,806.24	240,411.69
7. Excess Maintenance	1,352,713.83	139,581.84	1,492,295.67
8. Total	$1,640,848.38	$277,921.23	$1,918,769.61
9. Balance	$3,454,012.23	$16,950,434.35	$20,404,446.58
10. Additional Manhattan Income Taxes			
11. Available for Charges on Company and City Property	$3,454,012.23	$16,950,434.35	$20,404,446.58
12. City Rental under Contracts Nos. 1 and 2		2,644,905.28	2,644,905.28
13. Available for Charges on Company Property	$3,454,012.23	$14,305,529.07	$17,759,541.30
Charges:			
14. Interest on Bonds (Rental)	$1,808,240.00	$2,644,905.28	
15. Manhattan Dividend Rental	3,065,310.00		
16. Interest on 5% Bonds	1,442,138.87	6,628,823.15	
17. Interest on 7% Notes	1,084,361.70	1,291,500.00	
18. Sinking Fund on 5% Bonds	570,995.37	1,646,084.63	
19. Interest on 6% Notes	16,724.24	381,449.04	
20. Interest on Equipment Trust Certificates		169,422.66	
21. Total	$7,987,770.18	$12,762,184.76	$20,749,954.94
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,533,757.95	$4,188,249.59	D $345,508.36
Passengers carried	352,723,553	736,820,672	1,089,544,225

D—Deficit

[fol. 102]

SCHEDULE "F"

Year Ended June 30, 1926

	Manhattan	Subway	System
1. Gross Income	$5,410,969 19	$19,683,229 17	$25,094,198 36
Less			
2. Manhattan Cash Rental	$50,000 00	$	$50,000 00
3. Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	27,771 92	41,539 07	69,310 99
6. Other Rent Deductions	240,453 27	5,567 25	246,020 52
7. Excess Maintenance	1,156,347 50	*175,002 00	981,345 50
8. Total	$1,474,572 69	$79,096 68	$1,395,477 01
9. Balance	$3,936,396 50	$19,762,324 85	$23,698,721 35
10. Additional Manhattan Income Taxes			
11. Available for Charges on Company and City Property	$3,936,396 50	$19,762,324 85	$23,698,721 35
12. City Rental under Contracts Nos. 1 and 2		2,655,186 26	2,655,186 26
13. Available for Charges on Company Property	$3,936,396 50	$17,107,138 59	$21,043,535 09
Charges			
14. Interest on Bonds (Rental)	$1,808,240 00	$2,655,186 26	
15. Manhattan Dividend Rental	3,066,486 00		
16. Interest on 5% Bonds	1,445,243 54	6,628,823 15	
17. Interest on 7% Notes	1,088,456 20	1,290,617 04	
18. Sinking Fund on 5% Bonds	631,949 12	1,821,804 16	
19. Interest on 6% Notes	21,899 99	504,999 37	
20. Interest on Equipment Trust Certificates		291,321 84	
21. Total	$8,062,274 85	$13,192,751 82	$21,255,026 67
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,125,878 35	$6,569,573 03	$2,443,694 68
Passengers carried	346,204,574	784,280,073	1,130,484,647

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit

SCHEDULE "G"

Year ended June 30, 1927

		Manhattan	Subway	System
1.	Gross Income	$5,035,275 70	$19,455,499 61	$24,490,775 31
	Less			
2.	Manhattan Cash Rental	$50,000 00	$	$50,000 00
3.	Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4.	Amortization of Debt Discount and Expense			
5.	Interest on Unfunded Debt	17,482 43	39,452 84	56,935 27
6.	Other Rent Deductions	228,717 91	3,739 20	232,457 11
7.	Excess Maintenance	1,570,287 08	*90,465 88	1,479,821 20
8.	Total	$1,866,487 42	$1,526 16	$1,868,013 58
9.	Balance	$3,168,788 28	$19,453,973 45	$22,622,761 73
10.	Additional Manhattan Income Taxes			
11.	Available for Charges on Company and City Property	$3,168,788 28	$19,453,973 45	$22,622,761 73
12.	City Rental under Contracts Nos. 1 and 2		2,655,569 01	2,655,569 01
13.	Available for Charges on Company Property	$3,168,788 28	$16,798,404 44	$19,967,192 72
	Charges:			
14.	Interest on Bonds (Rental)	$1,808,240 00	$2,655,569 01	
15.	Manhattan Dividend Rental	3,086,756 00		
16.	Interest on 5% Bonds	1,457,159 47	6,640,807 15	
17.	Interest on 7% Notes	1,082,562 93	1,280,222 33	
18.	Sinking Fund on 5% Bonds	611,809 92	1,764,185 74	
19.	Interest on 6% Notes	31,389 62	517,346 88	
20.	Interest on Equipment Trust Certificates		215,825 00	
21.	Total	$8,077,917 94	$13,073,956 11	$21,151,874 05
22.	Balance After Actual Maintenance (Item 9 less Item 21)	D $4,909,129 66	$6,380,017 34	$1,470,887 68
	Passengers carried	359,019,660	814,626,596	1,173,646,256

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

[fol. 104] SCHEDULE "H"

At a meeting of the Transit Commission held at its office, No. 270 Madison Avenue, Borough of Manhattan, City of New York, on the 21st day of April, 1926.

Present: George McAneny, Chairman; LeRoy T. Harkness, John F. O'Ryan, Commissioners.

R. T. 4007

In the Matter of the Proposed Lengthening of Certain Platforms at Various Stations of the Railroad and Existing Railroads as Defined and Described in the Contract, known as Contract No. 3, dated March 19, 1913, Between The City of New York and Interborough Rapid Transit Company

Order

This Commission having adopted a resolution on July 31, 1923, that a hearing be held before it on August 9, 1923, in respect of the question whether the platforms of certain local stations of the Manhattan-Bronx Rapid Transit Railroad of the Existing Railroads (as defined and described in the contract, known as Contract No. 3, dated March 19, 1913, between The City of New York and Interborough Rapid Transit Company) should be lengthened to 480 feet for the purpose of permitting operation of ten-car trains at such local stations; and such hearing having been duly held by this Commission on many days to and including the 5th day of February, 1926, when said hearing was closed; and said hearing having been during its course extended so as to include not only the question whether such platforms of local stations of said Manhattan-Bronx Rapid Transit Railroad should be so lengthened, but also the [fol. 105] question whether all station platforms of all stations of the Railroad and Existing Railroads (as defined and described in said Contract No. 3) should, where not now of lengths equal to or exceeding 480 feet, be lengthened so as to be 480 feet in length; and at such hearing the Interborough Rapid Transit Company and The City of New York having duly appeared and been represented by Counsel; and evidence having been adduced by said parties

and by the Commission; and due deliberation having been had thereon by this Commission; and this Commission being of opinion and having determined upon said evidence that the operation of ten-car local trains along said Railroad and Existing Railroads, at such times as may be reasonably necessary, has become, and is, necessary to afford adequate and safe service and facilities as in said contract provided, and that, in order that such operation of ten-car local trains may afford adequate transportation for passengers, and service and facilities that shall be safe and adequate and in all respects just and reasonable, it is necessary that, as hereinafter ordered and directed, certain platforms at various stations of said Railroad and Existing Railroads shall be lengthened; and this Commission being also of the opinion and having determined upon the evidence adduced, that in order that there shall be operated, when such platforms shall have been so lengthened, a sufficient number of ten-car local trains to afford safe, adequate and comfortable service, it is necessary that additional Equipment, to consist of additional cars and of additional power generating and transmission facilities to operate such additional cars, shall be provided for said Railroad and Existing Railroads;

It is hereby

Ordered and directed that said Interborough Rapid Transit Company, Lessee under said Contract No. 3, cause the station platforms at the various stations of the said Railroad and Existing Railroads, to be lengthened in accordance with the schedule hereto annexed, which is made part hereof as if fully set forth herein, as Additions to the Railroad and Existing Railroads so that they will be 480 feet in length.

Further ordered and directed that in order to allow a reasonable time for the negotiation of possible stipulations or agreements between The City of New York and said Interborough Rapid Transit Company, in respect of such lengthening of platforms, this order shall not take effect until July 1, 1926;

[fol. 106] Further ordered and directed that requirement by the Commission for the provision of such additional Equipment, to consist of additional cars and of additional power generating and transmission facilities to operate such additional cars, shall not take effect until one (1) year from the date hereof;

Further ordered and directed that this order shall be subject to such further orders of the Commission supplemental hereto and consistent herewith as the Commission may from time to time make;

Further ordered and directed that the Secretary of this Commission be and hereby is authorized and directed to cause a certified copy hereof to be delivered to said Interborough Rapid Transit Company, and also to transmit certified copies hereof to the Board of Estimate and Apportionment of The City of New York.

By the Commission.

James B. Walker, Secretary.

Schedule (Annexed to Order of Transit Commission of April 21, 1926)
Lengthening of Platforms on the I. R. T. Subway Division Required to Permit 10-car Operation on Local Tracks

Broadway-7th Avenue line

Borough Hall, Brooklyn, to 242nd Street, Bronx, and South Ferry to 242nd Street, Bronx

	No. of Stations	No. of platforms
Stations with two platforms	37	74
Stations with one platform:		
Clark Street	1	1
Wall Street	1	1
Fulton Street	1	1
Park Place	1	1
Total	4	4
Stations with three platforms		
Pennsylvania Station	1	3
242nd Street	1	3
Total	2	6
(fol. 107) Stations with four platforms		
96th Street	1	4
Total of above	44	88
Platforms too short, but not to be lengthened		
South Ferry (outside)	1	1
96th Street (local)	1	2
242nd Street	1	3
Total	3	6

Platforms not to be lengthened—Nominally 440 feet, but varying from 469' to 545'2"
Long enough for 10 cars.

Subway stations:

Borough Hall	1	2
Clark Street	1	1
Wall Street	1	1
Fulton Street	1	1
Park Place	1	1
South Ferry (inside)	1	1
Rector Street	1	2
Cortlandt Street	1	2
Chambers Street	1	2
14th Street	1	2
Pennsylvania Station	1	3
Times Square	1	2
72nd Street	1	2
96th Street	1	2
103d Street (northbound)	1	1
110th Street (northbound)	1	1
116th Street (northbound)	1	1
137th Street (northbound)	1	1
145th Street (northbound)	1	1
157th Street (northbound)	1	1
168th Street (northbound)	1	1
181st Street (northbound)	1	1
191st Street	1	2
Total	23	34

Elevated stations:

125th Street (northbound)	1	1
238th Street (northbound)	1	1
Total	2	2
	25	36

Nominally 220', but varying from 219' to 226'-10". To be lengthened to 480' or an average additional length of 260'; total additional length—3,120'.

[fol. 108]

Subway stations:

50th Street	1	2
59th Street	1	2
66th Street	1	2
79th Street	1	2
86th Street	1	2
91st Street	1	2
Total	6	12

Nominally 405' but varying from 402'-3" to 405'. To be lengthened to 480' or an average additional length of 75'; total additional length—1,050'.

Subway stations:

Franklin Street	1	2
Canal Street	1	2
Houston Street	1	2
Christopher Street	1	2
18th Street	1	2
23rd Street	1	2
28th Street	1	2
Total	7	14

Nominally 348', but varying from 348' to 348'–11'. To be lengthened to 480' or an average additional length of 132'; total additional length—792'.

Subway stations:		
103d Street (southbound)	1	1
110th Street (southbound)	1	1
116th Street (southbound)	1	1
137th Street (southbound)	1	1
145th Street (southbound)	1	1
157th Street (southbound)	1	1
Total	6	6

Nominally 300', to be lengthened to 480', or an average additional length of 180 ft. Total additional length—360 ft.

Tunnel stations:		
168th Street (southbound)	1	1
181st Street (southbound)	1	1
Total	2	2

Elevated Stations

Stations	Present length	Lengths to be added	No. of stations	No. of platforms
125th Street	383' 9" (S. B.)	94'	1	1
Dyckman Street	457' 2"	46'	1	2
207th Street	451' 2" (N. B.) 351' 4" (S. B.)	158'	1	2
215th Street	451' 5" (N. B.) 362' 10" (S. B.)	146'	1	2
225th Street	444' 10" (N. B.) 350' 2" (S. B.)	165'	1	2
231st Street	451' 11" (N. B.) 352' 2" (S. B.)	156'	1	2
238th Street	350' 4" (S. B.)	130'	1	1
		895'	7	12

[fol. 109] Recapitulation

	No. of Stations	No. of Platforms
To short, but not to be lengthened—subway stations	3	6
Long enough, not to be lengthened—subway stations	23	34
Long enough, not to be lengthened—elevated stations	2	2
Total	28*	42
Counted twice	2	
Total	26	

	Each Platform	Total		
To be lengthened—subway stations	200'	3,120'	6	12
To be lengthened—subway stations	75'	1,050'	7	14
To be lengthened—subway stations	132'	792'	6	6
To be lengthened—tunnel stations	180'	360'	2	2
Total		5,322'	21	34
To be lengthened—elevated stations		895'	7	12
Total—Subway and elevated stations to be lengthened		6,217	28**	46
Total above			54	88
Stations counted twice			10	
			44	

36 full—10 part—minus 2.

***28—16 stations in full—10 stations in part.**

****28—18 stations in full—10 stations in part.**

Lexington-4th Avenue Line

Borough Hall, Brooklyn to Woodlawn, Jerome Avenue, Bronx
Exclusive of So. Ferry (included in B'way.-7th Ave. Line)

	No. of Stations	No. of Platforms
Stations with 2 platforms	35	70
Stations with 1 platform:		
City Hall Loop	1	1
Stations with 4 Platforms:		
86th Street	1	4
Brooklyn Bridge	1	4
14th Street	1	4
Grand Central*	1	4
Total	4	16
Stations with 3 Platforms:		
Woodlawn	1	3
Total of above	41	90

Platforms, not to be lengthened. Normally 480', but varying from 478' to 508'. Long enough for 10 cars.

[fol. 110]

Subway Stations:		
Borough Hall	1	2
Bowling Green	1	1
Wall Street	1	2
Fulton Street	1	2
Brooklyn Bridge	1	2
14th Street	1	2
Grand Central	1	2
51st Street	1	2
59th Street	1	2
68th Street	1	2
77th Street	1	2
86th Street	1	4
96th Street	1	2
103rd Street	1	2
110th Street	1	2
116th Street	1	2
125th Street	1	2
Mott Haven	1	2
149th Street	1	2
	19	39
Elevated Stations		
161st Street	1	2
167th Street	1	2
170th Street	1	2
Belmont Street	1	2
176th Street	1	2
New York University	1	2
183d Street	1	2
Fordham Road	1	2
Kingsbridge Road	1	2
Bedford Park Boulevard	1	2
Mosholu Parkway	1	2
Woodlawn	1	3
Total	12	25
Total—Subway and Elevated	31	64

*2 island platforms, but are too short: counted as 4 platforms.

	No. of Stations	No. of Platforms
Platforms too short—but not to be lengthened:		
Bowling Green Shuttle	1	1
City Hall Loop	1	1
Brooklyn Bridge Local	1	2
14th Street local	1	2
33rd Street	1	2
Total	5	8

[fol. 111]

Nominally 225', but varying from 222' to 232'. To be lengthened approximately 225': total additional length 4,004'		
Worth Street	1	2
Canal Street	1	2
Spring Street	1	2
Bleecker Street	1	2
Astor Place	1	2
18th Street	1	2
23rd Street	1	2
28th Street	1	2
Total	8	16
Grand Central Station—to be lengthened 14'	1	2

Recapitulation

Not to be lengthened—(not long enough)	5	8
Not to be lengthened—(long enough)	31	64
Total—not to be lengthened	36*	72
To be lengthened	9**	18
Total of above	45	90
Stations counted twice	4	
	41	

Lenox Ave.-White Plains Road Line
96th St. to 241st St.
Exclusive of 96th St. Sta. (included in B'way-7th Ave. Line)
Total Number of Stations—44

	No. of stations	No. of platforms
Stations with two platforms	22	44
Stations with one platform		
110th Street	1	1
Stations with three platforms		
Bronx Park	1	3
241st Street	1	3
	2	6
Stations with four platforms		
Gun Hill Road	1	4
Total of above	26	55

*36—32 stations in full, 1 station part 3
** 9—8 stations in full, 1 in part

	No. of stations	No. of platforms
Platforms too short, but not to be lengthened:		
145th Street (southbound)	1	1
Gun Hill Road	1	2
Total	2	3
Platforms not to be lengthened Nominally 480', but varying from 478' 4" to 529' 2". Long enough for 10 cars:		
[fol. 112]		
Subway stations:		
110th Street	1	1
116th Street	1	2
125th Street	1	2
135th Street	1	2
Mott Avenue	1	2
149th Street	1	2
Total	6	11
Elevated stations:		
Jackson Avenue (northbound)	1	1
Prospect Avenue (northbound)	1	1
177th Street (northbound)	1	1
Bronx Park	1	3
East 180th Street	1	2
Bronx Park East	1	2
Pelham Parkway	1	2
Allerton Avenue	1	2
Burke Avenue	1	2
Gun Hill Road	1	2
219th Street	1	2
225th Street	1	2
233rd Street	1	2
238th Street	1	2
241st Street	1	3
Total	15	29
Total—Subway and Elevated	21	40

Elevated Stations

Stations	Present length	Length to be added	No. of stations	No. of platforms
Jackson Avenue	351' 4" (S. B.)	129'	1	1
Prospect Avenue	349' 5" (S. B.)	129'	1	1
Intervale Avenue	433' 8" (both platforms)	46'	1	2
Simpson Street	431' 0" (N. B.); 376' 3" (S. B.)	49' N.B.; 104' S.B.	1	2
Freeman Street	442' 0" (N. B.); 351' 0" (S. B.)	38' N.B.; 129' S. B.	1	2
174th Street	437' 3" (N. B.); 361' 2" (S. B.)	43' N.B.; 119' S.B.	1	2
177th Street	351' 2" (S. B.)	129'	1	1
		915'	7	11
Subway station				
145th St. and Lenox Avenue (northbound)		131'	1	1

Recapitulation

	No. of stations	No. of platforms
Not to be lengthened	23*	43
To be lengthened	8**	12
	31	55
Stations counted twice	5	
	26	

*23—18 stations in full; 4 in part
** 8— 4 stations in full; 4 in part

[fol. 113] Brooklyn Lines

Borough Hall to New Lots Ave., President St. to Nostrand Ave.

Exclusive of Borough Hall Sta. (included in B'way.-7th Ave. & Lex.-4th Ave Lines)

Stations with two Platforms	20	40
Stations with one Platform:		
New Lots Avenue	1	1
Prospect Park Plaza	1	1
President Street	1	1
Total	3	3
Stations with three Platforms:		
Atlantic Avenue	1	3
Total of above	24	46

Platforms not to be lengthened. Nominally 480', but varying from 447' to 11" to 560'. Long enough for 10 cars.

Subway Stations:		
Utica Avenue	1	2
Kingston Avenue	1	2
Nostrand Avenue	1	2
Franklin Avenue	1	2
Eastern Parkway	1	2
Prospect Park Plaza	1	1
Bergen Street	1	2
Atlantic Avenue	1	2
Nevins Street	1	2
Flatbush Avenue	1	2
Newkirk Avenue	1	2
Beverly Road	1	2
Church Avenue	1	2
Winthrop Street	1	2
Sterling Street	1	2
President Street	1	1
Total	16	30
Elevated Stations:		
New Lots Avenue	1	1
Van Siclen Avenue	1	2
Pennsylvania Avenue	1	2
Junius Street	1	2
Rockaway Avenue	1	2
Saratoga Avenue	1	2
Sutter Avenue	1	2
Total	7	13
Total, subway and elevated	23*	43

*23—22 stations in full; 1 in part.

[fol. 114]

	Length to be Added	No. of Stations	No. of Platforms
Platforms to be lengthened:			
Atlantic Avenue (east platform)	24'	1	1
Hoyt Street (both platforms)	254'	1	2
Total	278'	2*	3

Recapitulation

Platforms not to be lengthened	23	43
Platforms to be lengthened	2	3
Total	25	46
Stations counted twice	1	
	24	

Queensboro Lines

Grand Central to Astoria and Corona

Total Number of Stations equals 22

	No. of Stations	No. of Platforms
Platforms not to be lengthened:		
Stations with one platform:		
Grand Central	1	1
Dutmars Avenue	1	1
Total	2	2
Stations with four platforms:		
Queensboro Plaza	1	4
Stations with two platforms	19	38
Total of above	22	44

Pelham Line

	No. of Stations	No. of Platforms
Platforms not to be lengthened:		
Stations with three platforms	1	3
Stations with two platforms	17	34
Total	18	37

*2—one station in full; one in part.

[fol. 115]

Total I. R. T. Recapitulation

Line	Total No. of Stations	Total No. of Platforms	Platforms to be Lengthened: No. of Stations	Platforms to be Lengthened: No. of Platforms	Total Additional Length
Broadway-7th Avenue	44	88	21 sub.	34	5,332'
Broadway-7th Avenue			7 "L"	12	895'
Lexington-4th Avenue	41	90	8 sub.	16	4,004'
Lexington-4th Avenue (Grand Central)			1 sub.	2	14'
Lenox-White Plains	26	55	1 sub.	1	131'
Lenox-White Plains			7 "L"	11	915'
Brooklyn	24	46	2 sub.	3	278'
Queens	22	44			
Pelham	18	37			
	175	360	33 sub.	56 sub.	9,749'
			14 "L"	23 "L"	1,810'
	175	360	47	79	11,559'

Orginally Broadway-7th Avenue

No. of Stations	No. of Platforms	Total Additional Length
6 sub.	12	3,120'
8 sub.	16	4,004'
14 sub.	28	7,124'

[fol. 116]

SCHEDULE "I"

At a meeting of the Transit Commission, held at its office, No. 270 Madison Avenue, Borough of Manhattan, City of New York, on the 31st day of December, 1927.

Present: John F. Gilchrist, Chairman; Leon G. Godley, Charles G. Lockwood, Commissioners.

R. T. 4007

In the Matter of the Proposed Lengthening of Certain Platforms at Various Stations of the Railroad and Existing Railroads as Defined and Described in the Contract, known as Contract No. 3, Dated March 19, 1913, Between The City of New York and Interborough Rapid Transit Company.

Supplemental Order "A"

Whereas, The Transit Commission on April 21, 1926, adopted an order, wherein it recited that it was of opinion and had determined that the operation of ten-car local trains along the Railroad and Existing Railroads (as defined and described in the contract, known as Contract No. 3, dated March 19, 1913, between The City of New York and Interborough Rapid Transit Company) at such times as may be reasonably necessary, had become, and was, necessary to afford adequate and safe service and facilities as in said contract provided, and that, in order that such operation of ten-car local trains might afford adequate transportation for passengers, and service and facilities that should be safe and adequate and in all respects just and reasonable, it was necessary that certain platforms [fol. 117] at various stations of said Railroad and Existing Railroads should be lengthened; and in said order it was recited that the Transit Commission was also of the opinion and had determined that, in order that there shall be operated, when such platforms shall have been so lengthened, a sufficient number of ten-car local trains to afford safe, adequate and comfortable service, it was necessary that

additional Equipment, to consist of additional cars and additional power generating and transmission facilities to operate such additional cars, should be provided for said Railroad and Existing Railroads; and in said order the Transit Commission ordered and directed that Interborough Rapid Transit Company, as Lessee under said Contract No. 3, should cause the station platforms, at the various stations of the said Railroad and Existing Railroads, to be lengthened in accordance with the schedule annexed to said order, as Additions to the said Railroad and Existing Railroads, so that they will be 480 feet in length, for the purpose of permitting operation of ten-car local trains; and it was provided, in the said order, that the said order, insofar as requiring such lengthening of platforms, should not take effect until July 1, 1926; and it was provided in said order that requirement by the Transit Commission for the provision of such additional Equipment, to consist of additional cars and of additional power generating and transmission facilities to operate such additional cars, should not take effect until one (1) year from the date of said order; and it was provided in said order that the said order should be subject to such further orders of the Commission supplemental thereto and consistent therewith as the Commission might from time to time make; and

Whereas, This Commission on June 23, 1926, and on subsequent dates, has adopted further orders extending the effective date of the aforesaid order to and including December 1, 1927; and

Whereas, This Commission on October 26, 1927, adopted an order ordering and directing that the hearing herein be re-opened, and such further evidence adduced herein as this Commission might deem relevant, at a hearing to be held by and before this Commission on November 17, 1927, and at such subsequent time or times, if any, to which such hearing might be adjourned; and

[fol. 118] Whereas, This Commission, on November 30, 1927, adopted an order herein ordering and directing that the effective date of the aforesaid order adopted by this Commission on April 21, 1926, be extended until further order of this Commission; and

Whereas, Such hearing was, by direction of this Commission, adjourned to December 1, 1927, and December 9, 1927, and on said December 9, 1927, and on December 16, 1927,

such hearing was held before Charles G. Lockwood, one of the Commissioners of this Commission, and statements were heard on behalf of The City of New York, by George P. Nicholson, its Corporation Counsel, by Joseph P. Morrisey, Assistant Corporation Counsel, and on behalf of Interborough Rapid Transit Company, by James L. Quackenbush, its General Attorney, and by J. G. Edwards, of Counsel, and on behalf of the Board of Transportation, by William G. Fullen, its Counsel, by George E. Coughlin, of Counsel, and with particular reference to the question whether said Interborough Rapid Transit Company would indicate its willingness that the Worth Street Station and the 18th Street Station, of the Manhattan-Bronx Rapid Transit Railroad be abandoned; and

Whereas, This Commission, by communication dated December 14, 1927, addressed to said Interborough Rapid Transit Company, advised said Interborough Rapid Transit Company that, unless this Commission should be in possession of the unqualified assent of said Interborough Rapid Transit Company, before noon of December 15, 1927, to the abandonment of said Worth Street and 18th Street Stations, in the event that this Commission should find it to the interest of the public, an order would be entered vacating said order adopted by this Commission on October 6, 1927, re-opening the hearing herein; and said Interborough Rapid Transit Company by communication dated December 15, 1927, referring to said communication dated December 14, 1927, from this Commission, not having indicated such unqualified assent to the abandonment of said Worth Street Station and 18th Street Station, but having requested that such hearing, then set down to be resumed on said December 16, 1927, be allowed to proceed generally as to all questions appertaining to such proposed lengthening of platforms; and said Charles G. Lockwood, Commissioner, in view of such failure on the part of said Interborough Rapid Transit Company to give its unqualified assent as aforesaid, closed said hearing on said December 16, 1927; and

[fol. 119] Whereas, This Commission is of opinion that, in view of such failure on the part of said Interborough Rapid Transit Company to give its unqualified assent as aforesaid, the said hearing, re-opened as aforesaid, should be closed and that said order adopted by this Commission

on April 21, 1926, should be supplemented, and made to take effect, as and to the extent as hereinafter provided:

It is hereby:

Ordered and directed, That the said hearing be and hereby is closed, and that the said Interborough Rapid Transit Company, Lessee under said Contract No. 3, shall lengthen or cause to be lengthened, for the following respective distances in the following respective directions, the following described station platforms of four (4) stations of the Manhattan-Bronx Rapid Transit Railroad, to wit:

Canal Street Station:

Northbound platform approximately 256 feet southwardly;

Southbound platform approximately 256 feet southwardly;

Spring Street Station:

Northbound platform approximately 258 feet southwardly;

Southbound platform approximately 251 feet southwardly;

Bleecker Street Station:

Northbound platform approximately 251 feet northwardly or southwardly;

Southbound platform approximately 255 feet northwardly or southwardly;

Astor Place Station:

Northbound platform approximately 255 feet northwardly;

Southbound platform approximately 179 feet southwardly;

and this Commission hereby assigns, to such work, labor and materials for and in connection with such lengthening of platforms as is properly classifiable as Construction of Additions to the Manhattan-Bronx Rapid Transit Railroad of the Existing Railroads. Work Order Number CT-10000-A; and this Commission hereby also assigns, to such work, labor and materials for and in connection with such lengthening of platforms as is properly classifiable as Ad-

ditions to Existing Equipment of the Manhattan-Bronx [fol. 120] Rapid Transit Railroad of the Existing Railroads, Work Order Number DT-10000-A.

Further ordered and directed, That all work, labor and materials for and in connection with such lengthening of station platforms shall be done under the supervision and direction, and to the satisfaction, of the Board of Transportation of The City of New York, which is hereby requested to supervise the work and to prepare the working drawings therefor. In general, the work, workmanship, characteristics and quality of the materials, and appearance, of such lengthening of platforms as is properly classifiable as Adgood as those of the respective existing stations to which such additions shall be made.

Further ordered and directed, That the structures to be constructed, in pursuance of this order, shall be generally in accordance, except as supplemented, revised or changed by the "Working Drawings" hereinafter referred to, with the plans or drawings of the Board of Transportation, signed by Rb't. Ridgway, Chief Engineer, dated July 22, 1926, entitled "Group No. 1 Platform Extensions to Stations of Contract No. 1 Canal St., Spring St., Bleecker St. and Astor Pl. Stations Contract Drawing No." and being respectively numbered as follows:

C-1 to C-26, both inclusive;
D-1 to D-4, both inclusive;
E-1 to E-4, both inclusive; and
F-501 to F-522, both inclusive.

Further ordered and directed, That the said Interborough Rapid Transit Company shall begin, or cause to be begun, actual work for each respective station of said four (4) stations above referred to (Canal Street, Spring Street, Bleecker Street and Astor Place stations) within sixty (60) days after the day on which this Commission and or the Board of Transportation and or its Chief Engineer shall deliver to said Interborough Rapid Transit Company drawings of the kind usually known as "Working Drawings" which will supplement and give details further than shown on said "Contract Drawings" and may contain revisions and changes as well as further details not shown [fol. 121] on such "Contract Drawings"; which "Working

Drawings" shall, prior to such delivery, be approved by this Commission.

Further ordered and directed, That requirement by this Commission for the lengthening of station platforms other than at the Canal Street, Spring Street, Bleecker Street and Astor Place Stations above mentioned, and for the provision of the additional Equipment referred to in said order adopted by this Commission on April 21, 1926, to consist of additional cars and of additional power generating and transmission facilities to operate such additional cars, shall not take effect until further order of this Commission.

Further ordered and directed, That this order shall be subject to such further orders of this Commission supplemental hereto and consistent herewith as the Commission may from time to time make.

Further ordered and directed, That the Secretary of this Commission be and hereby is authorized and directed to cause a certified copy hereof, together with blue-print copies of the "Contract Drawings" above referred to, to be delivered to said Interborough Rapid Transit Company and to request said Interborough Rapid Transit Company to advise this Commission on or before January 10, 1928, whether it will comply with this order, and also to transmit certified copies hereof to the Board of Estimate and Apportionment of The City of New York and to the Board of Transportation of The City of New York.

By the Commission.

James B. Walker, Secretary.

[fol. 122] SCHEDULE "J"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Thirteenth Revised Sheet No. 1

Cancelling Twelfth Revised Sheet No. 1—Effective January 21, 1928

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Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fol. 123] SCHEDULE "K"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Original Sheet No. 2A

Standard Rates, Terms, and Conditions of Service

(1) Rates of Fare

On routes of Subway Division 7 cents. Between any two stations of the same division, or between a station of one division and a station of the other division as provided in the "Transfer Points."

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

SCHEDULE "L"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Original Sheet No. 2B

Standard Rates, Terms and Conditions of Service (Continued)

(1) Rates of Fare (Continued)

On routes of Manhattan Division 7 cents. Between any two stations of the same division, or between a station of one division and a station of the other division as provided in the "Transfer Points."

Issued February 1, 1928. Effective March 3, 1928.

[fol. 124] Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

SCHEDULE "M"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Second Revised Sheet No. 3, Cancelling First Revised Sheet No. 3. Effective September 15, 1925

Standard Rates, Terms, and Conditions of Service (Continued)

(2) Regulations as to the Issuance and Acceptance of Transfers

(a) Passengers must transfer at transfer points and board first car or train passing in the direction indicated.

(b) Transfers are good for a continuous trip only in the same general direction indicated, if presented before time cancelled at intersection of issuing line and on the date issued.

(c) Transfers which are mutilated or punched for more than one time limit will not be accepted.

(d) Transfers are good to any line named on the transfers at intersection of issuing line.

(3) Regulations as to Baggage and Bundles

Agents and gatemen will not allow passengers to enter a station with dogs, bulky baskets or bundles but only with ordinary hand satchels and such parcels as they can conveniently carry on their laps or under the seats without inconvenience to other passengers. Inflammable material must not be carried into the station or upon cars.
[fol. 125] Section 302 of the Sanitary Code prohibits all persons from carrying or conveying upon or in any passenger car, except upon or on the front platform thereof, any soiled or dirty articles of clothing or bedding. Agents will see that it is enforced under penalty of arrest.

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

SCHEDULE "N"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Second Revised Sheet No. 3A, Cancelling First Revised Sheet No. 3A. Effective September 15, 1925

(4) Regulations as to Newspapers

Bundles of newspapers will not be allowed on station platform and will not be carried on the trains of the Subway and Elevated Division between the hours of 7:00 and 10:00 A. M. and 4:00 and 7:00 P. M., except under the following conditions:

1st. Each bundle of newspapers to contain not more than enough papers to make a package 18 inches long by 12 inches wide by approximately 15 inches thick.

2nd. Each bundle is to be supplied with a strap and handle by which it can be conveniently carried in one hand.

3rd. One carrier with two of these bundles, one carried in each hand will be allowed to enter the station, and pass by the turnstile after depositing one fare for himself and one fare for the two bundles.

[fol. 126] 4th. Not more than one carrier in charge of two such bundles will be permitted to ride on the front platform of the rear car in each train and another carrier with two bundles permitted to ride on the rear platform of the car next to the rear car.

5th. Not more than two carriers and four such bundles shall be allowed on any train within the hours specified.

6th. The bundles are to be deposited on the car platform at the points indicated by the Guards and are to be carried off the train with one bundle in each hand.

7th. No sorting, separating or wrapping of papers will be permitted on the cars.

8th. Throwing of bundles or packages of paper from trains is strictly prohibited and offenders will be liable to arrest.

9th. In depositing bundles or packages on station platform they must be so placed that passengers entering or leaving the car cannot stumble or fall over them.

At hours other than those mentioned the maximum size bundle permitted shall not exceed 18 inches long by 12 inches wide by 36 inches high. One carrier is permitted to have charge of not more than two bundles when passing through the station or riding upon the car, and one fare will be collected for each bundle over 18 inches high and one fare for the caretaker.

(5) Other Matters

(a) Children to the number of three (3), five years of age or under, will be carried free when accompanied by an adult.

(b) New York City Policemen and Firemen and officers of either department in full uniform, or upon presentation of badge while in civilian clothes, will be carried free. Fire Prevention bureau representatives in full uniform will be carried free. Representatives of the Transit Commission, [fol. 127] and the Board of Transportation upon presentation of badge and identification card will be carried free.

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fols. 128-130] Marshal's returns, showing service on John F. Gilchrist et al., omitted in printing.

[fol. 131] Appearance of counsel omitted in printing.

[fols. 132 & 133] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED AND SUPPLEMENTAL COMPLAINT—Mar. 3, 1928

The plaintiff above named files this, its amended and supplemental bill of complaint, against John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; Manhattan Railway Company, and The City of New York, and alleges, upon information and belief:

[fol. 134] To its second cause of action by adding at the end thereof paragraphs numbered respectively and reading as follows:

XXXIV-a. On or about February 8, 1928, and after the filing, publication and posting by the plaintiff on February 1, 1928, of the tariff sheets establishing a fare of seven cents per passenger, on each the Subway Division and the Manhattan Division of the rapid transit railroads operated by the plaintiff, as more fully set forth in the paragraph marked "XXXIII" of the original complaint herein, and after the filing by the plaintiff on February 1, 1928, of the application to the Transit Commission for the approval of the said tariff sheets and for permission to put the same into effect as to each the Subway Division and the Manhattan Division, as more fully set forth in the paragraph marked "XXXIV" of the original complaint herein, the plaintiff duly filed with the said Transit Commission a request in writing, as follows:

"February 8, 1928.

"Honorable John F. Gilchrist, Chairman Transit Commission, 270 Madison Avenue, New York City.

"DEAR SIR: Some of yesterday afternoon's newspapers stated that the Transit Commission had notified the Interborough Rapid Transit Company that the Commission will hold a meeting today upon the application filed by the Com-

pany on February 1, 1928. Lest any public impression be created of default by this Company in any desired appearance, I advise you that no notice of any public or other hearing upon this matter has been received by this Company. It may be that this inference of a hearing before [fol. 135] you upon our application arose from its appearance as an item upon your calendar for today.

"In order to make our position altogether clear to you, however, I desire to inform you that representatives of this Company will be glad to appear before you in behalf of our application at any time you may appoint. The allegations of our petition are made under oath and will be supported with proof. According to the reports, the members of the Transit Company have spent a large part of the past six days in conference with counsel for those opposing the petition then pending before you in a judicial capacity; in equal fairness now you may be willing to hear the facts and argument in support of the position, in the public manner hereinafter suggested.

"I have seen no reason suggested why our new schedules should not go into effect promptly as to our elevated lines. Commissioner Ryan of the Board of Transportation of the City of New York was publicly quoted on February first as recognizing the inadequacy of the five-cent fare on our elevated lines. Published statements of City Officials during the past six days have contained no facts or figures indicating that a five-cent fare on the subways is possibly sufficient for proper maintenance of the operating properties and the rendering of the best possible service to the public. Their statements as to our application have so far dealt mostly with a claim that, irrespective of the inadequacy of a five-cent fare and its effects on our patrons and all taxpayers and rent-payers, the City of New York should try to hold the Company to the fare stipulated in 1913. Whether such [fol. 136] a present effect, as to any part of our subway system, is to be given to the 1913 contract, is, of course, a question of law which will have to be settled by the Courts; but Sections 28 and 29 of the Public Service Commission law contain no such limitation on your jurisdiction, power and responsibility in acting upon our application and schedules as to each our elevated lines and our subway lines. The New York Courts have held that a reasonable rate,

higher than that stipulated by franchise or contract, may be made effective and lawful by the procedure which this Company has followed under the advice of counsel. The way must be deemed fairly open to an adequate fare which will protect our patrons and our property; and, in the language of the United States Supreme Court (270 U. S. 587, 591-592), the Transit Commission is the 'tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation.'

"If this duty and responsibility is to be disregarded by you and action taken without consideration by you of the confiscatory character of the five-cent fare and its ruinous effects upon rapid transit service, the Interborough Company will have no recourse but to bring the indisputable facts before a tribunal which may not disclaim the power and jurisdiction which today is yours. If, however, as this Company hopes, you will definitely take jurisdiction of our rates and proceed upon any proper complaint to determine the facts which will show whether or not our filed 7-cent rate is excessive, counsel for this Company will be glad [fol. 137] to attend before you and arrange for the presentation of our contentions and proofs in the orderly course as above suggested. If you are unwilling to do this and to face the facts as to the utter inadequacy of our present elevated and subway fares, then it will be your refusal which transfers future consideration of these fares to another tribunal. Yours also will be the clear responsibility for any public consequences of the traffic conditions made worse by your failure to grant prompt relief.

Yours truly, J. L. Quackenbush."

XXXIV-b. After the filing of the original bill of complaint in this Court on February 14, 1928, at 9.20 o'clock in the forenoon of that day, and the attachment of the jurisdiction of this Court to the cause therein, and after the service of the *subpœna ad respondendum* on all parties defendant in said action, the defendants constituting the Transit Commission convened at a special meeting and, without hearing the plaintiff and without public notice, made a determination and order purporting to reject, as unlawful, the tariff sheets referred to in the original bill of

complaint and duly published, posted and filed by the plaintiff on February 1, 1928, and to dismiss the said application of the plaintiff to the said Transit Commission of February 1, 1928; and, also, at the same time, without first serving such determination and order upon the plaintiff and without giving the plaintiff any opportunity to apply for a rehearing or for review by certiorari, adopted a resolution purporting to direct the counsel to the said Transit Commission to commence an action or proceeding in the Supreme Court, State of New York, in the name of the Commission, against the plaintiff Interborough Rapid Transit Company for the alleged purpose of having the charging and col- {fol. 138} lecting of a rate in excess of five (5) cents per passenger on each the Subway Division and the Manhattan Division stopped and prevented either by mandamus or injunction, as a violation of law.

XXXIV-c. Such action was taken by said Transit Commission notwithstanding that the said tariff sheets had actually been accepted by the said Commission and had been filed by it and been kept on its files since February 1, 1928, and notwitstanding that the Public Service Commission Law of the State of New York, Section 16, provides that all documents and records in the possession of the said Transit Commission shall be public records. Such purported order and purported resolution were made and adopted by the said Transit Commission *ex parte* and without any prior notice to this plaintiff, and without giving the plaintiff any opportunity to be heard in respect thereto and were wholly unauthorized, and constituted a denial by an agency of the State of New York of legislative or administrative relief, and thereby the said Transit Commission has so misconstrued and misapplied the laws as to compel observance by the plaintiff of the five-cent rate of fare and to prevent permanently a compensatory rate herein, from which there is no relief except by resort to this Honorable Court; that said order is in conflict with the laws and constitution of the State of New York and with the guaranties of the Constitution of the United States.

XXXIV-d. Thereafter and on the afternoon of February 14, 1928, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commis-

sion, the same being the Metropolitan Division of the Department of Public Service, and the defendant The City of New York, contemporaneously undertook to bring two civil [fol. 139] actions and a special summary civil proceeding, in the Supreme Court of the State of New York, County of New York, respectively entitled as follows:

Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant;

The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant;

The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant.

XXXIV-e. In and by the Civil Practice Act of the State of New York it is provided, in Section 218, that a civil action is commenced by the service of a summons, which is a mandate of the Court, and it has been judicially held and determined by the Courts of the State of New York that the action is commenced at the time of the service of the summons, and that an action is not begun until the summons has been served upon the defendant or the defendant has voluntarily appeared in the action.

XXXIV-f. The said summary proceeding and two actions brought by the defendants as aforesaid were not commenced until after the commencement of the original action herein by the filing of the bill of complaint with this Court, and were not commenced until 1.55 o'clock in the afternoon of the 14th day of February, 1928, when copies of the petition in the said summary proceeding and of the summons [fol. 140] and complaint in the said two actions, in the New York State Court, were served upon the plaintiff by the delivery of copies thereof to assistant counsel for the plaintiff.

XXXIV-g. The subject-matter of each the said summary proceedings and the said two actions, brought in the New York State Court by the said defendants, is comprised within the bill of complaint filed by the plaintiff in the original action in this Court, now pending before this Court unde-

termined, and no other matter is alleged in either of the pleadings in the said summary proceeding or the said two actions in the New York State Court. Each of the matters alleged or set forth in the said petition and the said two complaints in the New York State Court is comprised in the complaint filed by the plaintiff in the original action in this Court, either by affirmation or by negation.

XXXIV-h. The prayer for relief in the petition by the defendants constituting the said Transit Commission, in the said special summary proceedings, reads as follows:

"Wherefore your petitioner prays that this Court will by order specify the time, not exceeding twenty days after service of a copy of this petition, within which defendant must answer this petition, and further provide that this Court will inquire into the facts and circumstances as provided in Section 57 of the Public Service Commission Law; that a mandamus order be made and entered commanding and directing defendant to charge the five (5) cent fare in the tariff schedules on file and in effect or that an injunction be issued to restrain defendant from charging a seven (7) cent fare; and that your petitioner may have such other or [fol. 141] further relief as to this Court may seem proper."

The prayer for relief in the complaint in the said action brought by the defendants constituting the Transit Commission reads as follows:

"Wherefore the plaintiff demands judgment against the defendant as follows:

"(1) Compelling by mandamus or injunction the defendant, its agents, officers, servants and employees to specifically perform and continue in the performance of the aforesaid agreements as represented by Contract No. 3 and the aforesaid Certificate, by transporting and continuing to transport for a continuous ride over its lines all such passengers and persons as desire that privilege and present themselves on the payment of a fare of five (5) cents and no more.

"(2) Enjoining the defendant, its agents, officers, servants and employees from increasing its fare from five (5) cents to seven (7) cents on the subway and elevated railroads or any part thereof operated by the defendant, or

from carrying out its threats so to increase said fare, or from charging or collecting a fare in excess of five (5) cents on said railroads for a continuous ride in one direction, or from in any way violating or ignoring the provisions fixing a five (5) cent fare contained in said Contract No. 3 and in said Certificate, and also for an injunction restraining the defendant, its agents, officers, servants and employees, during the pendency of this action, from charging or collecting any such fare, and for such other and further relief as to the Court may seem just and proper, [fol. 142] together with the costs of this action."

The prayer for relief in the complaint in the said action brought by the defendant The City of New York reads as follows:

"Wherefore the plaintiff demands judgment enjoining and restraining the defendant, its officers, agents and employees from carrying out its said threat to increase the fare from five (5) cents to seven (7) cents, and from taking any steps tending to or looking towards the enforcement of said increased fare on the subway and elevated railroads operated by it, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from, in any way, violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said subway and elevated railroads, operated by it, and further prays that an injunction be granted restraining the defendant, its officers, agents, and employees, during the pendency of this action, from carrying out its said threat to increase the fare on its said subway and elevated railroads from five (5) cents to seven (7) cents, and from taking any steps tending to or looking towards the enforcement of said increased fare on said railroads, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from in any way violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said railroads, and for such other and further relief as to the Court may seem just [fol. 143] and proper, together with the cost of this action."

XXXIV-i. Thereafter, and on the afternoon of February 14, 1928, the defendants constituting the said Transit Commission and The City of New York, acting by their respective attorneys, counsel, agents or representatives, applied to one of the Justices of the Supreme Court of the State of New York *ex parte* and without any notice to the plaintiff, for, and secured, orders to show cause for preliminary injunction, which orders contained temporary restraining orders, as follows:

In and by one order in the summary proceeding brought by the defendants constituting the said Transit Commission, the plaintiff herein was directed to make answer to the petition and serve a copy of its answer upon the petitioner's attorney not later than February 17, 1928 (or not more than three days from the bringing of the said proceeding), and to proceed with a summary hearing to final judgment in the said proceeding on February 20, 1928, at Special Term, Part 1, of the Supreme Court in and for the County of New York.

By another order in the said summary proceeding, the plaintiff herein was directed to show cause before the said New York State Court on February 20, 1928, why an interlocutory injunction should not be granted and the plaintiff herein is temporarily restrained pending the determination of the proceeding.

The said summary proceeding brought by the Commission is alleged to be brought under Section 57 of the Public Service Commission Law, which is a purely statutory pro-
[fol. 144] ceeding, and restricted in scope, and there is no provision of law authorizing the granting of a preliminary injunction or a restraining order in, or any act of, such special summary proceeding.

The orders to show cause granted in the said two actions brought by the defendants in the New York State Court as aforesaid were likewise returnable before the said State Court on Feburary 20, 1928; likewise required this plaintiff to show cause why an injunction *pendente lite* to the same effect should not be granted, and contained similarly temporary restraining orders.

Upon the return day of the said orders, the defendants constituting the Transit Commission and The City of New York applied for and secured continuances of the said

orders, pending a determination in an ancillary action brought in this Court by the plaintiff against the said defendants, to restrain the prosecution of the State Court suits and to maintain and protect the primacy and exclusiveness of the jurisdiction of this Court first attached in this cause.

To the third cause of action by adding at the end thereof a paragraph numbered and reading as follows:

LVI-a. The plaintiff here realleges each of the matters and things stated and set out in paragraphs numbered "XXXIV-a" to "XXXIV-i" both inclusive, of this amended and supplemental bill of complaint, with the same force and effect as if the same were each herein again repeated and set forth.

[fol. 145] To the fourth cause of action by adding at the end thereof a new paragraph numbered and reading as follows:

LXV-a. The plaintiff here realleges each of the matters and things stated and set out in paragraphs numbered "XXXIV-a" to "XXXIV-i," both inclusive, of this amended and supplemental bill of complaint, with the same force and effect as if the same were each herein again repeated and set forth.

To the fifth cause of action by adding at the end thereof a new paragraph numbered and reading as follows:

LXXI-a. The plaintiff here realleges each of the matters and things stated and set out in paragraphs numbered "XXXIV-a" to "XXXIV-i," both inclusive, of this amended and supplemental bill of complaint, with the same force and effect as if the same were each herein again repeated and set forth.

Prayer for Judgment

To the end that the plaintiff may have that relief which it can only obtain in a Court of equity, and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff, it hereby prays:

1. That it be adjudged and decreed that the plaintiff have judgment as prayed for in the original complaint herein.

2. That it be adjudged and decreed that the plaintiff have similar relief in respect to the orders, acts and determinations of the defendants constituting the Transit Commission, and the suits and proceedings brought or threatened to be brought by the defendants, or either of them, which are set forth in this amended and supplemental complaint, [fol. 146] as in respect to the orders, acts, determinations, actions or proceedings which are set forth in the original complaint.

3. That the plaintiff may have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

Interborough Rapid Transit Company, by Earl E. Starbard, Vice-President. James L. Quackenbush, Solicitor for Plaintiff, No. 165 Broadway, Borough of Manhattan, New York City. William L. Ransom, Jacob H. Goetz, of Counsel.

[fol. 147] *Duly sworn to by Earl E. Starbard. Jurat omitted in printing.*

[fol. 148 & 149] In United States District Court

[Title omitted]

Answer of Transit Commission

John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, denying the jurisdiction of this Court and saving and reserving to themselves the claim that no Federal question is here involved and reserving also the benefit of their objections and defenses, hereinafter made, that the complaint herein states no cause of action or any cause of action within the jurisdiction of this Court and the right to move for a clear and simple statement of the alleged causes of action or to strike out

improper and irrelevant matter, or to dismiss the complaint [fol. 150] or any part thereof, answering and explaining the bill of complaint by the Interborough Rapid Transit Company filed herein on February 14, 1928, or such parts thereof as they are advised it is material to answer, say:

Answering to the first alleged cause of action:

1. They admit the allegations of Article I of the Complaint, except that they deny upon information and belief that plaintiff was incorporated pursuant to the provisions of Chapter 4 of the Laws of 1891, of the State of New York, as then amended, and is subject to all the provisions of the Public Service Commission Law (and except that they have no knowledge as to whether the different railroads operated by plaintiff are parts of a comprehensive system of elevated and subway rapid transit railroads, or as to the length of the railroad routes or miles of track now operated by plaintiff or of the number of passengers transported thereon during the year ended June 30, 1927).

2. They admit the allegations of Article II of the Complaint, except that they deny that the Manhattan Railway Company has been since July 1, 1907, and now is subject to all the provisions of the Public Service Commission Law.

3. They admit the allegations of Article III of the Complaint, except that they deny upon information and belief that these defendants and the defendant Prendergast were appointed under and by virtue of Chapter 343 of the Laws of 1926 of the State of New York, and except that they have no knowledge as to the citizenship and residence of defendants other than themselves.

4. They admit that The City of New York is a municipal corporation existing under the Laws of the State of New [fol. 151] York; and that (plaintiff does not allege that) the City of New York is not a necessary or proper party to the determination of the issues in this action, if any. They deny that there are any issues to be determined in this action; and they have no knowledge as to the other allegations of Article IV of the Complaint.

5. They have no knowledge as to the allegations contained in Articles V and VI of the Complaint.

6. They admit (that the Manhattan Railway has leased all the rights, franchises and property in its elevated railroads to the plaintiff, and that plaintiff has for many years been engaged in the operation and management of the elevated railroads in the Boroughs of Manhattan and The Bronx; but they have no knowledge as to the other) allegations of Article VII of the Complaint. They allege that the Manhattan Railway was in or about the year 1903 leased to the plaintiff for the term of 999 years and is now so leased and that ever since the making of said lease it has been and is now being operated exclusively by the plaintiff at its own risk and for its own account as part of its rapid transit system.

7. They deny that the Plan of Readjustment, referred to in Article VIII of the Complaint, was adopted with the full concurrence and approval of the Transit Commission or its predecessor; and they have no knowledge as to the other allegations of Article VIII of the Complaint.

8. They deny upon information and belief the allegations in Article IX of the Complaint.

9. They admit that the Legislature of the State of New York enacted the chapters and sections referred to in Articles X, XI, XII, XIII, XIV and XV of the Complaint; [fol. 152] but they have no knowledge of the other matters alleged in said Articles, and they refer to the said statutes themselves in full for a complete and accurate presentation of said statutes.

10. They admit that the Public Service Commission for the First District made the following orders, mentioned in Article XVI of the Complaint, prescribing the form of schedules to be filed, as required by law, by street railroad corporations subject to the jurisdiction of said Commission, showing the fares and charges of such corporations, namely: Order No. 708, adopted on or about August 28, 1908; an order in Case No. 1670, adopted on or about April 15, 1913; and an order in Case No. 1670, adopted on or about February 18, 1918, to which orders

they beg leave to refer for a complete and accurate statement of their contents. They admit that plaintiff notified the Public Service Commission for the First District that it accepted and would obey its said order of February 18, 1918; and that plaintiff filed with the Transit Commission, or its predecessor, tariff schedules showing the rates, fares and charges for the transportation of passengers on the rapid transit lines operated by it; and that in these tariff schedules the rates of fare were shown to be five cents per passenger.

They deny upon information and belief that it has been judicially determined by the Courts of the State of New York that the orders and regulations prescribing the form of schedules have the force of law; and that plaintiff was required and obligated by the provisions of the Public Service Commission Law or by said orders of the Public Service Commission for the First District to observe and charge, demand and collect a rate of fare on its rapid transit railroads of five cents per passenger or was prohibited [fol. 153] from charging, demanding, collecting or receiving a greater or different compensation for transportation of passengers than five cents per passenger; and they explain and show that plaintiff was obligated to charge said rate of five cents and was prohibited from charging a higher rate by certain contracts heretofore entered into with The City of New York and not by statute, and that the provision for tariff schedule merely gives publicity to the rates otherwise fixed.

They have no knowledge of the other allegations contained in Article XVI of the Complaint.

11. They admit that the properties on the Manhattan Division are all owned by the Manhattan Railway Company or by the plaintiff, and that Article XVI of the Complaint sets forth certain summaries of plaintiff's estimate of the present value of the elevated railroad properties, comprising the Manhattan Division. They have no knowledge as to what properties are embraced in the summaries set forth in said Article XVII or later in the Complaint, or as to what was included or excluded from such summaries, or as to what deductions were made by plaintiff from such summaries or computations; and they deny all other allegations contained in said Article XVII.

12. They deny the allegations contained in Article XVIII of the Complaint.

13. They deny each and every allegation contained in Article XIX of the Complaint, except that they admit that the return received by plaintiff from the elevated lines alone is not sufficient to support the credit of the plaintiff and to enable it to secure capital funds for the purpose of providing for new construction and equipment on all lines operated by it, subway as well as elevated.

[fol. 154] 14. They deny that the rate of fare of five cents is confiscatory, that plaintiff suffers any wrong or injury by said five cent rate of fare, that plaintiff suffers any irreparable injury or any injury for which it is without adequate remedy at law, and that the intervention of a court of equity is necessary; and they have no knowledge as to the other allegations of Article XVI of the Complaint.

15. They deny that the rates on the lines of plaintiff are inadequate or confiscatory and that plaintiff suffers daily, or any, confiscation from the enforced continuance of the contract rates of fare on its lines; and they have no knowledge as to the other allegations of Article XXII of the Complaint.

16. They have no knowledge as to what plaintiff is advised and believes, or as to the reasons on account of which it invokes the jurisdiction of this Court; and they deny the other allegations of Article XXIII of the Complaint.

17. They have no knowledge as to the matters alleged in Article XXIV of the Complaint.

And answering the second alleged cause of action:

18. They allege and repeat as to the matters and things sought to be real-eged in Article XXV of the Complaint, the same things they alleged with reference to Articles I to XXIV of the Complaint, both inclusive.

19. They admit that on March 19, 1913, the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment of the City of New York, duly granted to the Manhattan Railway Company the right to construct certain additional third

[fol. 155] tracks and to the plaintiff the right to construct certain extensions to the elevated railroads of the Manhattan Railway Company, by Certificates, to which they beg leave here to refer as part of their answer to each and all the causes of action alleged in the Complaint for a complete and accurate statement of their contents; and they have no knowledge of the other matters alleged in Article XXVI of the Complaint.

20. They have no knowledge as to the matters alleged in Article XXVII of the Complaint.

21. They deny, upon information and belief, the allegations of Artele XXVIII of the Complaint.

22. They admit the allegations of Article XXIX of the Complaint.

23. They admit that the Certificate of March 19, 1913, for elevated extensions was executed by the Public Service Commission for the First District, acting for and in behalf of The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891, as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enactment of the Public Service Commission Law, by Chapter 429 of 1907, and subsequent to Chapter 480 of the Laws of 1910; and they deny the other allegations of Article XXX of the Complaint.

24. They have no knowledge as to the allegations of Article XXXI of the Complaint.

25. They deny the allegations of Article XXXII of the Complaint.

26. They deny the allegations of Article XXXIII of the Complaint, except that they admit that plaintiff on February 1, 1928, filed and posted tariff sheets showing a rate of [fol. 156] seven cents to become effective March 3, 1928, and that the Transit Commission took no action rejecting such sheets because of defects of form; and they explain and show that such sheets were unlawful and ineffective because the seven-cent rate therein shown was higher than the lawful rate of five cents, fixed by contract, and that the said sheets were formally rejected by the Transit Commis-

sion on this ground, but not until after the Complaint had been served on these defendants.

27. They admit that on February 1, 1928, plaintiff filed an application to the Transit Commission, under Section 29 of the Public Service Commission Law, asking that the Transit Commission approve the revised tariff sheets mentioned in Article XXXIV of the Complaint, and that it grant permission to plaintiff to put the said tariff sheets into effect as to each the subway and the elevated divisions upon not more than five days' notice after publication at stations and filing with the Commission. They admit that Article XXXIV of the Complaint sets forth, in substance, the portion of said application, marked "III"; but they have no knowledge as to whether this portion is correctly quoted in said Article XXXIV. They deny the other allegation of Article XXXIV, and the statements contained in the portion purporting to be quoted from said application.

And answering the third alleged cause of action:

28. They say and repeat as to the matters and things sought to be realleged in Article XXXV of the Complaint, the same things that they said with reference to Articles I, III to V, X, subdivision (f), XII to XVI, XVIII, XX, each inclusive, of the Complaint.

[fol. 157] 29. They admit the allegations contained in the first paragraph of Article XXXVI, except that they have no knowledge as to what extent the matters are more fully described in the Complaint. They admit the allegations contained in the second paragraph of said Article XXXVI, except that they deny, upon information and belief, that it has been judicially determined that so far as the construction, operation and leasing of its rapid transit railroads is concerned, The City of New York is a railroad corporation and that such rapid transit railroads are a business enterprise the same as if they were owned by an ordinary railroad corporation and, as such, the operation of the railroads and the charges thereon are subject to the exercise of the regulatory powers of the State; and they have no knowledge as to the matters alleged in the last paragraph of said Article XXXVI.

30. As to the allegations contained in Articles XXXVII, XXXVIII, XXXIX, XL and XLI of the Complaint, they beg leave to refer to the Contracts Nos. 1, 2 and 3, and hereby incorporate the same herein, for a more complete and accurate statement of their contents, and deny that they are fully or correctly set forth in the Complaint.

31. They deny upon information and belief the allegations of Article XLII of the Complaint.

32. They admit that Contract No. 3 of March 19, 1913, for the construction and lease of subway extensions, was executed by the Public Service Commission for the First District, acting for and in behalf of The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891, as then amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enact-[fol. 158] ment of the Public Service Commission Law, by Chapter 429 of the Laws of 1907, and subsequent to Chapter 480 of the Laws of 1910; that Contracts Nos. 1, 2 and 3 were each executed pursuant to the authority of Chapter 4 of the Laws of 1891, as then amended, and were approved by the Board of Estimate and Apportionment, as aforesaid; and that it is the law of the State of New York that the rapid transit railroads described in Contracts Nos. 1, 2 and 3 belong to The City of New York in its propriet-y capacity; and they deny each and every other allegation contained in Article XLIII of the Complaint.

33. They have no knowledge as to the allegations of Article XLIV of the Complaint.

34. They deny the allegations contained in the first paragraph of Article XLV of the Complaint and the allegations contained in paragraphs (E), (F) and (G) of said Article. They deny, as alleged in paragraph (C) thereof, that the making of the 1913 lease and contracts contemplated that the City would not become an operator of competing rapid transit properties; that The City of New York has not fulfilled all its duties and obligations under the 1913 agreements and has neglected or failed to carry out any provisions then made for the future; that it was contem-

plated in 1913 that the City should not become a competitor of plaintiff's rapid transit service, except by means of the exercise of the recapture right reserved to it by the contracts; that the City's new Eighth Avenue subway was projected or started contrary to any plan underlying the 1913 agreements; that the taking of passengers from plaintiff's lines by the City's new lines will render the plaintiff's five cent fare inadequate and confiscatory; that the City has been guilty of any wilful or wrongful act; that the building of new subways constitutes any change in municipal policy; and that there were definite, or any, provisions [fol. 159] whereby future subway construction would be dealt with under said contracts, and additional lines and facilities operated by plaintiff as lessee.

They deny knowledge of the allegations in paragraph (A), (B) and (D) of said Article XLV, and of those allegations in paragraph (C) thereof as to the opinion of Commissioner John F. O'Ryan and (as to the number of passengers that the City's new Eighth Avenue Subway will take from the existing lines of the plaintiff).

They admit that the City is constructing certain new lines of subway but that Contract No. 3 contained definite provisions whereby future expansion of the railroads constructed under Contracts Nos. 1, 2 and 3 would be dealt with under Contract No. 3; and they explain and show that the new city subways are being constructed under authority of Chapter 4 of the Laws of 1891, as amended, and that the said provision for expansion of the said subways now owned by the City is contained in Article LXX of Contract No. 3, under which the Transit Commission directed the extension of station platforms, of which plaintiff complains in Article XLVII of the Complaint.

35. They admit the allegations of Article XLVII of the Complaint, except that they deny that the Transit Commission arbitrarily refused to permit plaintiff to put in evidence before it, or that any order therein referred to was made unreasonably, arbitrarily, or in denial to the plaintiff of a fair hearing and due process of law, guaranteed by the State and Federal Constitution, or that the evidence offered by plaintiff on the reopening of the proceeding showed or tended to show that the proposed lengthening of station platforms would not afford substantial relief

from existing conditions or traffic congestion and would not [fol. 160] be advisable as an operating matter; and they explain and show that plaintiff was entitled to no further hearing in respect to the extensions of the station platforms and that on the prior hearings, which were not required by law, plaintiff had conceded that the proposed lengthening of station platforms would afford substantial relief from existing conditions of traffic congestion and would be advisable as an operating matter, and offered no evidence to the contrary until the proceedings had been reopened by the Commission on October 26, 1927.

36. They admit that the orders and decisions of the Transit Commission in the proceeding R. T. 4007 were not authorized by the Public Service Commission Law or any other Act of the Legislature of the State of New York, except the Rapid Transit Act; and they complain and show that said orders and decisions were authorized by the Rapid Transit Act and by Contract No. 3 in Article LXX thereof; and they deny each and every other allegation contained in Article XLVIII of the Complaint.

37. They admit that the Transit Commission entered upon the hearing in Case No. 2851 as alleged in the first paragraph of Article XLIX of the Complaint, and that at and during the said hearing the said Commission was represented by special counsel who served gratuitously; and they deny each and every other allegation cont-ined in Article XLIX of the Complaint; and they explain and show that said proceeding is pending undetermined before said Commission and that no order has been made therein, directing plaintiff to furnish any additional cars.

38. They admit that Article L of the Complaint sets forth certain summaries of plaintiff's estimate of the present value of the properties used and useful in the opera- [fol. 161] tion of the Subway Division of the plaintiff; but they have no knowledge as to what properties are embraced in said summaries, or as to what was included in or excluded from such summaries, or as to what deductions were made by plaintiff from such summaries or computation; and they deny each and every other allegation contained in said Article L.

39. They have no knowledge as to the allegations contained in paragraphs (a), (b), and (c) of Article LI of the Complaint; and they deny each and every other allegation contained in said Article LI.

40. They deny each and every allegation contained in Article LII of the Complaint.

41. They say and repeat as to the matters and things realleged in Article LIII of the Complaint, the same things that they said with reference to Articles XXXII to XXXIV, both inclusive, of the Complaint.

42. They deny that the rate of fare of five cents is confiscatory; that plaintiff suffers any wrong or injury thereby; that plaintiff is without adequate remedy at law or is subject to irreparable injury; and that there is need for the intervention of a court of equity. They say and repeat as to the matters realleged in the last paragraph of Article LIV of the Complaint, the same things that they said with reference to Article XXII of the Complaint; and they have no knowledge as to the other matters alleged in said Article LIV.

43. They have no knowledge as to what plaintiff is advised or believes, or as to the reason on account of which it invokes the jurisdiction of this Court; and they deny each and every allegation contained in Article LV of the Complaint.

[fol. 162] 44. They have no knowledge as to the allegations of Article LVI of the Complaint.

And answering the fourth alleged cause of action:

45. They say and repeat as to the matters and things realleged in Article LVII of the Complaint, the same things that they said with reference to Article I to LVI, both inclusive.

46. They have no knowledge as to the allegations of Article LVIII of the Complaint.

47. They admit that the elevated and subway rapid transit railroad lines have distinguishing characteristics of routes, construction, equipment, operating conditions and traffic but they deny the other allegations contained in

paragraph "(a)" of Article LIX of the Complaint. They have no knowledge as to the other allegations contained in said Article LIX.

48. They deny the allegations contained in Articles LX, LXI, LXII and LXIII of the Complaint.

49. They have no knowledge as to what was announced through or stated by the public press; and they deny the other allegations contained in Article LXIV of the complaint.

And answering the fifth alleged cause of action:

50. They say and repeat as to the matters and things sought to be realleged in Article LXV of the Complaint, the same things that they said with reference to Articles I to LXI, both inclusive, of the Complaint.

51. They deny that the Transit Commission made an order, direction or determination as alleged in Article LXVI of the Complaint.

[fol. 163] 52. They have no knowledge as to the allegations of Article LXVII of the Complaint.

53. They deny the allegations of Article LXVIII of the Complaint.

54. They have no knowledge as to the announcements and statements in the press, referred to in Article LXX of the Complaint; and they deny the other allegations of said Article LXX.

55. They deny the allegations of Article LXXI of the Complaint.

56. They have no knowledge that plaintiff is in need of any relief; and they deny, as is set forth in the Prayer for judgment, that plaintiff can obtain relief only in a court of equity.

57. They are advised that it is unnecessary for them to answer the numerous conclusions of law and fact, or the argumentative allegations, or the allegations in the nature of evidence, which they have heretofore answered; and they are advised that it is unnecessary for them to answer the

numerous misleading titles or headings inserted between various Articles, and they make no answer as to them.

And for further and additional defenses to the several causes of action, alleged in the complaint, and as grounds for dismissing each of said alleged causes of action, these defendants say:

1. That these causes of action are not within the jurisdiction of this Court as a Federal Court, which has no jurisdiction to hear and determine the same.

2. That this Court has not jurisdiction of the parties.

[fol. 164] 3. That this Court has not jurisdiction of the subject-matter.

4. That these alleged causes of action do not really and substantially, or at all, involve a dispute or controversy properly within the jurisdiction of this Court.

5. That these alleged causes of action are not within the jurisdiction of a court of equity.

6. That these alleged causes of action are devoid of equity and fail to state facts sufficient to entitle the plaintiff to any equitable relief.

7. That these alleged causes of action fail to state facts sufficient to constitute causes of action.

8. That there is non-joinder of parties, in this, that the Attorney General of the State of New York and the District Attorney of New York County, are not joined as parties defendant.

And for a further and additional defense to the alleged first cause of action and as grounds for dismissing said alleged first cause of action, these defendants say:

1. That the five cent fare upon the lines of elevated railroads, known as the Manhattan Division, operated by plaintiff is not being maintained under Chapter 743 of the Laws of 1894 but is being so maintained pursuant to an express agreement between plaintiff and The City of New York, known as the Elevated Extension Certificate, dated March 19, 1913, which is hereby made a part hereof.

2. That at the time of the enactment of Chapter 743 of the laws of 1894 the elevated railroads were owned and operated by the defendant Manhattan Railway Company.

[fol. 165] 3. That on or about January 1, 1903, the defendant Manhattan Railway Company executed and delivered a lease of all the rights, franchises and property in its elevated railroads to plaintiff for a period of 999 years from November 1, 1875; and plaintiff entered into the possession of, and has since been and now is engaged in the operation and management of said elevated railroads.

4. That on or about March 19, 1913, The City of New York, by a certificate known as the Manhattan Certificate, granted to the defendant Manhattan Railway Company the right to construct certain additional third tracks and facilities to said elevated railroads; and the rights under said Certificate were added to the property of the Manhattan Railway Company lease to plaintiff and are now being operated and managed by plaintiff.

5. That on or about March 19, 1913, The City of New York, by certificate known as the Elevated Extension Certificate, granted to plaintiff the right to construct certain extensions to the elevated railroads operated by plaintiff as aforesaid; and in and by Article VI of said Elevated Extension Certificate it was duly stipulated and agreed that plaintiff was entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the said elevated railroads, namely, those owned by the Manhattan Railway Company and leased by it to plaintiff (including the third tracks constructed under the said Manhattan Certificate) and those constructed by plaintiff under the said Elevated Extension Certificate, the sum of five cents and no more.

6. That it is expressly provided by law that the Certificates hereinabove referred to shall be deemed to constitute a contract between the parties hereto.

[fol. 166] And for a further and additional defense to the second alleged cause of action and as grounds for dismissing said second alleged cause of action, these defendants say:

1. That for some time prior to January 1, 1903, the elevated railroads, now known as the Manhattan Division of the plaintiff, were owned and operated by the defendant Manhattan Railroad Company; but on or about that date the defendant Manhattan Railway Company executed and delivered a lease, at an agreed rental, of all the rights, franchises and property in its elevated railroads, to be for a period of 999 years from November 1, 1875; and the defendant Manhattan Railway Company thereupon ceased operating said elevated railroads, and plaintiff entered into possession of, and has since been and now is engaged in the operation and management of said elevated railroads.

2. That pursuant to Chapter 4 of the Laws of 1891 and acts amendatory thereof and supplementary thereto, the Public Service Commission, acting for and on behalf of the City of New York, on or about March 19, 1913, issued to the plaintiff a certificate known as the Elevated Extension Certificate, relating to the terms and conditions upon which plaintiff should construct certain extensions to the then existing elevated railroads, and relating to the terms and conditions upon which the plaintiff should operate all the elevated railroads now known as the Manhattan Division of the plaintiff; and plaintiff accepted this certificate.

3. That it was expressly provided by law that this certificate, upon its acceptance by plaintiff, should be deemed to constitute a contract between the plaintiff and the City of New York.

[fol. 167] 4. That the parties had been expressly authorized to by the Legislature of the State of New York and did agree in said certificate upon the rate of fare to be charged by plaintiff in its operation of the said elevated railroads; and it was agreed that the rate of fare should be five cents and no more for each passenger for one continuous trip in the same general direction.

5. That the authorization of the Legislature and the making of the contract, together, suspended the rate making powers of the State of New York during the period of the existence of the contract, and said rate is now immune from interference by the rate making power of the State of New York.

6. That the rate making authority of the State of New York has not assumed to exercise any authority over said rate, but has on the contrary at all times consistently refused to do so.

And for further and additional defenses to the third alleged cause of action and as grounds for dismissing said alleged third cause of action, these defendants say:

1. That pursuant to Chapter 4 of the Laws of 1891, The City of New York, acting by the Board of Rapid Transit Railroad Commissioners, on or about February 21, 1900, entered into a contract with John B. McDonald, known as Contract No. 1, for construction by him, at the expense of the City, and for the lease to him for maintenance and operation of a certain underground railroad.

2. That pursuant to Chapter 4 of the Laws of 1891, The City of New York, acting by the Board of Rapid Transit Railroad Commissioners, on or about July 21, 1902, entered into a contract with the Rapid Transit Subway Company, [fol. 168] known as Contract No. 2, for the construction by it, at the expense of the City and for the lease to it for maintenance and operation of a certain underground railroad.

3. That pursuant to law, both the aforesaid contracts contained provision for rate of fare, namely, for a fare of five cents and no more for each passenger for one continuous trip in the same general direction.

4. That thereafter John B. McDonald and the Rapid Transit Subway Company, respectively, assigned, with the written consent of the Board of Rapid Transit Railroad Commissioners, to the plaintiff, so much of such contracts as applied to the lease of said underground railroads.

5. That pursuant to Chapter 4 of the Laws of 1891, and acts amendatory thereof and supplementary thereto, on or about March 19, 1913, the City of New York, acting by Public Service Commission for the First District, entered into contract with plaintiff, known as Contract No. 3, extending Contracts Nos. 1 and 2 to certain new underground railroads to be constructed by The City of New York, and to be operated by plaintiff, both, in conjunction with the

then existing underground railroads, provided for and then being operated by plaintiff under Contracts Nos. 1 and 2; that the provisions of Contracts Nos. 1 and 2 were by the terms of Contract No. 3 continued and are now in full force and effect except as expressly modified by Contract No. 3.

6. That the underground railroads hereinabove referred to constitute the Subway division of the plaintiff, as described in the Complaint.

7. That it is expressly provided by Article LXII of said Contract No. 3, that plaintiff should be entitled to charge [fol. 169] for a single fare upon the lines to be operated thereunder the sum of five cents and no more.

8. That the authorization of the Legislature and the making of the contract, together suspended the rate making powers of the State of New York during the period of the existence of the contract, and said rate is now immune from interference by the rate making power of the State of New York.

9. That the rate making authority of the State of New York has not assumed to exercise any authority over said rate, but has on the contrary at all times consistently refused to do so.

9. That there is no provision in any of the three contracts above described by which The City of New York undertook not to construct underground railroads which might compete with railroads to be constructed under those contracts; in fact contemporaneously with the execution of Contract No. 3, a contract, known as Contract No. 4, was made by The City of New York, acting by the Public Service Commission for the First District, with a competitor of plaintiff, providing for the construction and operation of underground railroads which would compete and do now compete, with those operated by plaintiff; the Eighth Avenue Subway now being constructed by The City of New York is separate from the railroads constructed — Contract No. 4, but the terms of that contract are such that the Eighth Avenue Subway might have been constructed and operated thereunder.

9. That plaintiff's lines, with which the new Eighth Avenue Subway will compete, are now overcrowded in a man-

ner dangerous to the health, decency and safety of the passengers; and The City of New York in the exercise of [fol. 170] its police powers is warranted in constructing additional lines to relieve the overcrowding on said lines of plaintiff.

10. That despite the construction of the Eighth Avenue Subway, the plaintiff will not at any time during the existence of the contract have fewer passengers on its lines than it now has.

11. That the defendant Transit Commission have made no order requiring the plaintiff to furnish 432 new cars, but they have now under consideration and undetermined a proceeding with respect to the furnishing of such number of cars, if any, as the Transit Commission may decide to be necessary.

12. That the defendant Transit Commission's order requiring the lengthening of certain subway station platforms is necessary to relieve overcrowding now endangering the health, decency and safety of passengers; that said order was made as a result of proceedings instituted before the predecessor of said Commission in 1922, resulting in a decision by said predecessor in 1926 and confirmed by this Commission in 1927; that said proceeding was instituted and such order made pursuant to the provisions of Contract No. 3; that plaintiff has insisted and is insisting that the entire cost of such additions is required by said contract to be borne by The City of New York; which defendants deny and assert that one-half of such cost should be borne by the plaintiff.

13. That both the orders referred to in paragraphs numbers 11 and 12 above are authorized by the provisions of Contract No. 3, conferring upon defendants Transit Commission the power and duty to enforce these sections of said contract requiring plaintiff to furnish efficient and safe service.

[fol. 171] 14. That none of the matters set forth in Articles XLV, XVII, and XLVIX of the Complaint and referred to in Paragraphs 9-13 hereinabove are germane to the issues before this Court, nor do they involve a Federal question.

And for a further and additional defense to the fourth alleged cause of action and as grounds for dismissing said alleged fourth cause of action, these defendants say:

1. That they repeat and reallege paragraphs recited above as further and additional defenses to the second and third causes of action.

And for a further and additional defense to the alleged first, second, third and fourth causes of action and as grounds for dismissing said alleged first, second, third and fourth causes of action, these defendants say:

1. That at the time of the commencement of this action plaintiff had not exhausted its remedies before the administrative bodies of the State of New York, nor had the rate-making authority of the State of New York completed its action, with respect to plaintiff's grievances as to rate, or as to the furnishing of new cars.

And for a further and additional defense to the fifth alleged cause of action and as a ground for dismissing said fifth alleged cause of action, these defendants say:

1. That on February 9, 1928, the defendants Transit Commissioners learned through inspection of plaintiff's [fol. 172] accounts, as duly authorized by law, that on or before January 4, 1928, William L. Ransom had been retained as Special Counsel to plaintiff, with respect to the institution of legal proceedings against the Transit Commission and The City of New York to bring about an increase in the rate of fare chargeable by plaintiff; that the amount of his retainer had been fixed at the sum of $10,000; that payment was made on January 5, 1928, by voucher No. 278,630, and that $6,500 of this amount was charged to the Subway Division, operating expenses, and $3,500 of this amount was charged to the Manhattan Division, operating expenses.

2. That Contract No. 3, by Article XLIX, subdivision 3 thereof, provides that from the total revenues from the lines operated under Contract No. 3 there shall be deducted for operating expenses only such sums as are actually and necessarily incurred in the operation of the road; and that the Elevated Extension Certificate, by Article XII, subdivi-

sion 3 thereof, provides that from the total revenues from all lines of the Manhattan Division, there shall be deducted for operating expenses only such sums as are actually and necessarily incurred in the operation of the lines of the Manhattan Division; that legal proceedings instituted for the purpose of bringing about an increase in rate of fare are not sums actually and necessarily incurred in the operation of the road.

3. That Contract No. 3, by Article XXVII thereof, provides that the Commission may object to any expenditure, as unreasonable or improper, made or to be made by the plaintiff in connection with maintaining and operating the railroads of the Subway Division by notice thereof to the plaintiff; and that the Elevated Extension Certificate, by Article X thereof, provides that the Commission may object [fol. 173] to any expenditure as unreasonable or improper, made or to be made by plaintiff in connection with maintaining or operating the lines of the Manhattan Division.

4. That pursuant to powers and duties conferred as above, counsel for defendants, on or about February 10, 1928, wrote a letter to plaintiff, from which the paragraphs set forth in Article LXVI of the Complaint are quoted, properly protesting against plaintiff's charge of the retainer to said Ransom.

5. That this letter was in no wise an order, formal or otherwise, of the defendant Transit Commission.

Wherefore, these defendants demand that the bill of complaint of the Interborough Rapid Transit Company be dismissed and that they have and recover their costs and disbursements of this action.

John F. Gilchrist, Leon G. Godley, Charles C. Lockwood, Constituting the Transit Commission. Clarence M. Lewis, Esq., Solicitor for Defendants Gilchrist, Godley, and Lockwood, Constituting the Transit Commission, 270 Madison Avenue, New York City.

[fol. 174] *Duly sworn to by Charles C. Lockwood. Jurat omitted in printing.*

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

INTERBOROUGH RAPID TRANSIT COMPANY, Plaintiff, v. JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York; the MANHATTAN RAILWAY COMPANY; and THE CITY OF NEW YORK, Defendants.	In Equity. No. E 44-225.

ANSWER OF DEFENDANT, THE CITY OF NEW YORK, TO THE COMPLAINT OF THE PLAINTIFF.

The defendant, THE CITY OF NEW YORK, by GEORGE P. NICHOLSON as Corporation Counsel, having appeared herein to challenge the jurisdiction of this Court, and having moved in this Court to strike out portions of the complaint herein, and such motion having been denied; without in any wise waiving its objections to the jurisdiction or to the plaintiff's complaint, for its ANSWER, respectfully shows:

1. Answering "II", it denies that defendant, Manhattan Railway Company is or has been subject to the provisions of the Public Service Commissions Law, and alleges that said Company is not now operating and has not operated since 1903 any railroad within the State of New York.

2. Answering "IV", it alleges that said City of New York is a necessary and proper party to the determination of said issues by reason of contracts with plaintiff and defendant Manhattan Railway Company and its interest in the questions and the subject matter involved in this action, and by reason of its interest in and ownership of various properties, including the railroad known as the Subway Division, and by reason of its right to recapture the leases or terminate the contracts involved in this action.

3. It denies knowledge of the allegations in paragraph "V", except as to the capitalization of the plaintiff, and alleges that the plaintiff has included in its 5% bonds upwards of ten millions thereof that are owned by it in one of its sinking funds.

4. It is without knowledge of the facts alleged in paragraph "VI".

5. It alleges that the lease mentioned in "VII" has other material provisions, and refers to the original thereof.

6. It is without knowledge as to the facts in "VIII", but alleges that no application was ever made to said Transit Commission, or its predecessor for concurrence or approval of said plan.

7. It denies each and every allegation contained in paragraph IX and alleges that such portions of the elevated railroads owned by the defendant Manhattan Railway Company as were constructed after said constitutional provisions took effect were constructed and operated under and

pursuant to certain resolutions, consents or approvals passed or granted by the local authorities of the City of New York vested with power to grant such constitutional consent, which resolutions, consents or approvals are made part of this answer, with the same force and effect as though set forth herein, and the defendant begs leave on the trial to produce the same.

8. It is without knowledge concerning the facts alleged in "X".

9. It is without knowledge concerning the facts alleged in "XI".

10. It is without knowledge concerning the facts alleged in "XII".

11. It is without knowledge concerning the facts alleged in "XIII".

12. It is without knowledge concerning the facts alleged in "XIV".

13. It is without knowledge concerning the facts alleged in "XV".

14. It admits the allegations in subdivisions (a), (b), (c) and (d) of paragraph XVI that the Public Service Commission for the First District made certain orders on August 28, 1908; April 15, 1913, and February 18, 1918, prescribing the form and governing the construction and filing of schedules of fares for passenger service on street railroad corporations subject to the jurisdiction of said Commission but for greater definiteness and certainty, and for the effect of said orders, the defendant begs leave to refer to the three orders so made and mentioned in said paragraph and alleges that said orders of the Public Service Commission for the First District were made under and pursuant to the power vested in said Commission by sect.

28 of the Public Service Commission Law and that none of said orders fixed, prescribed or limited the rates of fare set forth in said schedules.

It denies the allegations contained in subdivision (h) of said paragraph XVI that by operation of the provisions of the Public Service Commission Law and of the said orders made by the said Commission the plaintiff was required and obligated under penalties, to observe and charge, demand and collect a rate of five cents per passenger and was prohibited under penalties from charging any greater or different compensation for transporting passengers than five cents and alleges that the fare chargeable by plaintiff on its said elevated railroads was fixed at the rate of five cents per passenger by the Elevated Extension Certificate, granted by the Public Service Commission on March 19, 1913, and that the granting and acceptance of said Certificate constituted a contract voluntarily entered into between the plaintiff and the defendant City of New York.

15. It denies the allegations in paragraph XVII that said rate of fare of five cents per passenger has become or was during 1926 and 1927 or now is or will continue to be unreasonable, inadequate and confiscatory of property used and useful in the business of transporting passengers upon the said elevated lines and that the said five-cent fare has deprived and does now deprive and will continue to deprive the plaintiff of a reasonable rate upon the fair present value of such property, contrary to the Constitution of the State of New York and of the United States and alleges the rate of fare of five cents chargeable by said plaintiff was fixed by said contract, and that said rate of fare so fixed does not contravene the provisions of the Constitution of the State of New York nor the Constitution of the United States. It

is without knowledge as to the other allegations contained in paragraph XVII.

16. It denies the allegations of paragraph XVIII of the complaint, and leaves the plaintiff to its proof; but alleges that whatever a reasonable rate of return may be upon the value of property used in the public service, it has no relevancy, force or effect at least insofar as concerns the above entitled suit in equity, to the return to this plaintiff upon value of its property comprising the lease of the said elevated railroads used in the public service for the reason that the fare chargeable by it is fixed by the said contract.

17. It denies the allegations contained in paragraph XIX that the maximum rate of five cents now chargeable by the plaintiff on its said elevated railroads has been for more than seven years, and now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered, and during said period has been and now is and will continue to be unjust, unreasonable and confiscatory of the plaintiff's property, and has been and is and will continue to be insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the plaintiff in the operation of said elevated lines and devoted to public service and alleges that the sole property of the plaintiff upon which it has the right to receive a fair return is the lease of the said elevated railroads, and further alleges that the only rate of fare which the plaintiff may charge upon said elevated railroads is the fare of five cents fixed and prescribed in said contract.

It denies the allegation contained in said paragraph XIX that the enforcement of such maximum fare of five cents contravenes the guarantees of the 14th Amendment of the Constitution of the United States, and of sect. 6 of

art. 1 of the Constitution of the State of New York, for the reason that said rate of five cents is fixed by said contract.

It is without knowledge concerning the other allegations of said paragraph XIX.

18. It admits each and every allegation contained in paragraph XXI of the complaint except that the plaintiff would be irreparably damaged by the five-cent fare or by reason of the enforcement of the penalties or the multiplicity of suits to which it might be subjected by reason of its acts set forth in said paragraph, and that it would be without adequate remedy at law each of which allegations defendant denied, and alleges that said five-cent fare is fixed by contract and whatever suits the plaintiff would be subjected to in the event of its charging a greater rate of fare than five cents would be by reason and because of its own violation of the said contract.

19. It denies that the Mayor, or any other officer of the City of New York ever announced or declared, or had any intention of enforcing any rate of fare against the plaintiff that is confiscatory as alleged in "XXII"; on the contrary the defendant alleges that it is the intention of said officers, and has been so declared and announced, to require the plaintiff to abide by the obligations of the contract between the plaintiff and the defendant; and this defendant denies that the plaintiff suffers daily or otherwise, confiscation from the continuance of any rates or limitations thereon, and alleges that on the contrary the plaintiff has flouted the obligations of its contracts with this defendant, annexed to this answer.

20. It denies each and every allegation contained in paragraph XXIII, and alleges that the five-cent rate of fare chargeable by plaintiff is fixed by the voluntary contract hereinabove named and referred to.

21. In answer to the allegations of paragraph XXV the defendant realleges each and every allegation contained in paragraphs 1 to 20 both inclusive, of this answer, with the same force and effect as if the same were each here again repeated and set out.

22. It admits each and every allegation contained in paragraph XXVII but for the greater definiteness and certainty begs leave to refer to the said Certificate for Additional Tracks and said Certificate for Elevated Railroad Extensions named and referred to in said paragraph.

23. It denies each and every allegation contained in paragraph XXVIII, and alleges that such elevated railroad extensions were constructed and are operated under and pursuant to certain resolutions, consents or approvals passed or granted pursuant to the provisions of Section 18 of Article III of the Constitution of the State of New York by the local authorities of the City of New York vested with power to grant such resolutions, consents or approvals, which resolutions, consents or approvals are made a part of this answer, with the same force and effect as though set forth herein, and the defendant begs leave on the trial to produce the same.

24. It admits each and every allegation contained in paragraph XXIX, but it alleges that the Elevated Extension Certificate, the fare provision of which is set forth in said paragraph, requires and provides that the plaintiff shall not only charge a fare of five cents but not more for one continuous trip in the same general direction over the Railroads, being the elevated extensions authorized by that certificate, but also provides that the plaintiff shall charge a fare of not more than five cents over the additional tracks, being the tracks authorized by the Additional Track Certifi-

cate granted to the Manhattan Railway Company referred to in said paragraph XXIX.

25. It admits that the date of execution of the elevated extension certificates, March 19, 1913, was subsequent to the enactment of the statutes specified in 1907 and 1910; it denies that the said Public Service Commission Law conferred any power whatever to regulate rates of fare fixed pursuant to the Rapid Transit Act; it alleges that the approval by the Board of Estimate and Apportionment of such Certificate was as the local authority of the City of New York, as well as in its capacity of the chief governing board of such city. Such approval was also the constitutional consent of the local authority of the City of New York to the construction and operation of the railroads therein provided for. It denies that such constitutional consent was granted separately and apart from such certificate, and it alleges that such consent was a part of a single transaction, whereby the contracts and other certificates annexed to this answer were authorized and executed, and upon the condition as to rates of fare therein specified; and it further alleges that the rates, fares and charges chargeable by the plaintiff, upon such elevated railroads or any part thereof, were thereby fixed as a condition of the constitutional consent of the local authorities of the City of New York for the construction and operation of the railroads referred to therein. Except as so alleged, it denies the allegations in "XXX".

26. It denies each and every allegation contained in paragraph XXXI, and alleges that by reason of the great and added improvements, economies and advancements in the science of operating the rapid transit railroads operated by plaintiff the operating expenses per passenger car-

ried on its railroads have not vastly increased since the date of the making of said contracts, and that the five-cent fare is adequate and will continue to be adequate and sufficient to defray the several charges and provide the return which it was expressly contemplated by the Certificate should be defrayed and provided from year to year during the term of the said grants to the plaintiff and the defendant Manhattan Railway Company.

It alleges that the five-cent fare chargeable by the plaintiff on said Elevated Extensions and Additional Tracks granted to the plaintiff and to the defendant Manhattan Railway Company have been and are fixed by contract voluntarily made and entered into by said plaintiff with the defendant City of New York.

In answer to the reallegation by said plaintiff of each of the allegations of paragraphs XLIV and XLV the defendant realleges each and every of the allegations of paragraphs 36 and 37 of this answer with the same force and effect as if each of the same were here set forth in full.

27. It denies each and every allegation contained in paragraph XXXII, and alleges that the collection or charge of a fare of seven cents per passenger on each the Subway Division and the Manhattan Division would be contrary to and in violation of the contracts heretofore voluntarily made and entered into between the plaintiff and the defendant City of New York, and would yield an unfair and unreasonable return upon the value of the properties owned by the plaintiff and actually in public service and more than a reasonable compensation for the service so rendered.

28. It denies the allegations of subdivisions (a) and (b) of paragraph XXXIII that by action duly taken by its officers and directors in pursuance of power and authority

conferred by law, the plaintiff fixed, determined and established the fare of seven cents per passenger as the rate thereafter to be charged and collected instead of the fare of five cents from each passenger upon each of the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the Company; and that it duly filed, published and posted the tariff sheets referred to in said paragraph. It alleges that said plaintiff had no power or authority to establish an unlawful rate of fare and that the Transit Commission was under no legal duty or obligation to reject said tariff sheets when tendered for filing, and that said Transit Commission had the right to follow its due and regular procedure with respect to the rejection of said tariff sheets, and that said procedure had been adopted and was being followed at the time this action was instituted, and that the failure of said Transit Commission to reject said tariff sheets when tendered for filing did not in any way legalize or recognize the legality of said schedules or the lawfulness of the rate fixed therein.

It further alleges that the charge or collection by the plaintiff of a fare in excess of five cents would be contrary to and in violation of the said contracts.

It denies each and every allegation contained in subdivision (c) of said paragraph, and alleges that the seven cent fare fixed in said tariff schedule sheets had no force or effect, was illegal and void, and contrary to and in violation of the provisions of the said contracts.

29. It admits the allegation contained in subdivision (a) of paragraph XXXIV that plaintiff filed an application to the said Transit Commission alleging the grounds and reasons set forth in the quoted paragraphs set forth in said paragraph XXXIV, but denies that said application was

duly filed under the provisions of Sect. 29 of the Public Service Commission Law and in accordance with the well-established practice of the Transit Commission and the Public Service Commission; and alleges that said application was invalid and void, and of no force and effect in that it contained and provided for the rate of fare of seven cents in violation of and contrary to the provisions of the said contracts fixing a rate of fare of five cents, and that by reason of said contracts the said Transit Commission had no power, authority or jurisdiction to entertain or grant such application for the reason that the fare contained in said application was contrary to and in violation of said contracts.

It admits the allegation contained in subdivision (b) of said paragraph that the Transit Commission took or announced no action with respect to said application during the five days after the filing thereof, but denies that such application was duly filed with the Transit Commission and alleges that the Transit Commission was under no duty or obligation to take and announce any action on said application during said five day period. It denies the allegations of said subdivision (b) that steps to oppose, obstruct, delay and prevent the going into effect of the plaintiff's said schedules of increased fares were taken by the defendant City of New York and by the defendant members of the Transit Commission up to the time of the commencement of this action.

It denies the allegations of subdivision (c) of said paragraph and alleges that the plaintiff has not in this complaint shown any facts as to the confiscation of its property.

30. Answering paragraph XXXV the defendant realleges each of the allegations set forth in paragraphs 1 to

17 inclusive of this answer with the same force and effect as if each of the same were herein again repeated and set out.

31. It denies that the operation of the railroads owned by the City of New York and the charges thereon are subject to the exercise of regulatory powers of the State of New York other than as provided and prescribed in the Rapid Transit Act, whereby any contract made pursuant to such statute, and with the approval of the Board of Estimate and Apportionment for said city, shall contain such terms and conditions as to the rate of fare to be charged as shall be previously determined and expressed in such contracts or agreements. It denies that any judicial determination has been made of the tenor or effect alleged in the last paragraph of "XXXVI", and in support thereof this defendant will produce, when, as and if required, the decisions of the highest courts of the State of New York, which cannot be set forth herein without violating the rules prescribed as to the form and contents of an answer in this court.

32. It alleges that the contracts mentioned and referred to in "XXXVII," "XXXVIII," "XXXIX" and "XL" contain other and material provisions than those mentioned by the plaintiff. For the particulars thereof reference is made to such contracts annexed to this answer.

33. It denies that the contents, tenor or effect of the contracts mentioned in "XLI" are correctly or properly set forth therein, and alleges that such contracts contain many and other material provisions; in proof of which reference is had to such contracts annexed to the answer of this defendant.

34. It denies each and every allegation contained in paragraph XLII, and alleges that the railroads operated under Contracts Nos. 1, 2 and 3 were constructed and oper-

ated under and pursuant to certain terms and conditions contained or referred to, in resolutions, consents or approvals passed or granted under and pursuant to the provisions of Section 18 of Article III of the Constitution of the State of New York by the local authorities of the City of New York vested with power to grant such constitutional consents, resolutions or approvals, which resolutions, consents or approvals are made a part of this answer, with the same force and effect as though set forth herein, and this defendant begs leave on the trial to produce the same.

35. It admits that the date of execution of contract No. 3, March 19, 1913, was subsequent to the enactment of the statutes specified in 1907 and 1910; it denies that the said Public Service Commission Law conferred any power whatever to regulate rates of fare fixed pursuant to the Rapid Transit Act; it alleges that the approval by the Board of Estimate and Apportionment of contracts Nos. 1, 2 and 3 was as the local authority of the City of New York, as well as in its capacity of the chief governing board of such city. Such approval was also the constitutional consent of the local authority of the City of New York to the construction and operation of the railroads therein provided for. It denies that such constitutional consent was granted separately and apart from such contracts, and it alleges that such consents was a part of a single transaction, whereby the contracts and other certificates annexed to this answer were authorized and executed, and upon the condition as to rates of fare therein specified; and it further alleges that the rates, fares and charges chargeable by the plaintiff, upon such railroads or any part thereof, were thereby fixed as a condition of the constitutional consent of the local authorities of the City of New York for the construction and

operation of the railroads referred to therein. Except as so alleged, it denies the allegations in "XLIII".

36. It is without knowledge concerning the alleged formulation and adjustment of capital obligations and fixed charges by the plaintiff mentioned in "XLIV".

It denies that any such alleged plan contemplated that revenues from the railroads would be sufficient to meet certain charges incurred by the City of New York and the plaintiff and to provide a fair and reasonable return upon the investment on all of the properties provided by the defendant, the City of New York, and the plaintiff, and it alleges that the principal element in said plan was an excessive and extortionate demand by the plaintiff that it be allowed an excessive and unreasonable return, which had no relation whatever to its investment in the said properties, or any of them, in that as a condition of permitting the enlargement of rapid transit facilities by the City of New York the plaintiff demanded that it receive, among other things, $6,335,000 per year for 49 years, or approximately $310,000,000; and in addition thereto the return to it of principal and interest upon all of the moneys advanced by the said plaintiff for the said purpose, and only because the defendant, the City of New York, could so obtain relief from the then grossly inadequate transit facilities, did it consent to such demands and that the moneys so demanded should be deducted by the plaintiff from the revenues of such railroads in the manner provided in the contracts annexed to this answer; that the plaintiff in violation of its contract obligations with this defendant enormously increased the cost of construction and equipment of such railroads, and postponed the time for the beginning of operation thereof in the lease; all as more particularly hereinafter set forth

in this answer; and thereby increased the cost of operation thereof, notwithstanding which, however, the plaintiff has deducted and received from the revenues of such railroads since January 1, 1919, sums materially in excess of those demanded by the plaintiff and specified in said contracts; all of which is more particularly hereinafter set forth in this answer. Except as so explained, defendant denies each of the allegations in "XLIV".

37. It is without knowledge of the alleged facts in "XLV".

38. It denies that the Public Service Commission has construed, or the Public Service Commission Law requires and compels the plaintiff to observe such fare of five-cents, as alleged in "XLVI(c)"; and this defendant alleges that plaintiff is required and compelled to observe such fare by reason of the contracts and certificates annexed to this answer.

39. It is without knowledge concerning the facts alleged in "XLVII".

40. It is without knowledge concerning the facts alleged in "XLVIII".

41. It is without knowledge concerning the facts alleged in "XLIX".

42. It is without knowledge concerning the facts alleged in "L".

43. It is without knowledge concerning the facts alleged in "LI".

44. It denies each and every of the allegations contained in paragraph LII, and alleges that the five cent fare now chargeable by the plaintiff on its subway division is fixed and contained in said Contracts Nos. 1, 2, and 3, voluntarily made and entered into between the plaintiff and the

defendant City of New York; and that such rate of fare does not contravene the guarantees of the 14th Amendment of the Constitution of the United States or of Section 6 of Article 1 of the Constitution of the State of New York.

45. Answering paragraph LIII the defendant realleges each and every allegation contained in paragraphs 27 to 29 each conclusive of this answer, with the same force and effect as if each of the same were herein again repeated and set out.

46. It admits each and every allegation contained in paragraph LIV of the complaint, except that the plaintiff would be irreparably damaged by reason of the enforcement of the penalties or the multiplicity of suits to which it might be subjected by reason of its acts set forth in said paragraph; and that it would be without adequate remedy at law. Defendant alleges that whatever damages or penalties the plaintiff would be subjected to in charging a greater rate of fare than five cents would be by reason of and because of its own violation of the contract fixing a rate of five cents voluntarily entered into between the plaintiff and the defendant City of New York.

47. It denies each and every allegation contained in paragraph LV of the complaint, and alleges that the five cent fare chargeable by plaintiff was fixed by Contracts voluntarily made and entered into between the plaintiff and the defendant City of New York; and that the orders and proceedings of the said Transit Commission with relation to the construction of station platform extensions were made or had by said Commission under powers reserved to it by said contract.

48. Answering paragraph LVII the defendant realleges each and every of the allegations set forth in para-

graphs 1 to 47 both inclusive, of this answer with the same force and effect as if each of the same were herein again repeated and set out.

49. It is without knowledge concerning the facts alleged in "LVIII".

50. It is without knowledge concerning the facts alleged in "LIX".

51. It is without knowledge concerning the facts alleged in "LX".

52. It is without knowledge concerning the facts alleged in "LXI".

53. It denies the allegations in "LXII" and alleges that the revenues derived under the contracts and certificates annexed to this answer provide an adequate and proper return in accordance with the terms thereof, and so far as they relate to the subway system, a highly remunerative return; as more particularly appears hereinafter in this answer.

54. It denies the allegations of paragraph LXIII and alleges that the fare of five cents chargeable by said plaintiff was fixed by contract voluntarily entered into between the plaintiff and the defendant, The City of New York, and that the charging of the rate of fare as fixed by said contract does not contravene the provisions of Article I, Section 6, Constitution of the State of New York, or the Fourteenth Amendment, Constitution of the United States.

55. I denies that the Mayor, or any other officer of the City of New York ever announced or declared, or had any intention of enforcing any rate of fare against the plaintiff that is confiscatory, as alleged in "LXIV"; on the contrary the defendant alleges that it is the intention of said officers, and has been so declared and announced, to require

the defendant to abide by the obligations of the contract between the plaintiff and this defendant; and this defendant denies that the plaintiff suffers daily or otherwise, confiscation from the continuance of any rates or limitations thereon, and alleges that on the contrary the plaintiff has flouted the obligations of its contracts with this defendant, annexed to this answer.

56. Answering paragraph LXV, the defendant realleges each of the allegations contained in paragraphs 1 to 55 both inclusive, of this answer with the same force and effect as if each of the same were here again repeated and set out.

57. It is without knowledge concerning the facts alleged in "LXVI".

58. It is without knowledge concerning the facts alleged in "LXVII".

59. It is without knowledge concerning the facts alleged in "LXVIII".

60. It is without knowledge concerning the facts alleged in "LXIX".

61. It is without knowledge concerning the facts alleged in "LXX".

62. It is without knowledge concerning the facts alleged in "LXXI".

Further Answering This Defendant Shows:

A. For many years prior to 1894 the matter of adequate and proper transit facilities in the City of New York was a question of great public concern. In furtherance of the provision of such facilities the Legislature, by Chapter 752 of the Laws of 1894, required the Board of Rapid Transit Commissioners to cause the question whether such railway or railways shall be constructed by the City, and at the public expense, to be submitted to the vote of the qualified

electors of the City within which such railway or railways were to be constructed, and at least thirty days prior to the next general election to file with the Election authorities a request for separate ballots, to be printed and supplied by such electors, one-half of which to read: "For municipal construction of Rapid Transit road" and the other half to read: "Against municipal construction of Rapid Transit road". Such Act further required the necessary steps to be taken in the conduct of the election and the canvass of votes, and further provided:

> "And the said railway or railways shall be constructed by the said City at the public expense if it shall be found from such statements so filed that there is a majority of the votes so cast in favor of such municipal construction."

It was further enacted that in case favorable action was taken upon such referendum it should

> "be the duty of said Board of Rapid Transit Railway Commissioners within thirty days after the official declaration of the said voting to proceed to construct the said railway or railways and to make and let all contracts required for the performance of the work necessary to be done and performed in and about the construction thereof."

At the next ensuing general election the referendum received favorable consideration by the electors.

B. While the Board of Rapid Transit Commissioners were endeavoring to carry into effect the project for municipal construction of rapid transit railways, the constitutionality of the Rapid Transit Act of 1894 was assailed, at the suit of Sun Printing & Publishing Company and others, as

taxpayers, for the purpose of enjoining the City of New York from employing its funds in the construction of the proposed rapid transit railways. The constitutionality of the Act was upheld in all courts, the final decision being rendered by the Court of Appeals on March 23, 1897.

Notwithstanding this, Manhattan Railway Company, one of the defendants herein, and other railway corporations then existing, continued their attitude of refusal to provide new facilities of their own or to enter into a contract with The City of New York for the construction of new lines under the provisions of the Rapid Transit Act.

C. By Chapter 378 of the Laws of the State of New York, of 1897, provision was made to unite in one municipality, under the corporate name of The City of New York, the various counties lying in and about New York Harbor, including the City and County of New York, the City of Brooklyn, and the County of Kings, the County of Richmond, and part of the County of Queens, and to provide for the government thereof.

As a result of the consolidation of these municipalities into Greater New York and the assumption of their outstanding debt by the Greater City, it was found impossible for The City of New York to provide sufficient funds for the construction of new rapid transit railways and for other necessary public improvements. In order to meet this condition, the State Legislature took the necessary steps for submission to the people of an amendment to the State Constitution, so as to exclude from the debt limitations of the City the debts of the separate counties embraced therein; the effect of which was to increase the debt incurring power of The City of New York by about $30,000,000. Such amendment to the Constitution received the affirma-

tive vote of the people and was adopted at the election held in November, 1899.

D. Thereafter, the Rapid Transit Commissioners published an invitation to contractors for bids for the construction, equipment and operation of the first municipally constructed rapid transit railway, the bids for which were opened on January 5, 1900. Before any action could be taken upon such bids, it was found necessary to adjourn the consideration thereof, pending the amendment of the Greater New York Charter in relation to the authorization of Rapid Transit bonds and the form of certificate necessary to make the contract binding upon The City of New York. Immediately upon the introduction of a Bill for this purpose, the then Governor of the State, Hon. Theodore Roosevelt, sent an emergency message to the Legislature, and in response thereto such Bill was passed on the following day, and having been accepted by the Mayor of The City of New York, was approved by the Governor and became a law on February 8, 1900.

E. As a consequence of such action, the necessary steps were taken resulting in an agreement dated the 21st day of February, 1900, between The City of New York and John B. McDonald, for the construction and operation of the Manhattan-Bronx Rapid Transit Railroad, known as Contract No. 1, which said agreement is a public record, and a copy thereof is deemed to be hereunto annexed marked Exhibit "A" and made a part hereof.

Such contract has from time to time been modified and supplemented by the following agreements, among others, each of which said agreements is a public record, and a copy thereof is deemed to be hereunto annexed and made a part hereof, as follows:

	Date	*Subject*
(1)	February 21, 1900	Modification as to security
(2)	June 21, 1900	Fort George Change of Route
(3)	January 10, 1901	City Hall Change of Route
(4)	May 2, 1901	Broadway Terminals
(5)	April 10, 1902	Correcting typographical error
(6)	July 10, 1902	Assignment to Lessee
(7)	July 21, 1902	Bergen Avenue (149th Street) Change of Route
(8)	January 16, 1903	Lenox Avenue Extension
(9)	July 16, 1903	Fort Lee Ferry Extension
(10)	July 16, 1903	Connection with Manhattan Railroad
(11)	November 24, 1903	Continuing Bond
(12)	March 24, 1904	Third Track North of Fort George
(13)	November 3, 1904	Computation of Rentals
(14)	December 1, 1904	Return of Contractor's Deposit
(15)	July 9, 1906	Outlet Chambers and Fan Houses
(16)	November 1, 1906	Van Cortlandt Park Extension
(17)	April 5, 1907	Third Avenue and 149th Street Station Entrances
(18)	June 27, 1907	Additional Tracks at 96th Street
(19)	June 27, 1907	Ventilation and Cooling
(20)	December 12, 1907	Arbitration Provisions
(21)	June 1, 1908	Adjustment of Park Avenue Litigation
(22)	April 21, 1909	Additional Station Facilities at 181st Street and St. Nicholas Avenue Station
(23)	August 3, 1909	Additional Station at Intervale Avenue
(24)	August 9, 1909	Additional Station at 191st Street
(25)	November 30, 1909	Zoological Park Station
(26)	January 18, 1910	Lengthening Station Platforms
(27)	December 9, 1910	Additional Entrances and Exits
(28)	December 30, 1911	Adjustment of Controversy over Extra Work and Omissions
(29)	July 11, 1911 (2)	Reduction of Construction and Equipment Bond and consent to and Assignment of Construction Provisions to Rapid Transit Subway Construction Company.
(30)	January 30, 1913 (2)	Reduction of Continuing Bond and consent to and Assignment of Construction Provisions to Interborough Rapid Transit Company.

F. After certain rights and liabilities under said Contract #1 passed by assignment to Interborough Rapid Transit Company, the plaintiff herein, and prior to the completion or beginning of operation of any part of said Manhattan-Bronx Rapid Transit Railroad, said Interborough Rapid Transit Company, under date of April 4, 1903, entered into an agreement with the defendant Manhattan Elevated Railroad Company, whereby it leased the lines of the latter for 999 years and guaranteed to each of the

stockholders thereof a return of 7% per annum upon each of their shares of stock in the said Company for such period, the capital stock of which Company was and is $60,000,000.

The necessity for additional rapid transit facilities having become evident even before the completion and opening of the Manhattan-Bronx Rapid Transit Railroad, under date of July 21, 1902, a further agreement was made between The City of New York and the Rapid Transit Subway Construction Company, for the construction and operation of Brooklyn-Manhattan Rapid Transit Railroad, which said agreement was subsequently known as Contract #2, and certain rights and liabilities under which passed by assignment to said Interborough Rapid Transit Company. Said agreement is a public record, and a copy thereof is deemed to be annexed hereto marked Exhibit "B", and made a part hereof, together with the agreements modifying and supplementing the said agreement, as follows:

	Date	*Subject*
(1)	September 11, 1902	Passenger Traffic Agreement
(2)	December 23, 1904	Substitution of Continuing Bond for Continuing Deposit
(3)	January 26, 1905	Borough Hall Change of Alignment
(4)	June 9, 1905	Additional Tracks on Fulton Street and Flatbush Avenue
(5)	August 10, 1905	Assignment to Lessee
(6)	December 14, 1905	Computation of Rentals
(7)	June 18, 1908	Shuttle Service, Bowling Green to South Ferry
(8)	September 22, 1908	Return of Portion of Cash Deposit
(9)	January 18, 1910	Lengthening Station Platforms
(10)	September 20, 1910	Additional Entrances and Exits
(11)	January 30, 1913 (2)	Reduction of Continuing Bond and consent to and Assignment of Construction Provisions to Interborough Rapid Transit Company.

G. In 1906, persons interested in Interborough Rapid Transit Company and Metropolitan Street Railway Company, a corporation owning or controlling an extension

system of street railways in the City of New York, procured the organization, under the laws of New York, of a corporation known as Interborough-Metropolitan Company, one of the purported purposes of which was to have a unified system or control of transit facilities in the City of New York, and which said corporation acquired all or practically all of the shares of stock of Interborough Rapid Transit Company, by issuing in exchange therefor $200 in par value of its 4½% collateral trust bonds and $99 in par value of its common stock for each share of said Interborough Rapid Transit Company; and by the issuance and exchange of its stock and bonds acquired control of the street railway system of the Metropolitan Street Railway Company.

The total issue of securities of the Interborough-Metropolitan Company was $225,000,000, consisting of $70,000,000 of 4½% Collateral Trust Bonds, $55,000,000 preferred stock and $100,000,000 common stock. This corporation ended its career in receivership and dissolution and the investment of the public in its securities was completely wiped out.

In the latter part of 1907, in the United States District Court, for the Southern District of New York, in a friendly action brought for such purpose, a Receiver was appointed of the Interborough-Metropolitan Company, which, prior thereto, had depleted its assets by the payment of dividends which were never earned, which payments were made the basis of the marketing of its securities. Subsequently, Interborough-Metropolitan Company was reorganized into what was known as the Interborough Consolidated Corporation. Substantially the only difference be-

tween those companies was that in the latter the common stock had no par value, and by reason of its being carried at a nominal figure of $5 per share, $95,000,000 of liabilities were written off.

H. In the period and while the transactions hereinafter mentioned were being had and carried into effect, and in particular in the years 1910, 1911 and 1912, the foregoing securities were outstanding, and the Board of Directors of the Interborough Rapid Transit Company, plaintiff herein, was dominated and entirely controlled by the aforesaid Interborough-Metropolitan Company, and its successor, Interborough Consolidated Corporation.

I. For several years prior to 1913 the necessity for additional rapid transit facilities in the City of New York continued to be most urgent and a matter of great public concern. From time to time the Rapid Transit Act was amended so as to enlarge the powers of the City of New York in relation to Rapid Transit Railways and the use of public money and property for such purposes. Among such amendments are those hereinafter mentioned.

Pursuant to action of the Legislature taken in the years 1908 and 1909, the Constitution of the State of New York was amended in 1909 so as to further increase the power of The City of New York in relation to Rapid Transit facilities, by providing that the debt incurred for such purpose by The City of New York, under conditions specified in the Constitution, should be exempted from the constitutional limitations upon the power of the City to incur debt.

J. At a meeting of the Board of Estimate and Apportionment of The City of New York, held on December 10, 1910, the following proceedings were had and taken:

The following matter not on the calendar for this day was considered by unanimous consent:

(The Mayor, at this point, appeared at the meeting and requested the President of the Board of Aldermen to continue to preside.)

Rapid Transit Railways.

Extensions to the existing system; also third-tracking and constructing additions to the 2d, 3d and 9th Avenue Elevated roads, and the completing and putting in operation of the Steinway tunnel.

The Comptroller presented the following:

State of New York, Public Service Commission for the First District, New York, December 20, 1910.

To the Board of Estimate and Apportionment of the City of New York:

Gentlemen—Under date of December 5th, the Interborough Rapid Transit Company submitted a proposition for extensive additions to its subway system, a copy of which is transmitted herewith. This proposition, provided certain features not now satisfactory can properly be adjusted, the Commission is prepared to accept.

In submitting this proposition, the Interborough Company stated that it was conditional upon favorable action upon its proposition to third-track and build additions to its 2nd avenue, 3d avenue and 9th avenue elevated roads and to complete and put in operation the Steinway Tunnel. This elevated railroad proposition is generally treated of in its letter of June 10, 1910, a copy of which is also transmitted herewith. The matters embraced in the proposition of June 10, with the exception of the one referring to the Steinway Tunnel, have reached a point where they have been embraced in draft contracts upon which a public hearing is to be held on December 23, and which, when acted upon by the Commission, will be submitted to you for your

approval and consent in accordance with the provisions of the Rapid Transit Act.

The fundamentals of the elevated railroad proposition are:

1. *Lines.*

(a) The third-tracking of the 2nd, 3d and 9th avenue elevated lines.

(b) The extension of the 2nd avenue line over the Queensboro Bridge into the Borough of Queens.

(c) The extension of the 3rd avenue line through Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Brook avenue.

(d) The extension of the 3rd avenue line along Webster avenue, White Plains road and other streets to Becker avenue or 241st street.

(e) The extension of the 9th avenue line along River and Jerome avenues and other streets to Woodlawn Cemetery.

2. *Terms.*

(a) The construction to be done and interest in property provided wholly at the cost of the Interborough Company and the Manhattan Railway Company. Such cost is estimated at about thirty-two million ($32,000,000) dollars.

(b) A term for the third-tracking equal to the term of the main franchise with the right reserved to the city to terminate such third-tracking right at any time after ten years from the beginning of operation and a term for the elevated extensions not to exceed eighty-five years, subject to termination after ten years.

(c) Rentals to be readjusted at the end of the first twenty-five years and thereafter at intervals of twenty years. The rate for the first twenty-five years to be two per cent of the increased gross receipts at certain stations in the case of the third-tracking and two per cent of the gross receipts of the extensions.

(d) The Steinway Tunnel to be turned over to the city without cost and to be operated by the Interborough Company as a part of the Manhattan-Bronx subway under Contract No. 1 with free transfers, the city to pay one and a half million ($1,500,000) dollars for the extension of the Tunnel, such amount to be repaid as rental, as provided in respect to the present subway in Contract No. 1.

Assuming that certain features of the proposition of December 5 can be adjusted and the details satisfactorily worked out, the Commission believes the acceptance of these general propositions for subway construction to be for the best interests of the city for the following reasons:

(1) The Interborough Company agrees to a provision obligating it to operate future extensions when and as constructed by the city, upon terms to be specified. This is a proposition upon which the Commission has consistently insisted and of paramount importance if the city subways are to be city subways in fact, as well as in name. Under the present contracts, the city could not compel the operation of additions to its subways without the acquiescence of the Interborough Company. If such a provision had been in Contract No. 1, for instance, steps could have been taken from time to time to relieve congestion by extensions to the present system. Accordingly, in the future the Commission will be able to lay out not only new systems, but also such additions to the present one as traffic conditions warrant. For example, there could be added the Broadway line in Brooklyn, additional tunnels under the rivers and additional trunk lines, should their construction be deemed necessary.

(2) The provisions of the amendments to the Rapid Transit Act proposed by the Commission in 1909 will apply to the extensions, and the city will have the right to take them over at any time after ten years after operation begins by paying an amount to be ascertained as provided in the contracts, but not to exceed the cost of the Interborough

plus fifteen per cent, and to decrease during the term in accordance with the contract provisions. Under this provision in the case of the subway extensions, the city would have the power after the expiration of ten years from the beginning of operation to take over the extensions, and by the addition of a few connecting links, have an entirely distinct and comprehensive subway system.

(3) The Interborough is at once to commence construction in all boroughs, so that some of the lines may be connected with its present system and put into operation within a short time, thus affording the quickest measure of relief.

(4) Arrangements can also be made under the subway proposition for the leveling of the subway terms, so that the entire system, comprising both the present subway and the extensions, will revert to the city at the same time. It will be to the advantage of the City to have all parts of the system revert to it at one time.

(5) For the expenditure of $53,000,000, plus the necessary amounts for real estate for right of way, the city will become the owner of additional subway facilities embracing 82.4 miles of straight single track, the total estimated cost of which for construction and equipment is $128,000,000. The title to the extensions, however, without reference to the relative participation of city and private funds will be in the city in precisely the same manner as if built wholly with City funds.

(6) The Interborough proposition involves a single five-cent fare and free transfers. The subway extensions embrace practically all of the Tri-Borough system, with the exception of the portion of the Lexington avenue route south of 42nd street, for which the west side line down 7th avenue may be deemed a substitution, the Canal street route, for which an under-river crossing is substituted, and the Broadway route in Brooklyn. The Jerome avenue branch of the Tri-Borough is to be taken over as part of the elevated extensions. In addition to what is provided in the Tri-

Borough, there are provided in this subway proposition the White Plains road extension in The Bronx and the Eastern Parkway extension in Brooklyn, to be operated as a part of the present subway system.

(7) The Pennsylvania Railroad station will be connected with the main transit system in the city.

(8) In addition to providing improved transit facilities in Manhattan, The Bronx and Brooklyn, the elevated proposition embraces two important connections with the Borough of Queens,—namely, by means of the Steinway Tunnel and the Queensboro Bridge.

When the Commission took office, the objectionable features of the Elsberg Bill of 1906 were still in effect and the City's borrowing capacity was too small to permit of important subway extensions with city money. To relieve the situation, the amendments to the Rapid Transit Act proposed by the Commission were enacted in 1909, having, as important features, the provision for terminating contracts at any time after ten years from the beginning of operation and the provision for the equal division of profits, upon both of which the present Interborough propositions are based. In addition, an amendment to the State Constitution exempting self-sustaining rapid transit bonds from the debt limit was secured, which became effective during the present year. With this legislation the City was in a position to proceed with rapid transit extensions.

Because of its control of the subway lines in Manhattan, The Bronx and Brooklyn and of the elevated lines in Manhattan and The Bronx, the Interborough Rapid Transit Company was in position by needed additional construction to give the maximum of relief, and the Commission did its utmost to induce that company to submit a proposition consonant with the large return which it was receiving from the present City subway. These efforts were unsuccessful—the only proposition submitted by the Interborough Company prior to that herewith transmitted being impossible of

acceptance. Unable to secure to co-operation of the Interborough Company, the Commission, after due opportunity for those interested in the subject to be heard, undertook the preparation of plans and forms of contracts, for the so-called Tri-Borough Rapid Transit Railroad, which is made up of a number of routes from time to time submitted to and approved by the Board of Estimate and Apportionment. An attempt to enlist private capital in the construction of this system was unsuccessful—no bids being received on that form of contract when the time for their receipt expired on October 20. A large number of bids were, however, received on October 27 for the construction of a major part of the system by sections at municipal expense. While these bids were under consideration, and while the matter of future rapid transit was, by reason of probable early action, a subject of widespread discussion, a proposition was submitted by the Hudson and Manhattan Railroad Company for the equipment and operation of the Tri-Borough system, with some modifications. That offer, which has expired by its own time limit, is an indication that an operator may be found to equip and operate the Tri-Borough system when constructed. If, for any reason, certain features of the details of the present proposition cannot be adjusted, and it be determined to construct the Tri-Borough system, it may be safely assumed that when the time comes there will be bidders to equip and operate it upon satisfactory terms.

The Commission will press the present negotiations with the Interborough Company to a conclusion and embody them in contracts and plans as rapidly as possible, unless your Honorable Board should consider the proposition as generally outlined open to objections which would render your consent impossible when the forms of contracts are finally submitted. Although the principal portions of the routes are already laid out, certain connections have not yet been legalized, and it will take considerable

time to perfect them. The Commission respectfully requests that, if there are objections on your part, it be advised at as early a date as possible. If the present propositions are disapproved, the contracts for the construction of the Tri-Borough system, which are now awaiting award, can promptly be acted upon and construction work immediately begun. The Commission will be pleased to receive a statement of the position of your Honorable Board on this subject and will be ready at any time that may be convenient to confer with your Honorable Board, or any Committee thereof.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,
W. R. WILLCOX, Chairman.

Interborough Rapid Transit Company, 165 Broadway, New York, June 10, 1910.

Dear Sir—Our further study of the rapid transit situation in this city persuades us that with the greatest despatch upon a part of the city authorities consistent with duty, some time must yet lapse before the actual construction of new subways can be commenced, and that it cannot reasonably be expected that such subways will be available to relieve the traffic congestion of this city within a period of from at least five or six years from the present time. This circumstance, the ever increasing pressure upon the existing subway and elevated lines, particularly the excessive crowding upon the east side elevated roads, and the passage by the recent Legislature of a bill which, if approved by the Governor, will enable the improvement of the elevated lines to proceed without undue delay incident to the settlement of property damages, lead us to now propose the construction of the following elevated railroad improvements:

1. *Second Avenue Line.*

The completion of the third track from City Hall station to 129th street.

Queens County Extension—The construction of a two-track extension from the Second Avenue elevated line across Queensboro Bridge to the Queensboro Bridge plaza. This extension when constructed will enable us to operate through elevated trains from Long Island City to Brooklyn Bridge and South Ferry, and afford the citizens of Queens the benefit of free transfers upon the payment of a single five-cent fare, to all parts of the elevated system in Manhattan and The Bronx.

2. *Third Avenue Line.*

The completion of the third track from Pearl and Chambers streets to about 147th street, with the privilege of thereafter extending the third track to the present terminus of the 3d avenue line at Bronx Park. This extension involves the construction of a new bridge across the Harlem River, and, because of the junction at the Harlem River with the 2d avenue line, the construction of a four-track line between the Harlem River and 145th street.

We propose to build at this point, through private property and public streets, not at present occupied by elevated structures or covered by any franchises, a two-track connection from about 143d street, through Willis and Bergen avenues, to a connection with the West Farms division of the subway at or about Brook avenue. This connection will enable a diversion of West Farms trains to the 2d and 3d avenue line, and will relieve the pressure upon the Broadway and Lenox avenue divisions of the subway.

Becker Avenue Extension—The extension of the 3d avenue line from Pelham avenue through Webster avenue, Gun Hill Road and White Plains avenue, to Becker avenue, as a two-track line, with the privilege of hereafter building a third track from the intersection of White Plains avenue and Gun Hill Road to Becker avenue, in order to provide for the better terminal facilities that will be essential to the satisfactory operation of the enlarged elevated system.

3. *Ninth Avenue Line.*

The completion of the third track from Rector street to 155th street.

Jerome Avenue Extension—The construction of a two and three-track elevated road from about 149th street and 8th avenue across McComb's Dam Bridge to about 162d street and River avenue, thence up River and Jerome avenues to about 194th street, with the privilege of hereafter constructing a third track between 162d and 194th streets. The portion of this line from 162d street and Jerome avenue north may either be built as an elevated extension to be jointly used by the new east side subways, or may be built by the city as a subway extension under a traffic arrangement whereby it may be used by the elevated road. If built as a subway extension, work should be first begun upon it, so that the structure would be completed in time to operate in connection with the other elevated improvements hereinbefore referred to.

The cost of the construction and equipment of the above extensions may be roughly estimated at approximately $30,000,000, and this, of course, will be entirely borne by the Manhattan Railway Company and its lessee, the Interborough Rapid Transit Company, with the possible exception of that part of the Jerome avenue line north of 162d street. In view of the very heavy special franchise taxes already paid by the Manhattan Company, aggregating on the basis of the last assessment $46,000 a mile; the cost of acquiring additional easements from abutting property owners over virtually the whole system; the circumstance that this new franchise must be largely confirmatory of what are apparently valid and surviving grants already possessed by the company; and that the construction of the third tracks will not occupy any substantially greater portion of the surface of the streets than is now occupied by the existing structure; it would seem only fair that your Commission should fix the rental for the proposed new third tracking

grant at some very moderate sum, certainly not exceeding two per centum of the increased receipts from stations served by the new third track.

If the enabling act now before the Governor shall be approved and our present proposition should be accepted, we should expect to begin work at once. The advantages of allowing us to immediately proceed may be summarized as follows:

(a) The third-tracking improvements can be put into service within approximately two years, thus bringing a by no means inconsiderable rapid transit relief to the city within at least three years less time than can be obtained by subway construction.

(b) The pressure upon the 3d avenue line, the travel on which is now more congested than upon any of the rapid transit lines in the city, will be relieved.

(c) If the third track be completed upon the 2d and 3d avenue lines, it will be possible to divert a considerable number of the trains now using the West Farms division of the subway to the 2d and 3d avenue lines. This in turn would give a superior rapid transit service to the citizens of The Bronx, and would at the same time enable this company to materially increase the train movement on the upper Broadway division of the subway; improve the congested conditions along Lenox avenue; and thus give a more efficient service to the upper portion of Manhattan.

Steinway Tunnel.

We are aware that in our earlier conferences you urged upon us the desirability of putting the Steinway Tunnel in operation at the earliest possible moment; and that many months ago we assured you that we would be glad to do so if proper legislation could be obtained. There was passed at the recent session of the Legislature a bill, now awaiting final approval, which will make possible the operation of this tunnel. If pursuant to the terms of this act a satisfactory franchise can be obtained from the city authorities

for its operation, we propose, in addition to the foregoing elevated improvements, to complete the construction of this tunnel and to operate it as a part of the existing subway, with open communication between the tunnel and the subway system at or near the Grand Central station. An additional line of rapid transit communication will thus be established, with free transfers, upon the payment of a single five-cent fare, between Long Island City and all parts of Greater New York reached by the existing subway lines.

We would suggest that you kindly arrange for as early a conference as possible to act on this application.

Very respectfully,

T. P. Shonts, President.

Hon. William R. Willcox,
Chairman, Public Service Commission
for the First District, State of New
York, Tribune Bldg., New York City.

Interborough Rapid Transit Company,
165 Broadway, New York.

December 5, 1910.

Hon. William R. Willcox,
Chairman, Public Service Commission
for the First District, State of New
York, Tribune Bldg., New York City.

Sir:—At a time when the city must decide whether its capital available for subway construction shall be invested in an entirely new rapid transit enterprise, or be devoted to perfecting that system of subways the title to which is already vested in the city, it is proper that the responsible public authorities should have before them the most favorable proposal which the lessee of the city's existing subway lines, after full consideration, is able to offer. In our consideration of the subject, we have had in mind not only the routes necessary to afford an efficient service to the city, but changes in the present subway contracts and the addi-

tional obligations that the company will be called upon to assume.

The Interborough Rapid Transit Company, therefore, begs leave to submit the following proposition:

It proposes the construction of the following natural extensions to the present subway:

West Side Lower Manhattan and Brooklyn Extension.

From Times square under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street in Brooklyn, and under Pineapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern Parkway to Utica avenue as a four-track road, and from Utica avenue to Buffalo avenue under Eastern Parkway as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenue, Brooklyn, under Lafayette avenue to Broadway.

East Side Upper Manhattan and Bronx Extensions.

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lexington avenue, thence under Lexington avenue and the Harlem River to a point south of 149th street as a four-track road; thence dividing, with two tracks to a connection, east to Mott avenue station, with the West Farms branch of the existing subway; thence two tracks under Mott avenue, 153d street, and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a connection will be made with the Jerome avenue extension

of the Ninth avenue elevated line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern Boulevard and Whitlock avenue, to a point in private property south of Westchester avenue; thence as a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway at about 179th street, over private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public streets to Bear Swamp road and White Plains road; thence over White Plains road to a connection with the proposed extension of the 3d avenue line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains road and Gun Hill road.

The cost of constructing and equipping the foregoing lines is estimated at $128,000,000. The Interborough Company hereby offers to build and equip the same for the sum of $53,000,000 to be furnished by the City, the City to provide in addition the necessary easements and rights of way, and the company to supply the funds necessary to defray the additional cost of construction and equipment, which, upon the basis of the above estimate, would amount to $75,000,000. The work will be done as "extras" under the terms of the Rapid Transit contract of February 21, 1900, under which the original subway was constructed and is operated, except so far as the terms thereof may be modified by the provisions of this offer; and the lines when constructed and equipped will be operated by the Interborough Company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

1. The net profits from operations, to be arrived at as hereinafter provided, shall be disposed of as follows:

(a) The City to take all net profits for the first five years from the time of beginning operations on any portion of the new subway extensions:

(b) The net profits after five years to be equally divided between the City and the Interborough Company.

2. The net profits shall be determined by deducting from the gross revenue of the extensions charges for the following items, in the order named:

(a) Maintenance of equipment, including an allowance for depreciation;

(b) Maintenance of ways and structures, including an allowance for depreciation;

(c) Traffic expense and cost of conducting transportation;

(d) General and administration expenses;

(e) Taxes, if any;

(f) The actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence and for carrying that portion of the cost of construction not met by the funds contributed by the City and providing a sinking fund of one per centum thereon;

(g) Interest on bonds issued by the City to defray the cost of construction plus one per centum per annum as a sinking fund.

3. The gross operating revenue of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or, if deemed advisable by either the City or the company, from the number of tickets deposited in the chopping boxes on the new extensions or by such other method as upon full consideration may be agreed upon between the parties.

4. If the gross income in any year after providing for the charges above mentioned shall be insufficient to meet the interest and sinking fund upon the construction and

equipment bonds issued by the Interborough Company, the deficit for such period shall be borne by the Interborough Company, and shall not be a cumulative charge against future earnings.

5. If the gross income in any year after providing for all charges above mentioned, including interest and sinking fund upon bonds issued by the Interborough Company to defray the additional cost of construction and equipment, shall be insufficient to meet the interest and sinking fund upon the City's bonds the deficit sustained by the City for such period shall accumulate and be a charge against the future profits before any division thereof shall be effected between the City and the Interborough Company.

6. The City will retain the right, now provided for by law, to take over the extensions at any time after ten years from the time that any portion thereof may be put into operation, upon paying to the Interborough Company, (a) the amount of its investment in construction over and beyond the $53,000,000 supplied by the City, plus 15 per centum, which sum shall decrease as the term continues, so that at the end of the full term of the contract under which the said extensions may be built as extras no amount will be required to be paid by the City, and (b) the then reasonable value of the equipment.

If this proposition be accepted we are prepared to immediately enter into contracts to carry the same into effect. After public bidding, the contracts will be awarded by us under the supervision of your Commission to responsible bidders for the construction of the lines in sections; and construction work thereupon will be commenced in each borough and upon all sections at once. Each part of the road as completed will be immediately opened for operation so that the outlying territory in Brooklyn and The Bronx will have the earliest possible relief and all other lines will be hurried to completion within an estimated period of five (5) years.

We have considered your suggestion that the present subway leases should be so altered that the terms thereof and of all extensions thereto operated by the Interborough Company should end at the same time. Contract No. 1, under which the Manhattan portion of the subway was built, provides for an original term of fifty years, with the right to renewal for additional term of twenty-five years. Contract No. 2, under which the line from the City Hall park to Flatbush avenue in Brooklyn was built, provides for an original term of thirty-five years, with the right to renewal for an additional term of twenty-five years. We are willing, if it can be legally arranged, that these contracts should be so modified that the original terms thereof and of all extensions built as extras under Contract No. 1 should be fixed at forty-nine years from the date of the completion of the extensions, and that the privilege of the renewal terms of twenty-five years should be cancelled.

The Interborough Company also offers to equip and operate, under a lease for a term equal to the unexpired term of Contract No. 1, under which the original subway was built, the 4th avenue subway in Brooklyn, including extensions to Fort Hamilton and Coney Island, when completed, as part of the present subway system for a single five-cent fare, upon the following terms:

The gross earnings of the 4th avenue division, of which a separate account shall be kept between the City and the Interborough Company, shall be ascertained from the tickets deposited at the stations upon the division.

From the gross earnings thus ascertained shall be deducted:

1. (a) All station expenses; (b) Maintenance of way and structures; (c) Damages for accidents happening on the division.

2. Other operating costs to be determined according to unit costs on the Interborough system, upon a car-mileage basis:

(a) Conducting transportation; (b) Maintenance of equipment and depreciation; (c) Cost of power; (d) General and administration expenses; (e) Taxes, if any.

3. After the payment of the foregoing charges, the actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence.

4. From the balance of the income then remaining shall be paid interest and sinking fund upon bonds issued by the City to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid annually by the City, but that portion thereof which represents payments made by the City upon bonds issued by the City as hereinbefore provided for shall accumulate and be a charge against future profits, before any division thereof shall be effected between the City and the Interborough Company.

(5) The net profits remaining after providing for the foregoing charges shall be equally divided between the City and the company.

The right will, of course, be reversed by the City, under existing provisions of law to supervise accounts relating to construction and operation, and to terminate the lease after ten years.

In the event that the foregoing propositions be accepted and incorporated in formal contracts, the Interborough Company will further agree, upon the same terms and conditions as hereinbefore set forth with respect to the operation of the 4th avenue subway, or upon such other terms as may be agreed upon between the City and the company, to operate such additional extensions to the system herein outlined as may hereafter be constructed by the City; provided, however, that the Interborough Company shall not be called upon to operate any extensions the operation of

which would result in a financial loss to the company, unless the City shall undertake to make good such loss.

The proposition herewith submitted is believed to embrace the following advantages over any other now before the City:

1. Citizens of Brooklyn, Manhattan, Queens and The Bronx may be transported upon the enlarged subway system which may best be described as a four-borough system, to any point, including the shopping and theatre districts of Manhattan, for a single five-cent fare; whereas, under any other plan, to obtain a similar advantage in almost every case, an additional fare of five cents would be required.

2. The extensions proposed can all be completed within a period of five (5) years from the time when the right to begin construction is given; whereas, under any other plan now before the City, a longer period for actual construction would not only be required, but the final completion would be further delayed by the inadequacy of the City's debt margin.

3. The plan above set forth is the only plan which limits the City's contribution to subway construction to the funds which the City now has available for subway purposes; thus leaving free for additional extensions, or for such other purposes as the City may determine upon, the funds which will be available in each succeeding year.

4. The City under the plan proposed would have in operation a harmonious subway system, with a through four-track line upon the east side and a through four-track line upon the west side of Manhattan, with suitable extensions to The Bronx and Brooklyn; whereas, under any other plan now under consideration the City would have a duplication of rapid transit service upon the upper and lower east side of Manhattan, the present single line only upon the uptown west side of Manhattan, and no rapid transit line at all upon the west side downtown section of Manhattan.

5. If competition with the Interborough Company be the prime consideration, it is believed that by the construction of the proposed extensions the City would be in a position to establish an independent competitive line at an earlier date than would otherwise be possible. Under recent provisions of law the west side down-town extension and the east side up-town extension in Manhattan, together with The Bronx and Brooklyn extensions, could be taken over after ten years from the time when the lines or any part thereof were put into operation. By the construction of a short cross-town line between 7th avenue and Lexington avenue, in the vicinity of either 34th or 43d streets, the City would then possess upon the island of Manhattan a subway system which would be the exact reverse of the subway system now operated by the Interborough Company, with the additional advantage of more comprehensive extensions to parts of Brooklyn and The Bronx, which, in the meantime, by reason of these very extensions, will have developed into profitable territory.

It can hardly be expected that within an equal length of time the City's credit would so expand as to enable it to complete an entirely independent system to a point where it would furnish the City with equal competitive advantages. It is suggested, however, that the advantage of competition is not so apparent in the case of City subways as in other avenues of transportation. The usual advantages of competition are a reduction of transportation charges and an improvement of service. But there is no prospect, so far as fares are concerned, that for so extensive a service as would be furnished by either rapid transit system now under consideration less than five cents would ever be charged; nor is there any prospect that the present five-cent fare upon the existing system would ever be increased. Upon the other hand, so far as service is concerned, the Public Service Commission is vested with full powers of supervision, and can enforce by direct order the perform-

ance of that efficient service which under other circumstances is produced only as the result of active competition.

In conclusion, the Interborough Company begs to refer to its proposition to complete the third track upon its elevated system and to build certain elevated extensions in The Bronx to be operated in connection therewith, and to complete and put in operation as a part of the subway system the so-called Belmont tunnel, which proposition has received the approval of your Commission. The cost of carrying out the elevated improvements is estimated at $32,000,000, all of which will be furnished by the Interborough Company. The Belmont tunnel when completed will represent a total investment of approximately $10,000,000, all of which, likewise, except $1,500,000, to be contributed by the City toward the completion thereof, will have been furnished by the Interborough Company. It will therefore be perceived that the contribution which the Interborough Company proposes to make from its funds towards the establishment of a well rounded rapid transit system in this city approximates a total of $107,000,000, against a contribution of $53,000,000 on the part of the City.

Respectfully submitted,

INTERBOROUGH RAPID TRANSIT COMPANY,

By T. P. Shonts, President.

The President of the Borough of Richmond presented the following:

Office of the President of the Borough of Richmond, New Brighton, N. Y., December 21, 1910.

Hon. WILLIAM J. GAYNOR, Mayor, City of New York, City Hall, New York City:

Dear Sir:—I learn from the newspapers this morning that the Public Service Commission is forwarding to the Board of Estimate and Apportionment an important communication upon the subject of new subway construction in The City of New York, and I sincerely regret that I cannot discover that any consideration has been given in the pro-

posed plans to the Borough of Richmond, or that such consideration is even contemplated, except in the far distant future. I therefore wish to submit to you, both as Mayor and as Chairman of the Board of Estimate and Apportionment, the following considerations which I think of great importance to the whole city, as well as to the Borough of Richmond, and which I think should be taken up in connection with the new communication from the Public Service Commission.

Every portion of the City will be directly benefited by the proposed new systems or extensions except the Borough of Richmond, and yet this Borough, because of its deep water harbor facilities and available unoccupied territory, offers the largest opportunities within an equal distance of the City Hall for valuable and varied growth within the City limits.

In the Borough of Manhattan it is proposed to construct, without local assessment, a new subway the full length of the island, and extend it in two branches throughout The Bronx. It is proposed to extend subway operatino into Queens, through the Steinway tunnel, making it easily possible for later extensions as they may be required. In the Borough of Brooklyn it is proposed to construct subways across its major part, with similar provisions for branch extensions.

If we turn now to the remaining Borough, that of Richmond, we find it the only one not as yet benefited or proposed to be benefited in any way by subway construction, so that its interests must continue to lie practically dormant until other boroughs are first filled with factories and population, and Westchester and New Jersey are satisfied with transportation facilities.

It seems only fair that in the consideration of this problem provision should be made by which the Borough of Richmond may have privileges corresponding at least to that of Queens and the outskirts of Brooklyn, not to mention the still greater benefits to Manhattan and The Bronx.

In other words, in order that the Borough of Richmond may be given the same treatment as the other divisions of the city, plans now under consideration should bring the subway system at least to the shores of Richmond. In Manhattan, Brooklyn and The Bronx far more than this is done, and in Queens that much is already conceded.

As you know, I have always been a strong advocate of the wisdom of a close physical connection by subway of all the different Boroughs. The subways already constructed, as well as those in contemplation, carry population to the borders of the city, as though intended to make provision for those living beyond, rather than within, its limits. If brought to the Borough of Richmond, such encouragement of the flow of population would develop the city rather than adjacent territory, and correspondingly increase the city's financial resources.

What has been done towards the improvement of Richmond has already, according to good financial basis, more than justified the expenditures by increased taxpaying ability meeting interest and sinking fund charges on all outlay.

Another point which should not be overlooked is the fact that it is not alone Richmond's interests which ask for consideration, but the interests of Manhattan business men residing in Richmond, who justly demand transportation facilities for their home district commensurate with those that other Manhattan business men secure for their home districts in Manhattan, Brooklyn, The Bronx and Queens.

The Borough of Richmond has an area nearly equal to that of Manhattan and The Bronx combined, and it urges for itself, and believes that the city as a whole, in the city's own interest, should insist for Richmond the same opportunity to grow that is given other Boroughs of the city.

Respectfully yours,

GEORGE CROMWELL,

President of the Borough.

The matter was then referred to the Transit Committee to report to the Board at the meeting of January 5, 1911.

His Honor the Mayor then retired.

K. At a meeting of the Board of Estimate and Apportionment held on January 5, 1911, the following proceedings were had and taken:

RAPID TRANSIT RAILWAYS.

EXTENSIONS TO THE EXISTING SYSTEM; ALSO THIRD-TRACKING AND CONSTRUCTING ADDITIONS TO THE 2D, 3D AND 9TH AVENUE ELEVATED ROADS, AND THE COMPLETION AND PUTTING IN OPERATION OF THE STEINWAY TUNNEL.

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company to construct, maintain and operate certain extensions to the existing rapid transit railway, conditional upon favorable action upon the proposition of said Company to third-track and build additions to its 2d, 3d and 9th avenue elevated roads, and to build and put in operation the Steinway tunnel, and requesting a statement of the position of this Board on the subject.

This communication was presented to the Board at the meeting of December 22, 1910, and was referred to the Transit Committee to report at the meeting of this day.

The President of the Board of Aldermen, a member of the Transit Committee, presented a report of the majority of said Committee as follows:

To the Board of Estimate and Apportionment:

Gentlemen—The Board of Estimate and Apportionment on December 22, 1910, referred to its Transit Commission a communication from the Public Service Commission, in which was transmitted for consideration by this Board a certain proposition that had been submitted on December 5, 1910, by the Interborough Rapid Transit Company to

the Public Service Commission, for action by that Commission.

Although it was clearly the legal duty of the Public Service Commission to pass upon this proposition, the Commissioners did not see fit to accept the responsibility but shifted that burden to the Board of Estimate and Apportionment.

The Board of Estimate and Apportionment is in no sense bound to perform the duties prescribed by law for the Public Service Commission, but it has a moral obligation to do all in its power to protect the interests of the public and advance the City's development in every possible way. Therefore, the members of the Transit Committee of this Board have undertaken willingly to pass upon a question which the Public Service Commissioners apparently were unable or unwilling to decide for themselves.

This Committee, which consists of the Mayor, the Comptroller and the President of the Board of Aldermen, has given full consideration, not only to the proposition transmitted by the Public Service Commission, but to the entire problem of the future transit development of the City.

The committee is divided in its opinion concerning the proposition before it. The Mayor differs from the other members.

The majority of the committee is opposed to the proposition submitted by the Interborough Rapid Transit Company for the following reasons:

1. Because it means the perpetuation and extension under private control of the present subway monopoly which, regardless of its obligations, has persistently exploited the public to satisfy corporate greed.

2. Because all the real benefits in the Interborough plan can be obtained through adherence to the principle of independence.

3. Because the mandate of the people, as expressed in the election of the members of this Board, was against

monopoly and in favor of City built and City controlled subways.

4. Because since that mandate was expressed at the polls there has been no change in conditions to justify the violation of the principles then adopted.

5. Because competition in quality and extent of service which can be guaranteed only by municipally owned and controlled subways is absolutely essential to the future development of the City.

6. Because the Interborough Company has proved itself unworthy of the Public trust by showing continued bad faith in its negotiations with the Public Service Commission, by its utter contempt of reasonable regulations, and in many other ways, even going so far as to offer flagrant defiance to the Commission on the day of the preparation of this report.

7. Because added distrust of the Interborough Company is inspired by the terms of the present offer, which discloses the purpose of the company to place all the burden and the risks of rapid transit extensions upon the City and obtain for itself all the benefits.

We recommend that the Board of Estimate and Apportionment formally commit itself to the immediate construction of an independent system for the following reasons:

1. For the seven reasons already given for the rejection of the Interborough proposition.

2. Because the City has available funds to the amount of $150,000,000, which is much more than is needed for the independent route.

3. Because the routing of the independent system is such that it will carry to their destinations in the various parts of the city at a five-cent fare practically all of the traveling public who will avail themselves of its service.

4. Because an independent subway system is the only comprehensive one which gives the public the use of the Centre street loop and the two bridges, representing already an expenditure of $7,000,000 of public money which other-

wise would pass into the control of the Brooklyn Rapid Transit Company, which now monopolizes the territory of Brooklyn and a part of Queens.

5. Because when the independent system is constructed economic necessity will compel the Interborough Rapid Transit Company to build extensions to the present system at its own expense, the facts demonstrating that this can now be profitably done.

6. Because the adoption of the independent system eliminates from the subway discussion the third tracking and extensions of the elevated railroads, unfairly and improperly included in this discussion by the Interborough Company, and leaves this distinctly separate proposition to stand on its own merits.

7. Because the independent system will give quick relief to congested sections of the city and at the same time will force the prompt construction of the natural and logical extensions of the Interborough system with its own funds.

8. Because the history of rapid transit discussion for the past three years shows clearly the general acceptance of the public, the press and the Public Service Commission of an independent route as the best solution of the subway problem in this city.

In support of these reasons we submit the following facts and considerations:

On January 14, 1910, a Transit Committee of the Board of Estimate and Apportionment was created pursuant to the following resolutions:

> "Whereas, The City of New York is in urgent need of an immediate solution of the problem of congested transportation facilities; and
>
> "Whereas, The members of the Board of Estimate and Apportionment are severally pledged promptly to relieve this congestion by providing for the construc-

tion of additional rapid transit routes or the extension of existing routes; and

"Whereas, The Public Service Commission of The City of New York has for two years, and before that the Board of Rapid Transit Commissioners had for many years, been engaged upon the consideration of the rapid transit requirements of New York City, and the formulation of plans for the construction and development of transportation facilities; and

"Whereas, No real relief can be provided without the concurrent action of the Board of Estimate and Apportionment and the Public Service Commission; be it

"Resolved, That the Board do and hereby does appoint a Committee, consisting of the Mayor, the Comptroller and the President of the Board of Aldermen, to confer with the Public Service Commission of the First District for the purpose of determining upon the proper steps to be taken by this Board in making provision for increased rapid transit facilities and for the purpose of formulating a plan for the immediate relief of transit congestion in the City of New York; and be it further

"Resolved, That this Committee be instructed to take into consideration in formulating such plan the existing and prospective borrowing capacity of the City for rapid transit purposes; and be it further

"Resolved, That this Committee report to this Board on or before its first meeting in the month of March definite recommendations for the consideration of this Board for the prompt relief of existing transportation conditions and for the adequate provision of additional transit facilities, with recommendations concerning the methods of financing any or all routes proposed to be built, whether by the issue of Corporate Stock, the levying of assessment upon property bene-

fited, or by granting a franchise for construction with private capital."

While the above resolution called for a report by the Transit Committee at or before the first meeting of the Board of Estimate in March, 1910, it was found impossible, in view of the negotiations then in process between the Public Service Commission and the various transit companies of the city, to formulate a definite plan for the consideration of the Board or to report definite recommendations with respect to the construction of particular routes at the time specified in the resolution. Your Committee has, however, held a number of joint conferences with the Public Service Commission and a series of meetings independently of that Commission and has given most careful consideration to the plans which have been under consideration by the Public Service Commission and to those which have been matured by it.

Your Committee has studied the various routes laid out by the Public Service Commission and approved by the Board of Estimate, and has also studied other prospective routes suggested to it either in conference with the Public Service Commission or independently.

The joint conferences between your Committee and the Public Service Commission began early in the month of February. At the first conference, the Chairman of the Public Service Commission laid before the Committee the outline of a rapid transit railroad covering a series of routes heretofore approved by this Board which, taken together, have been described as the Tri-Borough Route.

This route comprises two three-track branches in The Bronx, running respectively from Woodlawn Cemetery and Jerome avenue, southward along Jerome avenue, River avenue and Mott avenue; to a point at or about One Hundred and Thirty-eighth street and Mott avenue; and from Pelham Bay Park and Westchester avenue, southward along Westchester avenue, Whitlock avenue, the Southern Boulevard

and One Hundred and Thirty-eighth street to a point of junction with the first described branch. It runs thence in a four-track trunk line by tunnel under the Harlem River to the northerly extremity of Lexington avenue; thence under and along Lexington avenue to Irving place; southward under Irving place to Fourteenth street; thence southward under the prolongation of Irving place to Fourth avenue; thence crossing under the existing subway and in a southwesterly direction under the property of Grace Church, to Broadway; thence southward and along Broadway to Park place, thence with two tracks to Vesey street; thence curving southwesterly under Vesey street to Fulton street; thence with three tracks southward to Church street, thence southward to the south end of the proposed Rector street Station; thence with two tracks to Greenwich street at Morris street, thence with four tracks to Battery place, and there branching out into a terminal station with seven tracks, with two stubs for a loop under Battery Park.

Another two-track branch of this proposed railroad was designed to begin at the Hudson River and Canal street, running eastward under and along Canal street; passing under the proposed Broadway route and under the existing subway to the Manhattan Bridge.

It was proposed to use the present Centre street loop and to complete that loop in Brooklyn by building a two-track subway under Broadway to Lafayette avenue and back under Lafayette avenue to Flatbush avenue, where a junction was to be effected with the Fourth avenue subway now under construction. The Centre street loop was planned to be used as a terminus of the Broadway and Lafayette avenue loop and of the Fourth avenue subway now under construction, which runs from a point at the easterly approach to the Manhattan Bridge, under Flatbush avenue Extension, Fulton street, Ashland place and Fourth avenue to 40th street as a four-track trunk line.

It was planned to construct two extensions from the

Fourth avenue subway to 40th street and Fourth avenue, one three-track line along 40th street, New Utrecht avenue, 86th street and Stillwell avenue to Coney Island; the other a two-track line continuing along Fourth avenue to Fort Hamilton; the latter of these to be a subway throughout; the former to be elevated from 86th street to Coney Island.

The Bronx extensions first described were to be elevated, the westerly branch from Woodlawn Cemetery to River avenue and 158th street, the easterly branch from Pelham Bay Park to the Southern Boulevard and Whitlock avenue.

The Commission, at these early conferences, informed your Committee that it was proceeding, with the preparation of plans, specifications and contracts for the construction of those portions of this general rapid transit system, other than extensions in The Bronx and South Brooklyn, not already under construction, namely, the Broadway and Lafayette Loop, the Canal street crosstown line and the Broadway-Lexington avenue trunk line.

The Bronx and Brooklyn extensions were not included in this advertisement for bids owing to the fact that the Public Service Commission, estimating that the time required for their construction would be but two years, considered it unwise to begin construction upon them until the work on the trunk lines should have progressed half-way toward completion.

This general system was the subject of frequent conferences between the Commission and your Committee, and as planned had the approval of your Committee. The question of the source of capital for the construction of this system was much discussed. With the approval of your Committee the Public Service Commission advertised two forms of contract: the one for private capital construction, operation and equipment, title to vest in the City on completion of construction, and the other for construction only and with municipal funds.

These contract forms and specifications were submitted

to your Committee for its consideration, late in the spring of 1910. The Committee associated with itself a group of consulting engineers, consisting of the Consulting Engineer of the Borough of Manhattan, the Consulting Engineer of the Borough of Brooklyn, the Chief Engineer of the Commissioner of Accounts and the Principal Assistant Engineer of the Department of Finance, to whom it submitted for comment, the contract and specifications for construction with municipal funds. This Engineering Committee reported its criticisms and suggestions for changes, which were duly transmitted by your Committee to the Public Service Commission, with the recommendation that the contract form and specifications be altered accordingly.

After a series of conferences lasting through the greater part of the month of August, between the Chairman of the Commission, the Corporation Counsel, and the Acting Mayor, this form of contract and specifications was materially changed, substantially in conformity with the suggestions of your Committee, with the result that in the opinion of your Committee, a saving of approximately ten million dollars in cost was effected.

The Commission received no bids on the form of contract calling for private construction, equipment and operation, but on the revised form predicated upon construction with municipal capital, received a large number of bids.

At the time of the earliest conference between the Commission and the Committee, members of the Committee were informd by the Chairman of the Commission that negotiations were then under way between him and the operator of the present subway, looking to the construction of logical extensions of that subway by the present operator with funds to be furnished by it. These extensions were those popularly described as completing the H, namely, that down 7th avenue from 42d street, and under its projected prolongation southward, through Liberty street and by tunnel to Brooklyn; and that northward from 42d street under Madison avenue to The Bronx.

The Committee was informed toward the spring of the year that these negotiations, then under way for some time, were rapidly maturing to a satisfactory conclusion.

At the time when the question of the simultaneous construction of these extensions of the present subway system and the Tri-Borough system, as above outlined, was discussed and approved by your Committee (it being always the expressed understanding of both Committee and Commission that such extensions should be constructed, if at all, with the capital of the operator of the present system), it was pointed out by the Commission to your Committee that both the extensions of the Interborough system and the independent Tri-Borough system would, by the time of completion (four or five years hence) afford no greater transit facilities than reasonable foresight indicated would be required.

Upon this proposition no member of your Committee, either at the joint conference or in committee meeting, has ever expressed a contrary view.

From information furnished by the Chairman of the Commission it is the understanding of your Committee that these negotiations between the President of the Interborough Company and the Chairman of the Commission, looking to the construction of the Interborough extensions with Interborough money continued until early in the spring of 1910. According to the Chairman, his mind and the mind of the President of the Interborough had met upon all the essential features of the plan, details alone remaining to be adjusted. During a suspension of these negotiations the Chairman of the Public Service Commission was astonished to learn of the letter of July 5, addressed by the President of the Interborough Company to the Mayor, a copy of which was later forwarded to the Chairman of the Commission as well. This letter contains the surprising suggestion that these extensions (except that Lexington avenue was substituted for Madison avenue) be constructed for the Company with City funds, with certain guarantees by the City.

This letter has within the past two months been described by the President of the Interborough Company as an offer submitted to the Public Service Commission.

To make clear the force of this suggestion of the Interborough Company, your Committee presents the following brief history of the negotiations of that Company with the Rapid Transit Commission and the Public Service Commission:

In the spring of 1907 the Rapid Transit Commission asked for bids for certain rapid transit routes. Their determination to do so followed suggestions from the Interborough Company and the then Metropolitan interests that they would be interested in additional subway construction. A merger of the two interests took place, however, before bids were due and no bids were received. The Interborough wrote to the Commission giving increased cost of construction as its reason for failing to bid. It is to be noted that construction with municipal funds was contemplated.

No further steps were taken by the Interborough to supply the extensions, the necessity of which it admitted in 1907, until it made application to the Public Service Commission on March 10, 1909, to be allowed to build the Lexington avenue and 7th avenue subway extensions, to lengthen subway platforms and to third-track its elevated lines. This construction work was to be done at the expense of the Interborough Company. The proposition for the 7th avenue and Lexington avenue extensions was declined by the Public Service Commission in May, 1909, because conditioned upon the granting of an operating lease for fifty years with a twenty-five year renewal, a condition impossible under the Rapid Transit Act as it then stood. The third tracking was also declined for the reason that the application called for a perpetual franchise. The matter of lengthening subway platforms was taken up and is now under way.

On June 30, 1909, the Interborough applied for permission to construct the Lexington avenue and 7th avenue ex-

tensions, the cost to be paid for by the Interborough, this offer being conditioned upon the granting of certain elevated rights and purchase by the city of the Steinway Tunnel. The Commission, in August, 1909, declined this application because of the conditions and also because in its mind the general proposition did not afford a sufficiently comprehensive rapid transit development. It is to be noted that in both of these applications the Interborough signified its willingness to build subway extensions with its own money and that it so advertised extensively through the medium of the daily press. The following from the morning "World" of April 22, 1909, is a copy of one of the advertisements widely published by the company at that time.

The Safest Rapid Transit in the World.

Over nine hundred million passengers were carried in the last two years without a single fatality.

Travel on the elevated and in the subway is the safest in the world.

Month after month we handle these enormous crowds—without fatality—almost without accident.

And in order that your service may be made still better, and that your safety may be further insured, we asked to be allowed to build:

1. An East Side express subway from 42d street to The Bronx, which, connected with the present subway, will give a complete East Side subway.

2. A West Side express subway from 42d street to the Battery, which, connected with the present subway, will give a complete West Side subway.

3. Express tracks on both 2d and 3d avenue elevated lines.

The new subways we will build with private money; and when our present subway lease expires, we will turn them over to the City free.

We offer the utmost in safety; the utmost in service. Will you be content with less?

We are ready to act.

INTERBOROUGH RAPID TRANSIT COMPANY,
Theodore P. Shonts, President.

On June 10, 1910, the Interborough asked permission to third-track and extend its elevated lines and to operate the Steinway Tunnel. The Commission has this proposition under consideration at the present time. The Commission, on June 30, 1910, inquired of the Interborough whether, in view of the advantage of considering elevated extensions and extensions to the subway at the same time, the Interborough desired to make any proposition as to subway extensions. The reply from Mr. Shonts, on July 5, 1910, has already been referred to. This was not considered as a proposition from the Interborough until Mr. Shonts within the last two months wrote to the Commission stating that he desired to have it considered as a proposition. The Chairman of the Commission, in a letter to the Mayor dated July 7, 1910, in reply to one from the latter transmitting a copy of the letter from Mr. Shonts, expressed the objections of the Commission to such a proposition.

Early in the conferences between the Commission and your Committee, the cost of construction of the Tri-Borough system was discussed and estimated by the Commission, for all sections taken together, at $147,000,000, of which $25,000,000 represented the cost of the Centre Street Loop and the 4th avenue line, the former constructed, the latter under construction. Your Committee estimated that, through the operation of the constitutional amendment exempting self-sustaining rapid transit bonds, there would be available in 1910, for subway construction, a total sum of $60,000,000. This, the Public Service Commission estimated, would be sufficient to permit the initiation of construction in 1910 on all those sections of the Tri-Borough route not yet begun and requiring four years for their com-

pletion. Your Committee, at the suggestion of the Mayor and on his statement of expected results from the activities of his Tax Commission, estimated that additional sums of from fifteen to twenty millions yearly could be made available for subway construction, beginning with 1911.

Accordingly, for the purpose of securing the necessary funds against diminution through appropriation to other municipal purposes, a resolution was introduced by the President of the Board of Aldermen, and unanimously adopted by the Board on April 8, 1910, setting aside $13,000,000 corporate stock for rapid transit purposes, and pledging thereto, all funds made available through the exemption of self-supporting rapid transit bonds. Through the action of the courts, $43,868,325 of such bonds have been exempted. There are, therefore, to-day available for and pledged to rapid transit purposes, $56,868,325.

An examination of the rapid transit account by the Comptroller has disclosed the fact that the additional sum of $3,500,000 may be exempted under the constitutional amendment. Application has been accordingly made to the Appellate Division and an exemption of this amount may be expected within a very short time.

The Comptroller estimates that under the operation of the same section of the Constitution, dock bonds to the amount of $60,000,000 may be exempted by application to the Appellate Division. These bonds, under an opinion rendered by Hon. Archibald R. Watson, Corporation Counsel, on the 20th day of December, 1910, may be applied either to dock or rapid transit purposes, at the option of the Board of Estimate. Here, therefore, is another large amount of available credit which, if the necessity were great, could be applied to rapid transit purposes.

The Department of Taxes, replying to an inquiry propounded by the Board of Estimate, has reported that within the next five years the City may expect increases in the taxable value of realty sufficient to produce an added credit in the aggregate of $172,000,000, of which the Department

estimates that $60,000,000 will become available on the first of next July. Of this total sum of $172,000,000, at least $60,000,000 could be applied to rapid transit purposes.

It is estimated, therefore, that within the next five years there will be available for subway construction a total of at least $120,000,000, leaving all exempted dock bonds entirely out of consideration and leaving out of consideration, as well, whatever present margin of credit there may be left after voting last year's Corporate Stock Budget. If the City should elect to devote half of the dock bonds to be exempted to rapid transit purposes, it could add another $30,000,000 to this total of $120,000,000. The situation, therefore, since the receipt of the bids on the Tri-Borough Subway has been as follows:

A credit available for immediate use amounting to $60,000,000 with prospective additional available amounts during the next five years amounting to $60,000,000 with a possible additional $30,000,000 from dock bonds, or a total for the five years of $150,000,000.

The gross total of the lowest bids on those sections of the Tri-Borough route advertised, namely, from 138th street in The Bronx down Lexington avenue and Broadway to the Battery, the crosstown Canal street line, and the Broadway-Lafayette avenue loop, amounted to $85,437,570.11. With a credit plainly available sufficient to construct this system and its projected extensions in South Brooklyn and The Bronx, the Public Service Commission has withheld action upon the bids. A portion of the delay on the part of the Commission in acting on these bids is explained as follows:

On the 18th day of November, 1910, the Hudson and Manhattan Railroad Company, by its president, William G. McAdoo, submitted to the Public Service Commission an offer to operate, if constructed, that portion of the Tri-Borough system lying between 138th street in The Bronx and Wall street in Manhattan. This offer proposed a

change of the Tri-Borough system by omitting the Canal street cross-town loop and the Broadway leg of the Broadway-Lafayette avenue route, substituting therefor an under-river tunnel running through Wall street in Manhattan and Montague street in Brooklyn, connecting with the proposed Lafayette avenue subway in that borough, this extension to be continued out to the point contemplated in the plans of the Tri-Borough system. Mr. McAdoo's offer did not cover the proposed extensions of the Tri-Borough system in The Bronx, nor did it embrace any plan for the operation of the Fourth avenue subway or its extensions, or of the Centre street loop. While this offer of the Hudson and Manhattan Railroad Company was before the Public Service Commission, the Interborough Company, on the 5th day of December, submitted the proposition which is now referred to this Board and to your Committee for consideration. On December 3d the Hudson and Manhattan Railroad Company, through its president, notified the Public Service Commission that its offer would remain open until December 15 only, and that if no answer were rendered thereon by that day it would be withdrawn by the company. The Public Service Commission, having failed to act upon the Hudson and Manhattan Railroad Company's proposition up to December 15, that company thereupon withdrew its offer, its president in the letter of notification stating as follows:

> "Upon mature consideration of the matter, we have become convinced that it is futile for us to attempt to unite with the city authorities in an effort to provide an independent system unless the city authorities are fully determined that an independent system is wanted for the city. In short, there can be no competitive bids between this company and the Interborough on independence or monopoly. It seems to us essential that one policy or the other shall be decided upon before further progress can be made. If we should submit

another offer under present conditions, it would, we believe, simply provoke a long struggle which would result in delaying the final action upon rapid transit, to the possible detriment of the community, since the problem is so acute that delay is, of itself, a serious injury. We are unwilling to participate in an indefinite struggle of this sort."

This left before the Commission the proposal of the Interborough Company and the bids received on the Tri-Borough as first planned.

We will now take up the proposal of the Interborough Company.

The Interborough proposes the construction of the following subways, which it describes as "natural extensions to the present system."

West Side Lower Manhattan and Brooklyn Extensions.

From Times square, under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street, in Brooklyn, and under Pineapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern parkway to Utica avenue, as a four-track road, and from Utica avenue to Buffalo avenue under Eastern parkway, as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenues, Brooklyn, under Lafayette avenue to Broadway.

East Side Upper Manhattan and The Bronx Extensions.

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lex-

ington avenue; thence under Lexington avenue and the Harlem River to a point south of 149th street, as a four-track road; thence dividing with two tracks to a connection, east of Mott avenue station, with the West Farms branch of the existing subway; thence two tracks under Mott avenue, 153d street and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a connection will be made with the Jerome avenue extension of the 9th Avenue Elevated Line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern Boulevard and Whitlock avenue to a point in private property south of Westchester avenue; thence a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway, at about 179th street, over private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public street to Bear Swamp road and White Plains Road; thence over White Plains road to a connection with the proposed extension of the 3d Avenue Line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains and Gun Hill roads.

These new sections all to be operated under a form of indeterminate franchise terminable at any time after the expiration of ten years at the option of the City on payment to the company of its investment plus 15 per cent. less accumulated sinking fund.

The Company estimates the cost of these extensions at $128,000,000, of which it proposes the City shall subscribe $53,000,000 and the Company the balance, or $75,000,000. It offers to operate the entire system, old and new, for a

single five-cent fare and free transfers. It offers to divide the profits from the operation of its extensions as follows: For the first five years all the profits to go to the City, thereafter the net profits to be divided equally between the City and the Interborough Company. Its offer provides that in determining net profits there shall be deducted from gross earnings charges in an order named such that interest and sinking fund upon the bonds issued by the railroad company for the construction and equipment of these proposed extensions shall have precedence over interest and sinking fund on the bonds issued by the City. The Company proposes that gross operating revenues of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or if deemed advisable by either the City or the Company from the number of tickets deposited in the chopping boxes on the new extensions, or by such other method as upon full consideration may be agreed upon between the parties. The Company further offers to operate all future extensions to the system as may hereafter be constructed by the City, provided that the Company shall not be required to operate any extension the operation of which would result in a financial loss to the Company, unless the City should undertake to make good such loss. It further offers to alter its present leases of the existing subway in such a way as to terminate both at the same time, taking a term for the entire existing subway of 49 years from the date of the completion of the extensions.

If the present subway system, with the proposed extensions, be outlined upon a City map it is at once apparent that were the extensions of the Interborough system completed as outlined by it, we would have under an indeterminate franchise terminable in ten years, a new series of subways forming a half-system running through South Brooklyn, Eastern Parkway, Lafayette avenue, 4th avenue and the lower west side of Manhattan, and terminating at 42d street and 7th avenue. We would have another half-system

of subways under a like franchise running through the eastern and western portions of The Bronx, with a trunk line leading down through the easterly part of Manhattan Island and terminating at 42d street. We would have, under the same character of franchise, a short disconnected section running from the Zoological Gardens in The Bronx northward through White Plains avenue to the City Line.

The first half-system as thus planned requires for its reasonable and successful operation, the west side trunk of the present subway north of 42d street, with its extensions. The second half-system requires for its reasonable and successful operation, the east side trunk of the present subway south of 42d street. The small new extension in the middle Bronx could be used only in connection with the extension of the present subway in Bronx Borough and separated from it, would be a rapid transit waif.

These two half-systems and short extension can be bound together and operated as a transit unit only by the use of the trunk lines of the present subway. It has been suggested that at the end of a ten-year period, the City might take over these new half-systems under the terms of the indeterminate franchise proposed, and by constructing a connecting link through one of the side streets between 34th and 42d, could have a complete subway system which would be the reverse of the present system in duplicate, except that it would be more extensive in its outlying branches. Is not this manifestly fallacious? If once the traveling public of New York through a period of ten years, becomes accustomed to a continuous system of through transit in straight lines up and down the west side and up and down the east side of Manhattan, is it reasonable to believe that the governing body of the City could ever contemplate tearing this system apart and forcing the traveling public to adopt wholly new routes to reach given destinations?

It is the conviction of this Committee that to bind into the present system these new subways, as outlined in the proposal, which are really only extensions as frankly stated

by the Interborough, inevitably commits the City to their continued operation as integral parts of that system until the expiration of the lease held by the operating company upon the original subway, this, under the proposed modifications, being for a period of 49 years.

This brings up squarely the question of an independent subway system and of effective municipal control. If the argument of this Committee holds good and the proposed lines are incapable of a physical severance from the existing system and of operation independently, then an acceptance of the proposition of the Interborough Company means an abandonment of the construction of an independent subway system, with whatever results that may carry with it. There is another reason why this proposal precludes that kind of municipal control which is dependent upon the City's ability to take over and operate the new subways constructed. Even were the extensions capable of a physical severance and an independent operation, the form of franchise permitted by the present Rapid Transit Law must provide that the City shall pay to the Company, as a condition precedent to the exercise of its right to take over the new subways, an amount equal to the cost of construction borne by the Company plus 15 per cent. thereon, less accumulated sinking fund. It must also pay over to the Company a sum equal to the fair value of the equipment at the time of assuming control. The aggregate so payable under the proposal of the Interborough Company would approximate the sum of $75,000,000. Your Committee submits that the City's difficulty in finding such a lump sum at one time available for payment to the Interborough Company is so great as to amount to practical impossibility. When your Committee respectfully asks this Board, from its understanding of the financial situation of this City, is that sum likely to be found available at any one time during the period of the proposed franchise?

For both of the reasons just stated, your Committee is

convinced that the adoption of the Interborough Company's proposal will mean the certain abandonment of all hope of a physically independent subway system capable of severance from the Interborough System and over which The City of New York might exercise the kind of control contemplated by the Rapid Transit Act in its provisions for the grant of indeterminate franchises.

Your Committee will now consider the advisability of such a step. This question divides itself very naturally into a discussion, first, of general principles, and, second, of detailed advantages and disadvantages.

Upon the question of general principles your Committee feels that this Board should first consider whether the Commission which its members hold from the people by virtue of their election contains a mandate upon this issue. If it does, then only the weightiest reasons, and only such as may have arisen since the time that mandate issued, should lead the members of the Board to act contrary to their Commission. What was the commission received by the members of this administration from the people at the last municipal election? Six of the eight members of the present Board of Estimate were elected on a platform that declared all future subways should be owned by the city, should be built with the city's funds, construction by private capital not being permitted except when it is positively demonstrated that the city is financially unable to keep up with the demand for transit extension, and then only on terms that will preserve strict and effective municipal control. This absolutely committed the candidates to the construction of a new and physically independent system of subways—physically independent because strict and effective municipal control cannot be exercised over an extension or section which for its very existence as an operating entity depends upon a main stem over which the city has not, and cannot obtain control for fifty years. When the people on Election Day approved the declaration that future subways should be

built with city funds, it was not because the taxpayers preferred to spend their own money rather than the money of a corporation, but because it was clearly appreciated that only by excluding private capital from the construction of the new subways of the city, could the city secure the kind of control which would enable it to substitute a satisfactory for an unsatisfactory operator. This Board is, therefore, called upon to state whether, with a clear commission from the people to proceed with the construction of the subways with city funds and to establish effective control over them in the city's interest, it shall abandon the principles upon which its members invited the suffrages of the people and assent to establishing a monopoly and abandon control. As already stated, only the weightiest of reasons arising since the popular determination was had, would justify that course.

Your Committee submits that in place of the existence of weighty reasons in favor of such a course, there remain the gravest reasons against it. Some of these reasons your Committee submits are to be found in the history of the relations of the Interborough Company with The City of New York, and with the various efforts to compel adequate service by that corporation. That history discloses a corporation always reactionary and always unwilling to comply with the reasonable requirements of authority to improve its system, its service or its equipment; a corporation always disregardful of the public comfort, always contemptuous of authority until it faced compulsion brought to bear through the machinery of the law.

Your Committee points out that the attitude of the operator of the present subway displayed by its disregard of public convenience the contempt which it has shown for the reasonable orders of the Public Street Commission and its resistance to them has been due to the fact that that company holds the present subway under a long term lease which is not susceptible of modification by the City or by

any municipal or governmental authority. The Interborough Company, intrenched behind the unassailable rights granted it by virtue of its present lease, can afford to flout the City authorities and the Public Service Commission and to despise public indignation since the public has the option either to ride under the conditions offered by the Interborough Company, or to walk.

In a case such as the one presented, the future attitude and behavior of a public service corporation, or of an individual, can be judged only by its record. What has been true of the Interborough Company in the past, it is only fair to assume will be true in the future of that company or of any other company if it be situated and intrenched in like manner. There is but one lever offered to The City of New York through the Public Service Commission by which to control the future operation of future subways, but one safeguard against bad service, bad equipment and bad management. That is found in the provisions of the present Rapid Transit Law, enabling the City to lease its subways under an indeterminate franchise, terminable in ten years, guaranteeing to the municipality the right to change the operator at will, or to undertake operation in its own interests if it should see fit to adopt that course.

If, as is the case under the terms of the Interborough's proposal, there be neither the financial ability on the part of the City to exercise its option to assume control nor the physical layout of routes such as to make possible and attractive their independent operation if taken under control by the City, then all the advantages of the indeterminate form of franchise are nullified and lost, and the operator of such a system remains in the position of the present operator, namely, independent, secure, contemptuous and uncontrolled.

A fallacy into which some people seem to have fallen recently is the assumption that the thing most desired, or desirable, is a competition in rates of fare between the oper-

ators of two systems. That is not the kind of competition which this City either desires or requires. It is the competition in quality and amount of service that New York needs. While separate operators for the present subway with its future logical extensions and for a new independent subway system would, in the opinion of your Committee, be highly desirable, still it is not of first importance that the operation of those systems should be in different hands if only there be two distinct, separate and self-sufficient systems. The fact that an independent system exists and may at any time be taken by the City from the existing operator and turned over to a new operator, or operated municipally, is alone a complete and sufficient guarantee of adequate service. Once emasculate the system controlled by the City, however, and make it incapable of independent operation, and the threat of future competition disappears and leverage upon the operator is lost.

For all of the foregoing reasons, therefore, because of the decision of the people in favor of municipal control of future subways; because of the history of the Interborough's relations with The City of New York; because of the quality of the service which it has rendered; because of its attitude toward the public and authority, and chiefly because municipal control may be exercised over future subways only if their physical independence be established, your Committee is firmly convinced that the only solution of the transit problem in New York will be found in the immediate construction of an independent subway system over which the City will be at all times in a position to exercise control. To forego the immense material and tactical advantages to be found in the unincumbered ownership of such a system, it would be necessary for the City to find in the Interborough's proposition, advantages in routing, practical operation and economy infinitely greater than those offered by any projected independent system. Moreover, and this your Committee would emphasize as most important, before the

City should consider the construction of the extensions for the Interborough Company to the exclusion of its own independent system, it would be necessary to show conclusively that both could not be had at the same time and at the same cost to the City.

Let us now consider the details of the Interborough's proposition and some of the alleged advantages to be found therein:

Present Term of Lease—The Interborough Company proposes to amend its leases to provide for a flat term of forty-nine years beginning with the completion of the proposed extensions. As the proposed extensions will not, according to the Interborough itself, be completed under five years, the forty-nine year term becomes a fifty-four year term calculated from the present time. The present lease has already run six years. The proposed modification, therefore, means a practical reduction of but fifteen years from the aggregate of the original term with renewal period for the longer of the two leases, and of but three years in the case of the shorter. When it is considered that the present lease provides for a re-valuation at the end of fifty years with a general readjustment of terms at that time, which in the case of the shorter lease upon the present system would take place some time within the next thirty-two years, the offer of the Interborough Company to consent to this modification does not strike one as being quite so disinterested and generous as at first sight might be supposed. Its effect would be to extend the period of operation under the present terms for a period of ten years on the longer of the two leases, and for a period of twenty-two years on the shorter of the two leases, while what the company would surrender, would be merely a portion of the renewal term equal to fifteen years on the longer lease and three years on the shorter lease, a right, the value of which to the company or to the City would depend entirely upon the terms fixed for the renewal at the time of the expiration of the original terms.

In other words, it would operate to extend for a considerable number of years, operation under the terms which are now netting the Interborough Company 17.2 per cent. upon its investment.

Earnings and Expenses of Extensions—The Interborough plan for ascertaining gross revenues from the number of tickets sold or deposited in the boxes at stations along the extensions and for apportioning non-separable operating expenses on the basis of car miles, is calculated to work great injustice to the City. Take, for instance, persons who come from the neighborhood of 40th street, Brooklyn, or from points beyond, to practically all of the financial district and the congested east side below 42d street, Manhattan. Such passengers will be carried for at least three-fourths of the distance traveled over tracks of the new extensions. Three-fourths of the cost of transportation will be borne by the new extensions. The new extensions, however, will receive 100 per cent. of the revenue arising from the tickets dropped into the box when the passenger is traveling from such sections in Brooklyn to those sections in Manhattan south of 42d street. On the return journey, however, the extensions will still bear three-fourths of the cost of transportation but will receive none of the revenue, the tickets having been deposited along the line of the present subway.

It is believed that more Brooklyn traffic will move up the present east side subway from lower Manhattan to the section south of 42d street, than up the 7th avenue extension, or if it moves up 7th avenue, the bulk of it will stop below 50th street. If it moves up the east side in this way, the new extensions will get only half of the revenue and will pay parctically all of the operating expenses. If it moves up the west side to points south of 50th street, the new extension will get all of the revenues and will pay all of the expenses, but in this there is no compensation to the extensions for the loss on business moving up the east side leg to

points south of 42d street. The bulk of Pennsylvania Terminal and North River Ferry traffic will be commuters who will move north to 50th street to some extent, but for the most part, south to south Manhattan. In such case, again, the new extensions will not get all the revenues and will pay practically all the operating expenses for the traffic in both directions.

West Side traffic originating on 7th avenue south of Times square and terminating below 96th street on the present subway, and traffic arising between 96th street and Times square, and terminating between Times square and South Ferry, will divide the revenues and expenses practically equally between the present subway and the proposed extension. The 7th avenue Extension will have an advantage on traffic originating on that extension and terminating north of 96th street, in Manhattan, and on that originating in Manhattan north of 96th street and terminating on 7th avenue south of Times square. This is of little comparative significance if we can measure this traffic comparatively by the ticket sales on the present subway at stations north of 96th street, in Manhattan for the year ended June 30, 1910. Such sales amounted to only 32,355,355, out of 268,962,115 total tickets sold on the whole subway.

For the bulk of the traffic originating on the proposed extensions north of Grand Central and in The Bronx, the Interborough plan will work as unfairly for the extensions as it will for the 4th avenue, Brooklyn, branch, nor is this situation remedied if revenues be ascertained from sales of tickets at stations on extensions. A study of the City map and an understanding of the territory served by the present subway and to be served by the proposed extensions north of Grand Central Station, will convince any one that we can take the present subway north of Grand Central Station as a fairly good example of how such a plan would work. An analysis of the special and annual reports of the Interborough to the Public Service Commission for the year

ended June 30, 1910, shows that only 45 per cent. of the total tickets sold on the present subway were sold at stations north of Grand Central, and 69 per cent. of the total car miles run on the whole subway were run north of that station. Which means that if the Interborough plan were applied to the present subway north of Grand Central, that part of the subway would bear 69 per cent. of the total operating burden and would receive only 45 per cent. of the revenues. If these ratios are applied to the revenues and operating expenses for the whole subway for the year ended June 30, 1910, we get the following result:

	Line South of Grand Central Station	*Line North of Grand Central Station*
Revenue from sale of tickets	$7,389,544.45	$6,045,990.91
Operating expenses	1,474,499.36	3,281,950.18
Divisional income	$5,915,045.09	$2,764,040.73

Your Committee is convinced that no plan can be devised which can be counted on not to greatly increase the revenues of the present subway at the expense of the extensions, unless extensions and the present subway be operated as a unit and the profits on the whole enlarged system be divided with the City. Your Committee fears that the present plan will in actual operation make such a poor showing for the extensions, that badly needed extensions in the outlying boroughs will not in the future be built because of fear of loss to the City from their operation.

Future Extensions—These considerations bear directly upon the offer of the Interborough to operate all future extensions constructed by the city on terms similar to those laid down for the operation of the 4th Avenue Subway, Brooklyn, that is, the company will operate if the City guarantees it against loss. This will mean that no future extensions of the subway system in New York will be operated during the next fifty years except upon an express guarantee on the part of the City against loss on the part

of the operator, and it will also inevitably mean unending importunities and pressure by sparsely settled regions for the construction of spurs and branches at the general city expense. Such lines, when constructed at the general city expense involving interest upon bond and sinking fund are a heavy burden for an operator to carry and will bring with them all the probabilities of deficit and material increases in the annual city budget and tax rates. The people living in these sparsely settled sections must remember that their acceptance of the present offer, apparently attractive to them, will set a definite limit to the development of their boroughs for the next fifty years.

Five-cent Fare—What has been oftenest urged as the greatest advantage to be found in the Interborough proposition is the so-called five-cent universal fare. If we stop for a moment and place side by side maps of the two systems, the Interborough's and the Triborough's assuming the Triborough to be modified in accordance with the Hudson Company's proposal, so far as the substitution of an under river tunnel and upper Broadway section for the Canal street loop and Broadway, Brooklyn, section is concerned, we will find that every portion of the city served by the Interborough is also served by the Triborough system, with the exception of the west side of Manhattan and the Eastern Parkway district in Brooklyn. The shopping and theatre districts of Manhattan are served by the proposed subway under Broadway north of 10th street to 34th street. The Bronx is served equally well by both. South Brooklyn is served equally well by both. The Lafayette avenue region is served equally well by both. The great majority of those who use the subway are persons traveling between their homes and places of business. Travel from The Bronx to Brooklyn and to Manhattan will not have for its destination the upper west side of Manhattan, but the shopping, the theatre, the business and the financial districts. All this travel is accommodated as well by the

Triborough system as by the Interborough system. Travel from outlying points in Brooklyn and South Brooklyn to the shopping and business districts of that borough is served as well by the Triborough as by the Interborough system. Travel to the Pennsylvania Railroad station in Manhattan and from all boroughs will be served fairly well by the proposed Triborough system, since that system if modified as outlined by the Hudson Company's proposal, will bring passengers to within a block of the railroad terminal. The only points to which passengers on the Triborough system will be unable to ride for a five-cent fare are points on the west side of Manhattan, to which travel from the other borough is so light as to be practically negligible.

Quick Relief—It has been urged as an advantage in the Interborough's proposition that the construction work on all the proposed extensions can begin at once, whereas under the Triborough plan a trunk line must be constructed first. While it is true that the trunk line of the Triborough must be constructed first for the operation of the Bronx and Manhattan portions, the Broadway and Lafayette lines estimated to require but two years for construction could be used immediately on completion in connection with the Fourth Avenue division. Your Committee also points to the fact that in the Interborough's proposition, that company states that the construction of the extensions is estimated to require a period of five years. The construction of the complete Triborough, with its extensions, is not estimated to require a greater length of time. Moreover, the construction of the Triborough at once does not preclude immediate relief in several portions of the City, since in the opinion of the Committee it would serve more than anything else to insure the prompt construction of the natural and logical extensions of the Interborough system by that company with its own funds.

Further, attention is directed to the fact that the imme-

diate inception of construction work in all boroughs under the Interborough's present offer will logically have one of two results. If it be planned to bind the outlying extension into the present subway, immediately on completion and before additional through trunk line facilities are provided to take care of the traffic from such outlying extensions, the only result will be to increase the congestion in the present subway to a point worse than anything ever experienced or imagined, and to increase profits to the operating company by a corresponding amount. If, on the other hand, the manifest impossibility of driving all the additional traffic from Brooklyn and The Bronx into the present tube through the Borough of Manhattan, prevents the attempted operation of such extensions as soon as finished, and before the additional trunk line facilities are furnished, the only result must be to burden both the company and the City with a tremendous and needless charge for interest on the securities issued for construction.

Amount of Municipal Investment—Another advantage claimed for the Interborough proposal is that the immediate transit needs of the City will be relieved and satisfied by a gross expenditure by the City of only $53,000,000. In the first place, your Committee would point out that while the construction cost to be borne by the City, amounts to only $53,000,000, it is contemplated in the proposal that the City shall obligate itself to acquire all necessary fees and easements for the construction of the proposed extension. Whatever the cost of these, it must be added to the $53,000,000 in order to ascertain the total cost to the City under the proposal. Once that total has been ascertain it must be understood that it constitutes the price of financing a monopoly and the surrender of municipal control. The question is whether the greater price of an independent system is not justified by the need of independence.

Operation of Future Extensions—One of the advantages urged by the Public Service Commission in favor of the Interborough's proposal is that that company agrees to

operate all future extensions constructed by the City. In view of the fact that any operating contract made for the Triborough system would necessarily include a like or better provision, your Committee fails to see what advantage this agreement holds over an independent system.

More Service—It is also urged that the Interborough's proposal has the advantage of serving more territory than the proposed Tri-Borough, and particularly the lower west side of Manhattan Island including the Pennsylvania Railroad Company's terminal. An examination of the map again discloses the fact that in The Bronx the Interborough has really accepted the Tri-Borough's route and added a short extension to its own system northward to White Plains road. In Brooklyn it has again adopted the Tri-Borough's routes, except Broadway, adding an extension of its present system outward along Eastern Parkway to Buffalo avenue. The only territory, therefore, served by the Interborough not served by the Tri-Borough is the lower west side of Manhattan, a limited area in the northern middle section of The Bronx, and the Eastern Parkway District. The extension down the west side of Manhattan has been particularly urged, upon the ground that the City owes to the Pennsylvania Railroad Company, in consideration of the enormous improvement made by the latter, the duty to provide adequate facilities for its traveling public. While your Committee agrees that adequate transit facilities for this enormous expected traffic are most desirable, it nevertheless is convinced that a higher duty is due from the City to its general population and its undeveloped Boroughs than to the Pennsylvania Railroad Company. Your Committee is mindful of the fact that the greater part of the travel to and from the Pennsylvania Station in this City is composed of those who live in and commute to New Jersey. While these persons should undoubtedly be cared for as soon as possible, nevertheless, if choice between an independent system and service for the Pennsylvania terminal must be made, your Committee feels that the best

interests and advantages of the City of New York do not lie in the upbuilding of the New Jersey suburbs, but rather in the development of Brooklyn, The Bronx, Queens and Richmond, under a rapid transit system effectively controlled by the City. Were it therefore necessary to choose to-day between the extensions of the Interborough system to be affected by the expenditure of municipal funds, and the construction of an independent City system such as the Tri-Borough, your Committee feels strongly that the necessities of the situation and the ultimate good of the City demand the latter.

Your Committee, however, is convinced that the choice indicated is not presented to the City under the existing circumstances. The Interborough Company stood ready a year ago to construct its extensions with its own money. It stood ready in the spring of this year to construct a portion of the above outlined extensions with its own money and with full knowledge that the City proposed simultaneously to construct the Tri-Borough system. Something changed the company's attitude upon this question. Your Committee suggests that possibly the reason for this change of front is found in the fact that the City, through the operation of the constitutional amendment became possessed of available credit to the amount of some $44,000,000, which before was not within its reach. It is always easier for a corporation to use some one's else money rather than its own. It is also quite apparent that should the City accede to the demand of the Interborough Company and denude itself of a considerable part of its now available credit it would thereby render itself unable for an indefinite period to proceed with the construction of an independent City system. It is manifest that the interest of the Interborough in procuring the allotment of City credit to its own purpose is twofold: (1) The use of the City's money in the place of its own; and (2) the annihilation of all danger of competition for the future. Your Committee is convinced that had there not been some devel-

opment giving the Interborough Company reason to believe that it could procure from the City an allotment of its credit to the Interborough's purposes that company would before this time have been engaged in constructing the logical extensions of its own system with its own funds. Your Committee is convinced that the Interborough Company will be forced, as an economic necessity, to undertake the construction of those logical extensions with its own funds if the City proceeds to construct an independent system in its own interests. These logical extensions are the 7th avenue route southward from 42nd street, the Madison avenue route northward from 42d street, the Eastern Parkway extension in Brooklyn, and the White Plains avenue extension in The Bronx. Being as they are the natural complementary parts of the Interborough system which is now held by that company under an unassailable lease for a period of fifty years, the same arguments and principles lie in favor of their construction with the capital of the operator, which forbid the construction of an independent subway system by any capital other than the City's. Your Committee is convinced that the City can have these natural extensions of the Interborough system, and at the same time, have its independent system if only the members of this Board will stand fast by the principles which, in our judgment, should govern the settlement of this question.

As to the point made by some that there is no room for both systems if constructed simultaneously, your Committee submits the following figures obtained from the Public Service Commission. Beginning with the year 1900, and ending with the year 1910, the total average yearly increase in traffic on all transit lines within The City of New York was 67,795,920. The aggregate increase in traffic in the last five years has been 400,000,000, and in the year 1910 over 1909, was 130,000,000 passengers.

The rate of increase as stated above warrants the belief that the total increase in passengers during the next five

years will be at least 500,000,000. This would considerably exceed the number required to support the entire projected Tri-Borough system, if it be assumed that the entire increase of travel would be absorbed by that line, while no travel was drawn by it from any existing transit facility.

At this point let it be understood that the present subway has developed its own business and did not draw its traffic from transit facilities in existence at the time it was opened. On the contrary, traffic has increased on all such lines since the subway was built. The present subway carried 268,962,115 passengers during the year ending June 30, 1910. Although branches of the present subway traversed sparsely settled territory in Manhattan north of 110th street, and in The Bronx north of the Harlem River, nevertheless traffic thereon had become so profitable by the year ending June 30, 1906, that the ratio of operating expenses to gross earnings on the whole system was 42.23 per cent. This despite the fact that the Interborough was forced to operate many hundred thousands of useless car miles, due to lack of proper storage facilities at South Ferry which, as was pointed out by Bion J. Arnold, a consulting engineer of the Commission, in 1908, attained the enormous total of 1,000,000. The opening of the Brooklyn extension in 1908 greatly relieved this situation and, as pointed out by the Public Service Commission in its annual report for the year ending June 30, 1908, increased the whole traffic on the subway by at least 8.48 per cent.

If the above-outlined natural Interborough extensions were constructed by that company at a cost of $70,500,000 (the cost of these extensions as estimated by Mr. Shonts), and added to its system, and no additional traffic attracted to that system as completed, the present income of the Interborough system would be sufficient to pay fixed charges and a reasonable profit upon the entire investment. The facts with respect to cost and income of the Interborough system are as follows:

The City's disbursements to December 31, 1909, (including $2,260,000 arbitration amount not yet actually paid), were $54,514,417. The investment by the Interborough, as stated by the company, was $39,447,093. The net profits of the Interborough for the fiscal year ending June 30, 1910, were $6,769,572. In other words, the Interborough on its present income could retain a 6 per cent profit on its own investment and pay fixed charges on over $70,000,000 additional, above the present $54,500,000 invested by the City. As Mr. Shonts has stated that the extensions proposed by him would cost $70,500,000, it may be seen that the present profit of the Interborough would by itself sustain the cost of the extensions, leaving the income from the increased traffic on the extensions to swell the profits of the company.

The tremendous operating advantages to the Interborough to be found in the extensions of its system as outlined, require no exposition. Where it now must operate along a devious route north and south, it would then be able to operate on straight lines and at the same time to operate local service around two distinct loops, the one from the Battery to 42d street, the other from the Battery to Harlem. It has, moreover, been estimated by Mr. Bion J. Arnold, the Commission's Consulting Engineer, in a report rendered December 31, 1908, that Lenox avenue cars are diverted a distance of .85 mile in order to use the Broadway tracks between 103d and 42d streets, at a cost of 7.57 cents per car mile. During the year ending June 30, 1910, there were operated on Lenox avenue, 1,930,468 cars, which if Mr. Bion J. Arnold's figures be applied, means a loss of 7.57 cents per car mile for the useless mileage. If this were saved by a direct route it would mean an annual economy of over $124,000. This would be sufficient to pay the 6 per cent. fixed charges, including sinking fund requirement on over $2,000,000, which would go a long way toward paying the cost of a connecting East Side link between 42d street and the Lenox avenue branch, without any regard to the

increased business that would come, or to the short running time from The Bronx to 42d street. In other words, it would pay the Interborough Company to build a connecting link between those points along which to carry its Bronx traffic directly to a point below 42d street, even if that company anticipated and drew no traffic from the region traversed by such connecting link.

What the incoming and outgoing traffic at the Pennsylvania Terminal will be, no one can at present estimate. Whatever this may prove to be, however, it would fall naturally to the Interborough, if it should see fit to construct the Seventh avenue extension southward.

Your Committee believes that it has reviewed in this report all of the alleged advantages to be found in the Interborough Company's proposal. Upon final analysis, all these advantages in the opinion of your Committee disappear and leave the bare issue of monopoly against independence. This monopoly of the underground rapid transit of New York is the prize for which the Interborough Company is contending, and the goal toward which every effort of that company has been directed. It is to win that prize that every speciously attractive feature in the proposal of the company has been incorporated. The sophistry employed by the company in its argument that the proposed extensions are capable of severance and operation independently by a new operator or by the City has already been exposed in the earlier portion of this report. Had the company been in good faith in this matter it might easily have so framed its offer as to disarm in part this greatest of objections. It might have offered to surrender its present lease in so far as that lease covers the present system south of 42d street and north of Liberty street and to accept in lieu thereof an indeterminate franchise over this portion of its present route, asking in return, as a consideration of this surrender a flat term of forty-nine years over the proposed 7th Avenue Extension southward. This, it will be

observed, would give the Interborough Company as much as it now has, namely, a trunk line from the northern to the southern end of Manhattan Island, but would guarantee to the City a continuous, cohesive and complete subway system running from the northern end of The Bronx to the southern extremity of Brooklyn, which as far as its physical layout is concerned, could be taken under control by the City at the end of ten years, if it were found necessary, and operated by it directly or through a lease as an independent system, and whose severance from the Interborough system after the end of ten years would not demand of the traveling public a revolution in their habits of travel. Even this, had the Interborough Company seen fit to suggest it, would have left the insuperable difficulty lying in the necessity for a lump sum payment of upwards of $75,000,000 by the City as a condition precedent to assuming control. Had the Interborough Company genuinely desired to offer the opportunity for municipal control, it might have further suggested the application of the City's contribution exclusively to the construction of those lines only lying on the East Side of Manhattan, in The Bronx, and in Brooklyn, and the application of its own capital exclusively to the construction of the 7th Avenue Extension southward. This would have materially reduced the amount of the lump sum payable by the City to the Company in the event of the assumption of control. While modifications such as these would in all probability still leave serious objections to a contract for the construction of this system of extensions in partnership with the Interborough Company, it would at least have demonstrated good faith on the part of that Company in this matter, whereas the absence from the Interborough's offer of such terms which would appear to your Committee to be self-suggestive, demonstrates, more than anything else, that the sole object of that Company is to secure a grip upon the transit situation which no amount of effort by the City in the future could succeed in shaking.

Your Committee feels that it should direct the particular attention of the Board to the fact that the Interborough's proposal does not contemplate the full operation of the Centre Street Loop, nor does it contemplate the utilization of the City's two great bridges. The logical situation thus created is that the Centre Street Loop must either remain unused or must be used by the Brooklyn Rapid Transit Company as a terminal for those portions of its service which can be diverted from the Brooklyn Bridge. This is the result for which the Brooklyn Rapid Transit Company has long been striving. The great disadvantage suffered by the 4th Avenue Subway by reason of the proposed plan for ascertaining gross revenues and operating expenses, has already been pointed out earlier in this report. It would appear that in asking a guarantee the Interborough's offer to operate this branch had purposely been made so unattractive to the City that the City would be forced to reject the terms, and then in the event of acceptance of the other portions of the Interborough's offer, the 4th avenue line would fall to the Brooklyn Rapid Transit Company. This, together with the operation of the Centre Street Loop by that company, would continue the present division of territory between the Interborough and the Brooklyn Rapid Transit Company for the indefinite future, a division which gives both companies the fat and only a little of the lean, and which would compel the payment of double fares by persons wishing to reach the center of Manhattan from Brooklyn, or South Brooklyn from lower Manhattan. With the Centre Street Loop and the 4th Avenue Subway in its possession, the Brooklyn Rapid Transit Company would be in the enjoyment of a very practical and effective monopoly of rapid transit in Brooklyn. The Interborough Company once in possession of the routes comprised in its proposed extensions may forever defy competition throughout the other boroughs of the city.

In this connection your Committee also desires to call attention to the fact that the only offers ever received from

the Brooklyn Rapid Transit Company to operate either the loop or the 4th Avenue Subway have been so poor that their terms have not insured even interest and sinking fund on the cost of construction of these lines.

Attention is directed to the fact that the Public Service Commission in its communication informs this Board that the proposal of the Interborough Company to construct subway extensions is conditioned upon the acceptance by the City of its proposal to third-track and extend its elevated roads. The third-tracking plan is not a new one. Years ago, the Rapid Transit Commission received repeated requests from the Interborough Company and its predecessor, to permit the third-tracking of the 2d and 3d avenue elevated lines. This privilege has always been regarded as one of enormous value to the railroad company. Permission has always been denied upon the ground that a grant of such value to the company should be made conditional upon the extension of the company's subway system with the company's funds. It has further always been vigorously opposed upon the ground of injury to abutting property, the attendant unsanitary conditions and the unsightly nature of the structure. In this connection it is worthy of note that the company which was at the time operating the elevated lines, through its vice-president, Mr. Bryan, stated, in the year 1906, that it was prepared to accept twenty-five year franchises for the third-tracking of its line. At the present time the Interborough Company's proposal demands nine hundred and ninety-nine year franchises for the same rights. The Company also demands at the present time, eighty-nine year franchises for the extension of its elevated system.

Further, your Committee desires to call attention to the fact that this proposition, which includes the operation of the Steinway Tunnel, wholly fails to meet the situation in the Borough of Queens. It makes the easterly extremity of the Steinway Tunnel the limit of operation. No adequate

transit is offered to Queens by this plan, and while the operation of the Steinway Tunnel is not dependent upon the acceptance by the City of the subway portion of the Interborough Company's general proposition, your Committee points out that adequate provision for this borough might well be made a condition of the acceptance of any elevated railway and Steinway Tunnel agreement.

The point, however, which your Committee chiefly desires to impress upon the Board is that the rights which were at one time regarded by the Rapid Transit Commission of this City as so valuable to the Railroad Company that they were refused except upon condition of subway extension by that Company with its own funds, and which within the last few weeks have been described to the members of your Committee by some of the members of the Public Service Commission, as veritable gold mines for the Company, are now demanded by that Company as a condition precedent to its acceptance of certain other rights which in the opinion of your Committee are of themselves of such tremendous value that their parallel is not to be found in any city in the world.

The question presented to this Board in considering this matter at the present time is twofold: First, of principle: shall the City insist upon a new and independent subway municipally controlled, in accordance with the platforms on which the members of this Board were elected; second, an essentially practical question: shall the members of this Board deliberately create a monopoly of underground rapid transit in favor of the Interborough Company, turning over to that Company all the City's subways for a period of fifty years, on terms which give to the Company the profits, and to the City the risk—and this in the face of the history of the relations of the Interborough Company with the City of New York?

In order that the issue of monopoly as against an independent City-controlled subway system may be placed

squarely before this Board, your Committee offers the following resolutions:

To determine the principle by which this Board shall be guided in its action with regard to the construction of new subways and the extension of existing subways.

Resolved:

First—That the available credit of the City be devoted to the construction of an independent municipally owned and controlled subway system whose integrity as an operating unit can be forever maintained.

Second—That the present or future available credit of the City shall not be lent, in whole or in part, to any existing corporation or individual, for the extension of any existing system of subways until such independent system shall be completed and in operation.

Respectfully,

WM. A. PRENDERGAST,
Comptroller;

JOHN PURROY MITCHEL,
President of the Board of Aldermen.

The Comptroller moved the adoption of the foregoing resolutions.

Which motion was lost by the following vote:

Affirmative—The Comptroller and the President of the Board of Aldermen—6.

Negative—The Mayor and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—10.

The President of the Borough of Manhattan offered the following:

Resolved, That the communication of the Public Service Commission, addressed to this Board under date of December 20, 1910, with relation to the general proposition of the Interborough Rapid Transit Company, together with all reports or other papers relating thereto, be referred for

consideration to the Board as a Committee of the Whole; and, be it further

Resolved, That before taking further action the Board invite the Public Service Commission into conference upon the said proposition or any proposed modification thereof, or upon any alternative proposition, that the Commission may have to present or that may be presented to it.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

L. At a meeting of the Board of Estimate and Apportionment held on January 19, 1911, the following proceedings were had and taken:

Third Tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Roads and the Completion and Putting in Operation of the Steinway Tunnel.

At the meeting of January 5, 1911, the communication from the Public Service Commission presented to this Board at the meeting of December 22, 1910, relative to the proposition of the Interborough Rapid Transit Company, together with the reports and other papers relating thereto, were referred, for consideration, to the Board as a Committee of the Whole.

The Secretary presented the following:

City of New York, Office of the Mayor, January 11, 1911.

To the Board of Estimate and Apportionment:

As this Board has already voted against the report of my two associates on the Transit Committee it is not necessary for me to file a minority report, which I was unable to present at the last meeting of the Board for the reason that my said associates did not find it convenient to let me have a copy of their report in advance. But it may be well that

I at least present a report that I do not agree to a number of statements as of fact in the majority report, and at the same time I desire to call attention to some other things in the said report which are founded, it seems to me, on an erroneous conception of the law and the facts, and which give a false color to the report throughout.

First: They say they oppose the proposition of the Interborough Company that the City build certain extensions of the present subway (I quote): "Because the mandate of the people, as expressed in the election of the members of this Board, was against monopoly and in favor of city-built and city-controlled subways." This refers to the political platforms in the last City election. These platforms did favor city-built and city-controlled subways, in language more or less definite. The drafters of them seemed to have been under the delusion that some other kind of subways could be built under the sections of the statute which apply to the building of the City subways. But that is not so. The statute is beyond dispute. The said sections provide only for the building of City subways by the City through the Public Service Commission. There is no other way to build them. Though platform-makers did not know this, we should not be astray in respect of it. The present offer of the Interborough is not that it be permitted to build subways, but that the City build subways, and to eke out the scant credit and funds of the City, it offers to pay to the City in the course of construction all capital necessary in excess of $53,000,000 to be contributed by the City all told. The City builds the subways and owns them from the start. There is no other way. It is too bad to see a contrary notion, and that we purpose to follow it, put in the minds of people who do not examine the matter for themselves, and unconsciously, it may be, depend wholly for their inspiration or information upon vicious sources.

The false notion, long abroad, and industriously disseminated, that private capital, or a private capitalist who was often named, built the present subway in Manhattan

and The Bronx, has not yet been wholly driven out of men's minds. It took a few of us several years to dissipate it to some extent. Not one dollar of private capital went into the construction of the said subway. The City put every dollar into it. Nor did it loan the capital to build it, as is sometimes loosely said. On the contrary, it built the subway and owned it from the moment of completion and leased it for operation. It loaned no money or credit to anyone to build it. The mistake was made of giving too long a lease of it when built. That we are now striving to rectify by having the 75-years' term and renewal scaled down to 49 years or less. When the extension under the East River and over into Brooklyn was built some years afterwards, competition and conditions were such that of the $10,000,000 of capital used the City put in only $2,000,000, the company putting in the balance. And yet, for such is the statute, the City was the builder with these funds, and not the company, and the City owned the subway from the start the very same as though it put in all of the capital.

I regret to have to recur to things so fundamental, but I do it only that no one shall be misled if I can prevent it. Of course, my said associates do not mean to mislead, and none of us will be misled. But what about others? All I say is that my said associates have not made this matter clear, and that their report as a whole tends to make people believe that the offer of the Interborough is to build for itself, and thereby get some ownership or control which it would not otherwise have, whereas its offer is that the City build under the statute. It could not make any other kind of an offer, because there is no law for it. The City is to receive interest and a sinking fund out of earnings, and the profits of operation are to be divided equally between the City and the company.

Second: The report of my associates substantially admits that if what is called the Triborough route should be built by the City, the Interborough Company would probably be the successful bidder to operate it, when bids for op-

eration should be advertised for as required by the statute after construction is completed; if, indeed, any bidder for operation at all could be found. But they say (I quote): "It is not of first importance that the operation of those systems" (namely, of the Triborough and of the present subway) "should be in different hands, if only there be two distinct, separate and self-sufficient systems." But, pray, if both systems are operated by the same company, or by allied or subsidiary companies, how are they "distinct" and "separate"? These words and the phrase "independent system" may be very attractive, but I hope they will delude nobody. But the history of the world shows how potent attractive, but empty words and phrases, always have been in misleading thoughtless people. It is well that owing to our splendid system of schools the illiterate and thoughtless are no longer the majority among us.

Third: I have expressed a doubt in the foregoing whether any bid to operate the Triborough would be forthcoming. The cost of constructing and equipping that system is put at $250,000,000. I believe no competent person has claimed that it would be less than $225,000,000. But if we say $200,000,000 the case is still hopeless.

Five and one-half per cent. of that sum for annual interest and sinking fund is $10,500,000. The highest estimate of gross receipts from operation of the system that anyone has made is $16,000,000. Forty per cent. of that for maintenance and operation would be $6,400,000. This added to the said interest and sinking fund amount of $10,500,000 already shows a deficit, without going into other items. But the case is worse, for the gross receipts would probably not reach $16,000,000. As is well known that system was recently put up for bids for operation in advance of construction, but no bid was forthcoming. No one with private capital for investment could see anything but a deficit ahead. Some are glad of this, because they have in mind, although they keep it to themselves pretty well, that for

lack of a bidder the City would be forced to operate the road, and this is the object which they are striving for. Some time in the future, namely, when the public virtue and intelligence of the community is fit for it, the City will be operating all of its public utilities, including city railroads, but that time has not come yet in my judgment.

Fourth: The report of my associates shows that City funds to build the Triborough route would be slow in coming, on account of the ordinary expenses of the City which have to be met yearly, but it says that if great needs exist, the dock funds can be used to build subways. I regret to hear this suggestion made. There are certain things which need to be done to improve our docks, and for the handling of freight along our docks, which are as essential to the prosperity of this City as the building of subways. The Dock Commissioner has already prepared the plan for a railroad along the docks to handle the freight, and to supersede the surface tracks of the New York Central running down through the City. A bill is now being prepared to be sent to the Legislature to carry this out. The purpose is to apply the dock funds to this, among other things.

Fifth: The report of my two associates says that a year ago the Interborough Company offered to furnish all the funds needed for the City to build the extensions to the present subway, and ask what has caused that company to change its mind in that respect. The Interborough Company never made such an offer. It did offer to furnish the money to the City to build the extension from 42d street down Seventh avenue and to the Battery, and the extension up Lexington avenue to The Bronx. The extensions which it now proposes that the City should build, and to which it offers to contribute, are in mileage four times the length of the fragments embraced in the said offer by it a year or more ago. Let us not confound things. No doubt that company would be only too glad to renew the said offer and have it accepted. But no doubt the Public Service Commis-

sion would promptly reject it now as it did then, and say that, "The lean must go with the fat"; that no proposition to build subways would be considered unless they embraced extensions into the outlying boroughs. The profitable trunk lines through Manhattan must go with the less profitable and the unprofitable lines into the other boroughs. The said report of my associates also leaves the impression that the present proposition that the City build extensions adopts the "Triborough routes." The contrary is the case. The Triborough system, so-called, was made up principally of routes which were laid out years ago by the old Rapid Transit Board as extensions of the present subway. The present subway is only a fragment of what these men laid out as a system to be owned and controlled by the City forever. I have not heard a single reason advanced why the City should now abandon that system and build another system, "independent," as it is called. The new system would have to be operated by a company just as the present subway is, and in all probability by the present operating company. What would be gained by that? What we need of all things is to stick to what was designed from the beginning, namely, that since the City builds and owns the subways it should build one great comprehensive system to connect all of the boroughs, and be operated on a single fare of five cents throughout the whole system. I am unable to comprehend why anyone should ask that two or more systems be built, thereby introducing the necessity of paying a new fare every time you change from one line to another. No matter how many systems of subways we should have they would all be under the control of the Public Service Commission as to the kinds of cars to be used, the headway, the speed, the length of trains, and in every respect as to accommodation, as is all prescribed by the statute. Will anyone say that the Public Service Commission could control two or more separate companies in these respects better than it could control one?

Sixth: If we carry out the present proposition, and thereby have all of the subway extensions built by the City, the City to put in only $53,000,000 of the capital, all in excess, estimated to be $75,000,000, to be contributed by private capital, the City will then be able to devote its funds hereafter to the building of extensions in the boroughs as they become necessary. It can, for instance, build extensions such as through Queens to connect with the Steinway Tunnel, in Brooklyn to connect the Fourth avenue subway with Coney Island, and also with the Borough of Richmond under the water, as has been pointed out by the President of that Borough. If the City ferries to that borough are to continue to create the present huge deficit, the quicker the subway extension to St. George be built the better, for the interest and sinking fund charge on the cost thereof would be less than such ferry deficit, as now appears.

Seventh: The said report states that the credit of the City should not be loaned to any existing company for extensions. This can only mislead those who do not know the law of the case as laid down by the statute, although not so intended. The City is not permitted to loan its money or its credit to any company. All it can do is to build the subways itself through the Public Service Commission as I have already pointed out, and yet some will continue to repeat that the proposition is that the City should loan the money to the company. Indeed, some go so far as to say that the proposition is to give it to the company; to make a present of it. But of course we must at some point cease to regard such statements, however we may regret to see thoughtless persons misled by them.

Permit me to say in conclusion that the vast majority of the intelligent people of the City of New York desire that this Board now go forward in this great matter, after a year already spent in leading up to it. It is justly expected of us that we do now proceed immediately. An end should come to this perpetual talking and arriving at no result.

The Public Service Commission is now ready to proceed to formulate construction and operation contracts, and if there be any delay the cause is here in this Board.

Respectfully submitted,
W. J. Gaynor, Mayor.

Which was ordered printed in the minutes and referred to the Committee of the Whole.

Subsequently the President of the Borough of Manhattan stated that at the conference of the members of the Board yesterday it was proposed that a committee be appointed by the Mayor to confer with the Public Service Commission for the First District in relation to the proposition of the Interborough Company, and he offered the following resolution:

Resolved, That a committee of three members of the Board be appointed by the Mayor to represent the Board in conference with the Public Service Commission upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it; such committee to report back to the Board from time to time as it may direct.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The Comptroller, in explanation of his vote in the affirmative, stated that such action did not in any way bind him to enter into negotiations with the Interborough Company, if it is understood that the only matter before the Board at the present time is the entering into of such negotiations.

M. At a meeting of the Board of Estimate and Apportionment held on February 2, 1911, the following proceedings were had and taken:

Rapid Transit Railways, Extensions to the Existing System, also Third-tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Roads and the Completion and Putting in Operation of the Steinway Tunnel.

A communication, dated January 27, 1911, was received from the Mayor's office, informing the Secretary of the appointment by His Honor, the Mayor, of the following committee, pursuant to resolution adopted January 19, 1911, that a committee of three members of the Board be appointed by the Mayor to represent the Board in conference with the Public Service Commission upon the pending proposition of the Interborough Rapid Transit Company to operate certain extensions to the existing rapid transit lines, etc., or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present: The President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond.

Which was ordered filed.

By unanimous consent, the President of the Borough of Manhattan offered the following:

Resolved, That the special committee appointed in pursuance of the resolution adopted by the Board at its meeting of January 19, to confer with the Public Service Commission with relation to the pending proposition of the Interborough Rapid Transit Company, or to such alternative plans, including independent routes, as may be presented, be authorized to confer, also, with the officers of the Interborough Company, with a view toward ascertaining

whether that Company will enter into a contract for the construction, equipment and operation of subway extensions upon terms acceptable to the City; and be it further

Resolved, That the committee be requested to report to the Board as early as may be practicable the results of such conferences, in order that the Board, if the general terms proposed prove acceptable to it, may authorize the Public Service Commission to proceed with the negotiation of a contract.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

N. At a meeting of the Board of Estimate and Apportionment held on June 13, 1911, the following proceedings were had and taken:

The Board met in pursuance of the following call:

City of New York, Office of the Mayor, June 12, 1911.

In pursuance of the provisions of Section 226 of the Greater New York Charter, the Board of Estimate and Apportionment requests the Mayor to call a meeting of said Board on Tuesday, June 13, 1911, at 12:30 o'clock p. m.

W. J. Gaynor, Mayor; Wm. A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens; George Cromwell, President, Borough of Richmond.

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of

Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways; Extensions to the Existing System; also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads, and the Completion and Putting in Operation of the Steinway Tunnels.

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company to construct, maintain and operate certain extensions to the existing Rapid Transit Railway conditional upon favorable action upon the proposition of said Company to third track and build additions to its Second, Third and Ninth Avenue Elevated Roads, and to build and put in operation the Steinway Tunnel, and requesting a statement of the position of this Board on the subject.

At the meeting of June 8, 1911, the President of the Borough of Manhattan, Chairman of the Conference Committee of the Board having this matter in charge, stated a report was being prepared, and by motion, duly adopted, Monday, June 12, 1911, at 3 p. m., was fixed as the date to consider the matter.

His Honor, the Mayor, then called a meeting of the Committee of the Whole for 2 p. m., Monday, June 12, 1911.

His Honor, the Mayor, reported that the Committee of the Whole had met in the Mayor's office, Tuesday, June 13, 1911, at 12 o'clock noon, had considered the report of the Conference Committee and had agreed to recommend to the Board that a special meeting be held Wednesday, June 21,

1911, at 10:30 o'clock a. m., to consider the report and recommendations of the Committee.

The President of the Borough of Manhattan, Chairman of the Conference Committee of the Board, presented the report, which is as follows:

City of New York, Office of the President of the Borough of Manhattan, City Hall, June 13, 1911.

To the Honorable Board of Estimate and Apportionment:

Gentlemen—Your Committee was appointed under a resolution adopted by the Board on January 19, 1911, to confer with the members of the Public Service Commission for the First District, as the Commission has suggested, "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

Under a subsequent resolution adopted January 31, 1911, your Committee was empowered also to confer, in conjunction with the Commission, "with the officers of the Interborough Company with a view toward ascertaining whether that Company will enter into a contract for the construction, equipment and operation of subway extension upon terms acceptable to the City."

Your Committee has since been in constant conference with the Public Service Commission, and is prepared to submit its findings and recommendations. For the reason that in the development of the subject before us the two bodies have worked, in a sense, coordinately, our conclusions are submitted in a joint report which is presented herewith.

We recommend that the program of action proposed be approved by the Board, and that its policy in dealing with the rapid transit contracts to be submitted for its consideration in the near future shaped accordingly.

We recommend that your Committee be continued for

such further conferences with the Public Service Commission as may be necessary, and with authority to represent the Board in submitting to the operating companies the statement of the terms upon which the City would be willing to grant the franchises and operating rights for which they have applied.

We suggest the time allowed for the receipt of definite answers from the companies in question be limited by resolutions of the Board, and that the final action of your Board be taken at the earliest practicable date.

The Public Service Commission is prepared to proceed with the preparation and award of contracts, and to take such further action as may be necessary upon its part, as soon as the decisions of the Board have been taken.

We wish, in conclusion, to express our high appreciation and approval of the course the Public Service Commission has taken in this juncture. Its invitation to the Board to confer directly upon those matters in which the concurrent action of the two bodies is necessary was intended to expedite the process of reaching final determination, and to hasten the work of actual subway building. We believe that the work done in conference will have that effect.

Whatever course is now taken will require the original action of the Commission upon all of the matters within its jurisdiction; but the agreement in advance we now present upon those matters requiring the action, at one stage or another, of both bodies, is likely, we believe, to bring about a solution of the transit problem within the very near future.

Throughout our close touch with the Commission and its work, we have been impressed by the vast amount already accomplished in preparing for the situation with which the City now deals. The Commission's labors, both before and since the development of the present situation, will prove, we believe, to be of great and lasting public value. All of which is respectfully submitted.

GEORGE MCANENY, President of the Borough of Manhattan; CYRUS C. MILLER, President of the Borough of The Bronx; GEORGE CROMWELL, President of the Borough of Richmond.

To the Honorable Board of Estimate and Apportionment:

Gentlemen—The Public Service Commission, under date of December 20, 1910, submitted to the Board of Estimate and Apportionment a proposition of the Interborough Rapid Transit Company dated December 5, 1910, for the construction jointly with the City, and for the equipment and operation by that company, of certain additions to the present subway system. The Commission, in its letter of transmittal, stated that this proposition, "provided certain features not then satisfactory could be properly adjusted," would be acceptable to it; and added as follows:

> "The Commission will press the present negotiations with the Interborough Company to a conclusion and embody in contracts and plans as rapidly as possible unless your honorable Board should consider the proposition as generally outlined open to objections which would render your consent impossible when the form of contracts are finally submitted. Although the principal portions of the routes are already laid out, certain connections have not yet been legalized, and it will take considerable time to perfect them. The Commission respectfully requests that, if there are objections on your part, it be advised at as early a date as possible. If the present propositions are disapproved the contracts for the construction of the Tri-Borough system, which are now awaiting award, can promptly be acted upon and construction work immediately begun. The Commission will be pleased to receive a statement of the position of your honorable Board on this subject and will be ready at any time that may be convenient to confer with your honorable Board, or any Committee thereof."

As difference of opinion existed in the Board of Estimate with relation to the terms upon which the Interborough Company should be granted further operating rights, and as to whether such further rights should be granted at all, the Board concluded that it would appoint a committee to confer with the Commission, and to report its conclusions before the Board undertook to decide officially whether or not the proposals submitted were "open to objections that would render the consent of the Board impossible unless modifications were made."

The Board, which on January 5 had referred the general subject to the Committee of the Whole, voted on January 19, 1911, the appointment of a sub-committee of three of its members to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company or upon an proposed modification thereof, or upon an alternative plan that the Public Service Commission may present, or that may be presented to it."

Under this resolution, the Mayor named the President of the Borough of Manhattan, the President of the Borough of The Bronx, and the President of the Borough of Richmond as members of the Conference Committee. On January 31, 1911, the Committee was empowered also to confer, in conjunction with the Commission, "with the officers of the Interborough Company with a view toward ascertaining whether that company will enter into a contract for the construction, equipment and operation of subway extensions upon terms acceptable to the City."

Proposals Considered.

Under this broad authority the members of the Public Service Commission and the Committee of the Board of Estimate and Apportionment have, since February 1, been in almost daily session. They have considered not only the proposal of the Interborough Company dated December 5, 1910, but also an amended proposal from the same company, submitted at a later date; and two proposals of

the Brooklyn Rapid Transit Company relating to the improvement and extension of its existing elevated system in Brooklyn and Queens, and the operation of a comprehensive system of subways to be built by the City.

The conferees have considered, also, the advisability of a third system, to be operated independently or by one of the existing companies, as well as certain other proposals with relation to the construction and operation of rapid transit lines.

Consideration has not been confined to specific proposals for separate lines, but has included the development of a comprehensive plan and the basic principles that must underlie a satisfactory policy for the future.

Proposal of the Interborough Company.

The Interborough Company, in its offer of December 5, 1910, upon which the two bodies first went into conference, proposed as follows:

(I.) That the City and the company unite in the construction of the following new lines:

(a) The Lexington avenue and 7th avenue subway extensions necessary to the completion of the so-called "H" system in Manhattan;

(b) The Southern boulevard and Westchester avenue line, partly by subway and partly by elevated structure to Pelham Bay Park in The Bronx;

(c) A connection from the Lexington avenue subway to a point of conjunction with the proposed elevated extension on Jerome avenue in The Bronx, and another with the present subway near 149th street;

(d) An elevated connection proceeding from the West Farms division of the subway at 179th street, northward through White Plains road to Gun Hill road, there to connect with proposed elevated extensions;

(e) A new East River tunnel, to be built in connection with the company's present Brooklyn lines, to permit a further subway extension from its present terminus at

Atlantic and Flatbush avenue through the Eastern parkway to Buffalo avenue; and

(f) The Lafayette avenue line, from Flatbush avenue to Broadway, Brooklyn.

(II.) That the company would build and equip the foregoing lines for the sum of $53,000,000 to be furnished by the City; the City to provide in addition, the necessary easements and right of way, and the company to supply the funds necessary to defray the additional cost of construction and equipment which, upon the basis of their estimates, would amount to $75,000,000.

(III.) That the new lines to be built as "extras" under the terms of the Rapid Transit contract dated February 21, 1900, under which the original subway was constructed and is operated, except so far as the terms thereof might be modified by other provisions of the new offer.

(IV.) That the lines, when constructed and equipped, be operated by the company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

(a) The City to take all net profits for the first five years from the time of beginning of operation on any portion of the new lines;

(b) The net profits on the new lines after five years to be divided equally between the City and the company;

(c) The net profits to be determined by deducting from the gross revenue of the new lines in the order named:

The charges for maintenance, depreciation, traffic expenses, taxes, etc.;

Interest and sinking fund charges upon the funds raised by the company to carry its share of the cost of construction and equipment;

Interest and sinking fund on the bonds of the City;

(d) The gross operating revenue to be ascertained "from the number of tickets sold at stations along the extensions, or, if deemed advisable by either the City or the

company, from the number of tickets deposited in the chopping boxes on the extensions; or by such other method as upon full consideration may be agreed upon between the parties."

(c) The gross operating expenses to be determined on the basis of the number of car miles operated and according to the unit car mile costs on the company's entire system.

(V.) That if the gross income in any year, after providing for all of the charges above mentioned, is insufficient to meet the interest and sinking fund upon the bonds of the company, the deficit for such period would be borne by the company, and not carried as a cumulative charge against future earnings.

(VI.) That if the gross income in any year, after providing for the charges mentioned including interest and sinking fund upon the company's bonds, is insufficient to meet interest and sinking fund upon the City's bonds, the deficit thus sustained by the City would accumulate and be a charge against the future profits before any division thereof proceeds between the City and the company.

(VII.) That the City retain its right provided for by law to take over the new lines, as one system, at any time after ten years from the date that any portion thereof may be put into operation, upon paying to the company.

(a) The amount of its investment in construction over the $53,000,000 supplied by the City, plus fifteen per centum, such sum to decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment.

(VIII.) That the contracts for operation of the new lines be given for a period of forty-nine years from the date of completion of new lines, and that the present subway leases should be so altered that the terms of all should end at that time.

(IX.) The company offered also to operate all extensions either under construction by the City or to be built by it hereafter, in addition to the lines it proposed to operate on a profit-sharing basis, upon an understanding that the City carry all losses from the operation of such lines; such losses, however, to be cumulative and to be paid out of future receipts when any such line reaches a profit-yielding basis.

Elevated Lines and the Belmont Tunnel.

In a supplementary communication to the Public Service Commission, under date of December 5, 1910, the Interborough Company added that its general offer for the construction and equipment of subways "is predicated upon the acceptance by the City authorities of the offer of that company covering the elevated improvements and the completion and operation of the Belmont tunnel, although the latter proposition is not in any way dependent upon the subway offer."

The proposition of the Interborough and Manhattan Elevated companies, upon the acceptance of which the subway proposals were conditioned was submitted to the Commission under date of June 10, 1910, and covered the following points:

1. The third tracking of the 2d, 3d and 9th avenue elevated lines of the company's Manhattan system.

2. The extension of the 2d avenue line across the Queensboro Bridge to the Queens plaza.

3. The extension of the 3d avenue line from Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Park avenue.

4. The extension of the 3d avenue line along Webster avenue, White Plains road and other streets to Becker avenue or 241st street.

5. The extension of the 9th avenue line over the Harlem River and Jerome avenue to Woodlawn Cemetery.

6. The construction work to be done and the property to be provided wholly at the expense of the Interborough or Manhattan Company (estimated by the company at $32,000,000), and the lines to be operated on the following terms:

(a) The terms for each of the third tracking franchises to be perpetual, thus following the terms of the main franchises of which they would become a part; with the right, however, reserved to the City to terminate the new franchises at any time after ten years from the beginning of operation;

(b) The term of the elevated extensions to be eighty-five years, subject to termination after ten;

(c) The rate of rental to the City for the new franchises to be two per cent. of the increased gross receipts at the express stations in case of third tracking, and two per cent. of the gross receipts of the extensions; this rate to be subject to revision at the end of twenty-five years;

(d) The Steinway tunnel to be conveyed to the City and to be operated as part of the original subway system, upon payment by the City of $1,500,000 to cover the cost of the extension of the tunnel to the Grand Central Station, such amount to be repaid as rental, as provided under the general terms of the present subway contract.

Proposal of the Brooklyn Rapid Transit Company.

While the discussion of the Interborough Company's proposal was under way, the Public Service Commission, on March 2, received the proposal of the Brooklyn Rapid Transit Company for the operation of certain proposed new subways to be built by the City and of other City lines now under construction, in conjunction with the company's existing elevated lines and such of its surface lines as were originally operated by steam. The plan submitted did not call for the use of any street or right of way in the Borough of Manhattan for which application had been made by the

Interborough Company, though in Brooklyn it did propose to take over the Eastern Parkway extension which the Interborough Company had included in the proposed system, and the 4th avenue line which the Interborough had offered to operate upon the agreement of the City to carry all incidental losses. The Lafayette avenue line, the Brooklyn Company offered to include in its plan; but advised that it be omitted. In general, the company proposed:

1. That a new subway be constructed in Manhattan from the Battery to 59th street by way of Church street, Broadway and 7th avenue, with an extension easterly on 59th street across the Queensboro Bridge to a point of conjunction with the Brooklyn Company's elevated system;

2. That the Broadway line be connected with the Fourth avenue and other subway lines in Brooklyn through the construction of a new tunnel at the Battery under the East River;

3. That the company, at its own expense, construct elevated extensions:

(a) from the old City line easterly in the Borough of Queens to Jamaica;

(b) from Williamsburg Bridge northwardly across Newtown Creek and by way of Jackson avenue to Queensboro Bridge;

(c) from the present terminus of the Third avenue line to Bay Ridge;

4. That the company, at its own expense, elevate its present steam surface lines in South Brooklyn, as well as the extension of the Lutheran Cemetery line from Ridgewood to Fresh Pond road;

5. That it third track its present lines on Fulton street, Myrtle avenue and Broadway;

6. That it operate the so-called Bridge Loop subway lines in Manhattan with extensions:

(a) by way of Delancey street and Spring street to Broadway;

(b) by way of Canal street to Broadway; and

(c) from the present Centre street terminus at the Brooklyn Bridge southward through Nassau and Broad streets to the Battery tunnel;

7. That it operate, whenever built, a tunnel line between the present terminus of the 4th avenue line on 42d street, in Brooklyn, under the bay to Staten Island.

The Brooklyn Company, in this communication, made no proposition as to operating terms, but added:

> "If the plan we have outlined appeals to the judgment of the Commission and of the Board of Estimate and Apportionment as having merit, we shall be pleased to take up with you and the Board of Estimate and Apportionment the question of terms and division of cost.
>
> "We may say, generally, that the terms proposed by us would not be less favorable than those presented in any offer now under consideration by your Commission and the Board of Estimate.
>
> "The offer would include an agreement, under equitable arrangement, to operate any extensions of the above routes in any of the five boroughs which might be necessary in the future for the development of transportation facilities."

Supplementary Offer of the Brooklyn Company.

The conferees immediately took up consideration of this offer. As they were informed, however, that the use of Broadway from the Battery to 59th street for the purposes of a Brooklyn connection, might result in the withdrawal of the Interborough Company's offer, the conferees suggested to the Brooklyn Company that it consider the broadening of its proposal to include those lines contiguous to its system which, in the event of such a withdrawal, would be left to some operator other than the Interborough. The company replied that the plan it had originally submitted

was prepared primarily for the purpose of serving Brooklyn, and incidentally the growing needs of those portions of the congested districts of Manhattan through which the Brooklyn traffic naturally flows. It added, however, that in order that the City might not be deprived of the advantages of a comprehensive system, it would be willing to equip and operate that portion of the so-called Triborough route proceeding from the intersection of the proposed line on Broadway at 9th street northward to The Bronx, with such natural extensions in The Bronx as the City might provide.

As a result of the discussion of this phase of the situation and of the needs of other sections of the city, recognized by the conferees, the Brooklyn Company, on April 25, submitted a supplementary proposition offering to operate a system embracing the lines it had originally proposed and the following additional lines—all on a basis of an equal division of profits with the City:

1. The proposed Lexington avenue section of the Triborough route, from Ninth street north to The Bronx;

2. The Southern boulevard and Westchester avenue line, as a subway, as far as the Bronx River.

3. The Jerome avenue line as far as the Kingsbridge road;

4. Elevated lines proceeding easterly from the Queensboro Bridge to

(a) Astoria, and

(b) Woodside and Corona;

5. The proposed line running easterly from Union Square, Manhattan, under the East River to the Eastern District of Brooklyn to East New York, the precise route in Brooklyn to be determined hereafter;

6. The Nostrand avenue extension, from Eastern Parkway to Flatbush avenue; and

7. Livonia avenue extension, from the Eastern Parkway at Buffalo avenue to New Lots road.

The company offered to operate also, on an extension basis—that is, the losses from operation to be carried by the City, subject to liquidation from the surplus profits of the inner lines—the following:

1. The northern section of Westchester avenue line, from the Bronx River to Pelham Bay Park;

2. The northern section of the Jerome avenue line, from Kingsbridge road to Woodlawn;

3. An elevated extension on Utica avenue, Brooklyn, running south from the Eastern Parkway; and

4. The tunnel from the present terminus of the Fourth avenue subway, in Brooklyn, under the Bay to Staten Island.

The operating terms proposed by the Brooklyn Company, in its supplementary offer, include the following:

1. That the City should pay the cost of construction of all subways and of all elevated lines not at present contiguous to the Brooklyn system, while the company would pay the cost of extending and third tracking its own lines, and the cost of equipment of all lines; that it should operate all both new and old, as well as future extensions, as one system;

2. That the rate of fare should be universally five cents, with the exception of fares to or from the Coney Island district, which should be ten (10) cents; upon the proviso "that the said fare of ten cents may at any time and for any period be reduced to such figure not less than five cents as will be sufficient to yield from such Coney Island operation the fair cost thereof plus a reasonable profit."

3. That the tenure of the contract for all of the lines, subway or elevated, constructed by the City, and of the new elevated extensions to be constructed by the company where they follow public streets and places, be for ten years, subject to recapture by the city at any time thereafter; except that the tenure of the so-called Bridge Loop lines in Manhattan, as extended through Nassau and Broad streets,

together with the incidental use of the bridges, shall be for twenty years, as the statute permits, with the privilege of renewal under an adjustment of terms for a second period of twenty years.

4. That all of the lines described as "original" or inner lines in either of the company's proposals be operated on the following basis as to receipt and expenditures:

The gross receipts from the operation of all such lines to be pooled, and the receipts to be divided equally between the City and the company, after the following deductions in the order named:

(a) Operating expenses, provisions for depreciation, renewal and obsolescence;

(b) Taxes, insurance, and rental of leased lines, if any;

(c) An amount to be retained by the company equivalent to the net earnings of the existing lines operated by the Brooklyn Rapid Transit system in connection with the proposed new lines as of the year preceding the beginning of operation under the proposed contract with the City;

(d) Interest and amortization upon the new capital supplied by the company both for construction and equipment;

(e) Interest and amortization upon the cost to the City of the lines constructed by it.

5. That the contract contain a separate provision as to terms of compensation for the use of the Centre street subway and the bridges, to go into effect in case the City exercises its option to terminate the franchises of the other subway lines within the company's proposal after ten years.

6. That in addition to the lines the company is willing to operate upon the basis of half and half division of profits, it will operate as "extensions" any additional lines that the City may construct on the following basis:

(a) Extensions agreed upon by the City and the Company to be governed by and included in the general provisions of the contract as to receipts and deductions therefrom, applicable to "Original Lines."

(b) Extensions required by the City and not concurred in by the company to be operated as part of the entire plan, but the financial operations of such extension to be kept in a special account and determined as follows:

The accounting of receipts upon extensions to be based upon the value of the tickets collected at the stations on each, with the miscellaneous station and way earnings; and the expenses of operation to be ascertained upon the *passenger* basis, to be determined according to unit cost on the entire system covered by the contract, including the extensions.

After the payment of the expenses of operation there shall be paid out of earnings the actual annual charges for carrying the cost of equipment necessarily and properly allotted to each extension, and for providing a proper sinking fund; and that from the balance then remaining shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction;

That where the income is insufficient to meet the foregoing charges, any deficits shall be paid annually by the City; and

That all of the remaining net proceeds, after the deductions have been made, shall be divided in proportion of three-fourths to the City and one-fourth to the Company.

The Brooklyn Company's Offer to Operate a Broader System.

The Brooklyn Company, in its letter of April 25, repeated its willingness to operate a more comprehensive system than that covered by its first proposal, if the City so desired, and if mutually acceptable terms could be reached, as follows:

> "In case the City should desire to make a different disposition of this East Side-Manhattan-Bronx line, either as embodied in the Interborough plan or otherwise, we are perfectly willing that such a course should

be taken—provided that this disposition will not deprive the people of Brooklyn, Queens and Richmond of the use of Broadway as a distributing Manhattan subway, or not postpone such use to some indefinite time in the future.

"If, however, the operation of the additional East Side lines which we have described should fall to us, then our proposition becomes no longer a three-borough but a five-borough proposition, and imposes considerations and responsibilities from which we have no disposition to shrink, but which, accompanied by the severe terms insisted upon by your Committee as to revocable franchises, rates of fare and equal division of profit, necessarily require conservative judgment in the expenditure of private capital and a limitation of risk in the equipment and operation of extensions."

Negotiation of Terms.

The Committee of the Board of Estimate, following a discussion of the general subject in the sessions of the Board, sitting as a Committee of the Whole, informed the officers of the Interborough Company, at the first of the conferences attended by them, that the proposals of the company as submitted would not be acceptable to a majority of the Board; and that the Board could not be expected to pass favorably upon any of the contracts for the operation of the new lines desired by the company, unless their underlying terms were modified radically. Upon this understanding the conferences proceeded.

The modifications proposed, it may be said, covered incidentally those points upon which the Public Service Commission had itself been prepared to urge changes.

The conferees, in their negotiations with the representatives of each of the applicant companies, have proceeded upon the theory not only that the routes operated by either, if either secured a contract, would go as far as possible toward giving the City the comprehensive transit service its

needs demand; but that in the fixing of operating terms common principles should apply to each. All of the modifications with regard to terms proposed to the Interborough Company at the opening of the negotiations were repeated to the Brooklyn Company when its first offers were received, as well as certain others peculiar to the form of contract the Brooklyn Company seeks. We shall not attempt to rehearse in detail the course of these negotiations; but may recapitulate the results as follows:

Revised Interborough Terms.

The Interborough Company, in a communication dated May 9, submitted the following proposed changes in its original offer designed to meet, in some measure, the objections the conferees had raised.

1. To meet the demand for further routes, the company proposed to add to the system originally contemplated:

(a) A two-track subway connecting with the Williamsburg terminus of the proposed Lafayette avenue line in Brooklyn, proceeding thence through the Eastern District and under the East River to Union square in Manhattan, up Broadway to 42d street, and thence by 7th avenue to 59th street, easterly by way of 59th street and the bridge to a connection with the Queensboro plaza—that part of the line, so proposed, from 14th street and Broadway to Long Island City involving the use of this much of the through Broadway line proposed by the Brooklyn Company;

(b) Elevated lines proceeding from the Queensboro plaza to (1) Astoria and (2) Woodside.

The company proposed also:

2. To build and operate the proposed Jerome avenue line as an extension of the subway system, and under a forty-nine year lease, rather than as an extension of the 9th avenue elevated line, as at first proposed, under an eighty-five year lease. The company proposed, however, to terminate the new line at Kingsbridge road and, in any event, to reserve trackage rights to its elevated system.

3. To build the proposed White Plains extensions to the 3d avenue line north to the Gun Hill road and White Plains road also as a subway extension with trackage rights reserved to the elevated.

4. To accept a modification of its present leases with the City, "provided the lien of any duly authorized mortgage be not disturbed," so that either the present East Side subway from 42d street south to the Battery, or the present West Side subway from Times square north shall be held by the lessee under the ten-year recapture clause; thus enabling the City to possess a through line upon either the East Side or the West Side, in exchange for an indeterminate lease of forty-nine years upon the proposed West Side extension from Times square south, or the reverse of this plan, reserving to either of the lines exchanged traffic rights for the elevated trains from White Plains road and Jerome avenue, as well as the right to connect the southerly end of Lenox avenue extension under the terms of Contract No. 1 —the difference in value of the lines to be adjusted by agreement between the company and the City whenever an exchange is effected, or, if such an agreement cannot be reached, then by arbitration upon terms and conditions to be agreed upon.

5. To agree with the City, if the termination of all subway franchises be synchronized at forty-nine years from the date of beginning of operation of the new extensions, and provided the City, in the meantime, shall have taken over the new sections of the Interborough system under the ten-year clause, to give the City the privilege of taking over also the lines of the present subway "upon tendering to the Interborough Company a sum equal to the aggregate estimated profits of the company for the five-year period immediately preceding the time at which the City may hereunder accept such said option, and upon otherwise complying with the terms of the lease."

6. To allow all over a three per cent. profit to the com-

pany from the lines to be operated on a half and half basis —in excess of the carrying charges of its investment in construction and equipment—to apply toward the carrying of deficits upon the operation of extensions, under the terms proposed by the City.

7. That all costs of construction be divided evenly between the company and the City.

The company estimated that the adoption of the additional routes it proposed would increase the total cost of construction and equipment of the new lines from $128,000,000 (the original estimate) to $167,745,000; of which amount the cost of equipment, to be borne wholly by the company, would be $31,965,000. The cost of construction would upon these estimates, amount to $135,780,000, of which one-half, or $67,556,500, would be borne by the City and the balance by the company; making a total outlay by the company, upon its own figures, of $99,524,500, the cost of real estate not included.

It is the conviction of the conferees that the City should not permit any part of Broadway between Vesey street and 42d street to be occupied by any company in a way which will interfere with the establishment of a trunk line subway. For this reason they do not favor the construction of a two-track subway for the Interborough Company between 59th street and 14th street via 7th avenue and Broadway to connect with the 59th street line upon the one hand and the 14th street, Eastern District subway upon the other. Such a line would provide no service that would not be afforded by the present subway and the 7th avenue extension, provided the 59th street line were extended to 8th avenue or the river and the 14th street line were carried across town. The proposed line would not only prevent the construction of a trunk line in Broadway but would prevent the routes on 59th street and Broadway from being carried westerly so as to afford communication with all of the longitudinal transit lines in Manhattan.

The conferees believe that the modification of the company's existing contracts, permitting the City to recapture after ten years either the existing 4th avenue line south of 42d street or the Broadway line north of 42d street, upon exchange of the corresponding legs of the opposite north and south line, would strengthen the City's general position in the matter of future recapture. We have, therefore, pressed the acceptance of this clause.

The conferees believe that the proposed clause permitting the recapture of the entire system—old lines and new—after thirty-five years, would add also to the City's freedom in dealing with the possibilities of the future. While the plant proposed would give the City no ultimate right or advantage that could not be secured through condemnation proceedings, it would, undoubtedly, be valuable in relieving the City from the expense of such proceedings, as well as from the delay which, if the City were not in accord with the operating company, might be protracted.

The conferees are also of the opinion that if the leases of the old and new lines are to be synchronized, the date when they shall terminate might properly be fixed at forty-nine years from the beginning of operation of any new line, providing that period shall not begin later than five years from the present time. The contract should provide, however, for the leveling of the renewal periods without alteration of the original terms of the existing contracts.

The company has not agreed to the following modifications of its offers, suggested by the conferees:

1. The adoption of the cost-per-passenger basis as against the car-mileage basis in estimating operating expenses on the new lines.

The conferees believe that the acceptance of the proposed plan—that receipts be computed upon the basis of tickets collected and that expenses be computed upon the basis of the number of car miles operated—would be unfair, that it would seriously handicap the new lines while

adding considerable sums to the already large profits upon the present lines and that it would hinder the construction of additional subways in the future under the terms of the contract now being considered.

It is essential that the lines to be constructed should not only receive their fair share of the earnings but should not be charged with more than their fair share of the operating expenses. Under the plan proposed, the Lexington avenue subway in Manhattan, 4th avenue subway in Brooklyn, and any other line that might be built, like the 14th street-Eastern District line, would be deprived of their fair share of the receipts and yet would be charged with operating expenses out of all proportion to the relative distances which the passengers would ride upon the present lines and the new lines about to be added or to be added in the future.

The conferees believe that the adoption of the cost-per-passenger basis would be fair to the City, to the Company and to the many areas which will need rapid transit in the near future. No method has been suggested which is equally fair to all interests, but perhaps such a method exists and, if found, would be acceptable to the conferees.

This subject has been discussed at length in an appendix, and it is unnecessary, therefore, to repeat the discussion here. It will be sufficient to mention a few of the points which are essential to any fair method. It is naturally the desire of the conferees to extend the 5-cent fare zone in all directions from the center of the City. This cannot be accomplished unless the large profits from the profitable short-haul traffic on inside lines is used to offset the expenses of carrying residents to the more distant localities. If those portions of the present subway lying in the upper part of Manhattan and The Bronx had been financed upon the car-mile basis and could not call for assistance upon the short-haul traffic in lower Manhattan, they would today be a burden upon the City, and the City would be paying deficits for their operation, notwithstanding the fact that the Inter-

borough Company is earning from 17 to 18 per cent. upon the money actually invested by it in the subway. The short-haul traffic on inside lines in New York City is probably the most highly lucrative of any city in the world, and if the large profits from such traffic may not be used to offset deficits on outside lines, the indecent congestion and overcrowding which characterizes certain tenement house districts must continue and probably grow worse rather than better. This question is, therefore, of vital importance not only to the outlying districts which are in need of rapid transit facilties but to the whole City because of its intimate relation to the City's health and well-being. It is unnecessary to point out the many difficulties which are connected with the application of the car-mile basis and the ease with which the cost-per-passenger basis could be applied. Suffice it to say, that if the operating company desired to take advantage of the City under the former method, it could be done easily. It is probable further, that differences of opinion would constantly arise as to the accuracy of the computation and whether the car-mileage upon the extension was larger than reasonably required. There are many other objections which make the plan an impossible one.

2. The inclusion in the construction account of the cost of real estate and easements.

Although the City's expenditures for real estate and easements for the present subway were paid from the City's general bond account, the conferees see no reason why similar expenditures in the future should not be treated as part of the cost of subway construction and the bonds issued amortized from the receipts of the new lines. The anticipated cost of real estate upon the Interborough lines outside of 7th avenue—where the bulk of the cost will be borne from the street opening fund under the proposed projection of the avenue itself southward to Canal street—would not be great; amounting, perhaps, all told, to $4,000,000. This amount is certainly a part of cost and should so be considered.

3. The exclusion of banking discounts from the cost of construction.

The discussion of this subject is given in an appendix from which it will be seen that it is of first importance. The Interborough Company desires that all discounts upon bonds shall be added to the money cost and that the 15 per cent. bonus shall be computed not only upon the actual cost in money, but upon the discounts.

The conferees do not propose that the Company shall be prohibited from issuing bonds at a discount, or paying reasonable brokerage charges, but merely that, if it does follow such a course, it shall not compel the City to pay these discounts and brokerage charges, and 15 per cent. thereon in addition to the actual amount of money invested in the undertaking by the Company.

4. The right of the City to transfer lines, recapturable after ten years, to a second operator with one intermediate recapture.

This provision, which the conferees deem essential, the Interborough Company has shown a disposition to accept, if any agreement is reached upon other terms.

Elevated Lines and the Steinway Tunnel.

The application of the Interborough and Manhattan companies for the necessary franchises to construct and operate additional tracks upon the Manhattan elevated lines, and to construct and operate elevated extensions in The Bronx and to Queens, has been considered by the conferees. The Interborough Company has uniformly insisted that, while it was willing to provide the facilities upon terms to be agreed upon, it would not carry out any plan for the extension of its subways unless the elevated franchises were also accepted. As the Company has maintained this position throughout the present conferences, it became necessary to consider the terms upon which the Company would grant the elevated franchises at the same time that the discussion of the subway proposals proceeded.

The conferees are in agreement that the third tracking of the Manhattan lines is necessary to the full utilization of this important system. Objections have been raised from time to time, based upon the general theory that no new elevated structure of any sort should be built in the Borough of Manhattan, as well as upon questions of local discomfort. The conferees are convinced, however, that as the structures already exist, the advantage to be gained through the improvement proposed would be greater than the objections to the addition of a third track.

When the present conferences were begun, the Public Service Commission had prepared two certificates under the Rapid Transit act; one relating to the additional tracks enumerated in the Company's proposition of June 10, 1910, and one to the elevated extensions. The Commission and the Company had agreed upon the major portion of these certificates; but upon certain essential points there were differences of opinion, and the certificates have not yet been formally adopted.

The principal point of difference remaining related to the share of the profits of the future system that would fall to the City by way of compensation for the new franchises. The companies had proposed that the City receive 2 per cent. of the increase in the gross receipts at express stations and on the extensions—a method that would have netted the City probably not more than $75,000 or $100,000 a year. They had also proposed to convey to the City the title to the Belmont tunnel, and to operate the tunnel line as part of the present subway system under Contract No. 1, upon payment by the City of the amount required to adapt the Manhattan terminal of the tunnel to its proposed new uses, estimated at $1,500,000.

The conferees urged that as these two propositions had no logical relation to each other they should be separated and each treated upon its own merits. They had proposed that, instead of 2 per cent. of the increase in the aggregate gross receipts at certain stations, the City should receive 50

per cent. of the increase in net profits upon the entire system, the average annual net profits for the two years ending June 30, 1911, to be taken as the basis for computing the increase.

The representatives of the Company have agreed, meanwhile, that the Belmont tunnel, which, including carrying charges, during the past three years, has cost the Company, according to its statement, $8,600,000, should be conveyed to the City, if the City so elects, for $3,000,000, or entered in the construction cost of any continuous railroad of which it may become a part at a like sum.

The conferees believe that the third-tracking franchises sought by the Manhattan Company should be granted only upon terms that adequately compensate the City for the extraordinary valuable rights they would confer.

Revised Terms of the Brooklyn Company.

Many of the terms proposed in the Brooklyn Company's supplementary offer of April 25 were reached as the result of the negotiations proceeding between the conferees and the Company before the offer was definitely formulated. They include the acceptance of such mooted points as:

(a) The cost-per-passenger basis as against the car-mileage basis in estimating operating expenses on the new lines;

(b) The inclusion in the construction account of the cost of real estate and easements;

(c) The exclusion of banking discounts from the cost of construction;

(d) The right of the City to transfer lines recapturable after ten years to a second operator without intermediate recapture.

In the course of the further negotiations, following the receipt of the letter of April 25, the Company agreed, further:

1. To omit from the account of carrying charges upon its investment any allowance for amortization upon the new

capital supplied for equipment—this item being otherwise covered in the provision made for depreciation and obsolescence.

2. To merge with the present elevated lines of the Brooklyn Union Company, in a manner satisfactory to the Public Service Commission, the Canarsie line and the Lutheran Cemetery extension, now operated under leases, and to strike from the account of operating expenses any provision for the "rental of leased lines."

3. To submit the entire plant the Company proposes to merge with the City lines to a physical examination by a Board of Engineers appointed by the Public Service Commission, and, before any contract is made, to make good any deferred maintenance that the Commission, upon the report of such engineers, may require.

The Company has also informed the conferees that it will be able to effect a traffic arrangement with the Hudson and Manhattan Railroad Company for the exchange of passengers between the stations of the latter Company at Broadway and 33d street and the Grand Central Station without the payment of extra fare in either direction.

The conferees have not yet pressed to a conclusion with the Brooklyn Company the following further modification, which they believe should be made:

1. The amount of the allowance to be reserved from the gross receipts in lieu of the net earnings of the present lines:

The conferees believe that the reservation of an equivalent of the receipts of its existing lines, before the profits of the proposed new system are applied to the carrying charges upon the new lines, is perfectly proper and fair to the City. They believe, however, that the basis for estimating the amount to be paid annually should be the sum of the net profits of the year ending June 30, 1911. The Company originally proposed that the profits of the year immediately preceding the beginning of the operation of the

new plan be taken as the basis. It was argued by the conferees that, as traffic upon the old lines would be considerably stimulated during the three years immediately before operation by the knowledge that new connections were to be made, the Company would not be entitled to the benefits of the increased rate; that, in any event, an allowance of the present year's earnings—approximately $3,000,000—would constitute a fair return upon the estimated value of the Company's plant.

In the course of the negotiations after April 25, the following substitute was proposed:

1. The Company to accept annually from the gross receipts a sum to be determined as follows:

To the aggregate amount of receipts collected on all said existing lines in Brooklyn and Queens shall be added an amount equal to the receipts at the Manhattan terminals of the Brooklyn and Williamsburg bridges during the year prior to beginning of operation in Manhattan beyond the present terminal of either of said bridges, plus advertising and miscellaneous receipts of existing lines. From the total amount of such receipts shall be deducted for operating expenses a sum computed by multiplying the number of fares represented in receipts from passengers, as ascertained above, by the average operating cost per passenger on the entire system.

The balance of receipts as thus calculated shall be the sum above referred to, to be retained by the Company as the net earnings of existing lines, provided that in no given year shall the amount thus appropriated exceed the sum of $3,500,000, nor be less than the amount of net earnings from operation of the Brooklyn Union Elevated Railroad Company for the fiscal year ending June 30, 1911.

The conferees have considered this proposed substitute at some length, and with great care, but are still of the opinion that the allowance to be made should be based upon the operation of the year preceding the contract—that is, the year ending June 30, 1911.

2. Coney Island Fare—The Company proposes to retain the present 10-cent fare on the lines reaching Coney Island, arguing that the recent examination by the Public Service Commission demonstrated the fact that the roads in question would not yield a fair return upon a 5-cent basis, and that it accordingly should not be required to accept the lower rate. The conferees are of the opinion, however, that as the City allows the Company to reserve to itself the aggregate rate of present net profit on its elevated lines, without regard to the segregated profit or loss of individual lines, no reason remains why a 5-cent fare should not be extended to this as to other parts of the City.

South Brooklyn and Staten Island.

The conferees suggest that action upon the projected new South Brooklyn lines be deferred for the reason that the various alternatives presented for the disposition of these lines and their connections require more attention than it has as yet been possible to give; and for the further reason that certain plans now in course of development for the connection of Staten Island may have an important effect upon the ultimate solution.

The original proposition of the Broklyn Company, dated March 2, involved

(a) The elevation of the so-called Sea Beach, Culver and West End lines and the connection of these lines with the 4th avenue subway at 43d street; and

(b) An extension of the present 3d avenue elevated line to Fort Hamilton.

The Company estimated that the cost of this work, together with incidental terminal improvements at Coney Island, would be about $12,000,000, and in its supplementary proposition of April 25 it submitted the following alternatives: Either

1. That any or all of the South Brooklyn extensions, when elevated, be treated as extensions of the 4th avenue subway, under franchises revocable after ten years; or

2. That the City construct the original extensions of the 4th avenue subway embodied in the plan of the Tri-Borough route, and that these be included in the lines to be equipped and operated by the Company under its general proposal.

In the event of the adoption of the latter alternative, the Company offered to apply toward the construction of the City lines the money it originally proposed to spend upon its own lines.

Under the Company's original plan, the tunnel line to Staten Island, when built, would proceed from the present subway terminus at 43d street. It has been proposed, in the course of the conferences, that in order to make a closer Staten Island connection, it would be better to extend the 4th avenue line to about 65th street. The conferees are of the opinion that in the laying out of the comprehensive transit system that they have in view provision should be made looking toward an early start upon the Staten Island connection. They are now informed that the Department of Docks and Ferries has under consideration the practicability of connecting Staten Island and Brooklyn with a tunnel and marginal line for the carrying of freight from the trunk line railroads now discharging along the Staten Island water front. It has been stated that such a line, if built, could readily be used for both passenger and freight service; and that very possibly it could be constructed from funds contributed jointly by the railroads and the City. The cost has been estimated at about $12,000,000, so that the City's share, if such an arrangement were feasible, would not exceed $6,000,000. We are also advised by the Engineers of the Board of Water Supply that such a tunnel might be used for the carriage to State Island of the water mains of the Catskill system, which it is now proposed to lay in the bed of the Narrows. The saving thus effected in the cost of the water tunnel the engineers estimated at $1,000,000, if the line is available within three or four years.

A very substantial premium is thus placed upon proceeding promptly with a State Island connection. We recommend that the City allow at least $5,000,000, over and above the amounts saved, as its share of the cost of a projected tunnel to Staten Island, to be connected with the 4th avenue subway. A general communication on this subject from the President of the Borough of Richmond is attached hereto (Appendix XVIII).

Immediately following the settlement of the general question submitted, we should be prepared to take up the definite working out of the layout of the lines serving South Brooklyn, Staten Island and Coney Island.

Conclusions of the Conferees.

Throughout their deliberations the conferees have been in agreement that the policy of the City in dealing with the transit situation should embody these principles:

I. That future rapid transit lines should follow as closely as possible the development of a logical and well-ordered City plan;

II. That the City should provide, as rapidly as the means at its command permit, not only for relief of congested areas, but for the opening of lines through those sections that, though relatively undeveloped, offer promising opportunity for the better distribution of population;

III. That the location of particular routes should be determined by the City, for the City's reasons, and not necessarily to conform to plans proposed by operating companies;

IV. That the occupation of lines in the hands of private operators should be kept within the City's control, and that the City should always have the power to retake the component parts of a system capable of independent operation at any time that it may deem such a measure necessary.

V. That where a proper measure of control can be maintained, it is good policy and correct economy to utilize and

extend the facilities offered by existing rapid transit lines already at the service of the City, rather than to reduce the uses of such lines through wasteful competition.

VI. That the available funds of the City should be used for new construction work and placed where they will aid best in preserving the City's strategic position.

VII. That the City should have a full and fair share in all profits derived from the operation of new lines; not only as a matter of the rightful enjoyment of the fruits of its own franchises, but as a means of hastening the release of its self-supporting investments from the constitutional debt limit and of the construction of additional transportation facilities;

VIII. That the basis of operation, in every case, shall be such as to secure a proper contribution from the earnings of the more profitable inside or "short haul" lines to help support the less profitable or outlying lines, thus assuring to the City proper service and equitable return from each system as a system, and not as a section of scattered routes, with the gains of those most profitable reserved for private enjoyment;

IX. That the actual operation of the lines should continue under strict control, and that the contracts for operation should embody not only the essential provisions of the Public Service act, but such other guarantees of the character of equipment furnished or the adequacy of operating service as the City may exact; and

X. That no plan should be adopted or proposal accepted that will prevent the development of the entire City as a social and economic unit or hinder the logical extension of transportation facilities in the future.

In considering the present transit situation of the City, and the alternatives developed in the course of these negotiations, the conferees have not only given attention to the vast amount of underlying detail, but have kept constantly in mind the relation of the several propositions involved to the principles above set forth.

Without rehearsing further the history of the negotiations, or the points of difference between the operating offers, or between the City's representatives and the representatives of either operator, they are now prepared to recommend that the following action be taken:

Proposed Routing Terms.

I. That the City construct, at its own expense, a new subway connecting with the 4th avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occasion may require, and four tracks from 9th street northward;

(d) A two-track line from 59th street easterly to and over the Queensboro bridge, there to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan bridge by way of Canal street to Broadway.

II.—That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III.—That the City construct, also at its own expense, following two-track extensions of the bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg bridge by way

of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn bridge to the Wall street district—by way of Nassau and Broad streets.

IV.—That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the bridge loop lines with their proposed extensions, in such form as to link these lines with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

V.—That the City construct, at its own expense, a new two-track subway, proceeding from Union square in Manhattan easterly under 14th street and the East River to the Eastern District of Brooklyn, and thence to a point to be later determined, and that, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI.—That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that acting upon the alternatives presented for the routing and constructing be withheld temporarily and referred back to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII.—That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of Rapid Transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence

under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th street and Southern boulevard to Westchester avenue, and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times square under 7th avenue, as extended, Varick street, West Broadway and Greenwich street to the Battery, as far as possible as a four-track road;

(d) A two-track tunnel via Whitehall street to the Borough Hall in Brooklyn.

VIII.—That if an agreement be reached upon terms, the City enter into a separate contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line;

(c) To Woodside and Corona; and (d) to Astoria.

The lines converging at the Queensboro plaza, if this contract be accepted, to be connected also by way of the Queensboro bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the construction cost of the continuous line proposed, the tunnel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX.—That, if an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

(a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern parkway to Buffalo avenue; also a two-track subway extension from the Eastern parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern parkway by way of Buffalo and Livonia avenues through the Brownsville district of New Lots road.

X.—That the cost of construction of all of the lines to be built and operated by the Interborough Company under these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI.—That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII.—That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII.—That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union square or 9th street; and

that, if an agreement on terms be reached with the Brooklyn Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV.—That, if the Interborough Company fails to accept a lease for the operation of the proposed line from 42d street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro bridge.

XV.—That, if the Interborough fails to accept a lease for the operation of the Eastern parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI.—That, if a contract be made with the Brooklyn Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

XVII.—That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union square, Manhattan, and the projected Lafayette avenue line from Broadway to Flatbush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII.—That, if neither the Interborough Company nor the Brooklyn Company accepts leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so-called Triborough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX.—That the Public Service Commission, in any event, proceed to prepare and award contracts for the construction of the lines to be built and owned by the City, as rapidly as practicable, in order that work may be started immediately.

XX.—That the franchises sought by the Interborough and Manhattan companies for the third tracking and extensions of their elevated lines in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

Proposed Operating Terms.

We propose that the grant of operating rights for any of the above-named lines be conditioned upon the acceptance of the following terms:

I. Rate of Fare—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II. Terms of Leases—That all contracts for the operation of lines title to which is vested in the City, whether such lines be constructed by the City or by the Company, or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company, may be leased for twenty years, with the privilege of renewal, upon an adjustment of terms, for twenty years in addition.

III. Provision for Recapture—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus 15 per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

IV. Cost of Construction—That the costs of construction, whether borne by the City or by the operator, or upon a basis of division between the City and the operator shall be the cost in money and shall include:

(a) All contracts for original construction work, or

(b) For station finish;

(c) All carrying charges during construction;

(d) Engineering expense;

(e) Extras and damages;

(f) Real estate and easements; and

(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V. Division of Profits—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of:

(a) The value of the tickets collected at stations;

(b) Miscellaneous earnings from stations;

(c) A pro-rata of advertising and other general receipts.

The fixed cost of operation shall include:

(a) Station expenses;

(b) Maintenance of way and structure;

(c) Damages for accidents; and

(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the

City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;

(f) Maintenance of equipment, renewals and depreciation;

(g) Cost of power;

(h) General and administration expenses; and

(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charges of the operator for carrying the cost of equipment; with provision for a sinking fund not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent.) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs of construction or costs of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum.

Provided—

4. That if the gross income in any year, after providing for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the deficit for such period shall be borne by the operator solely; and

Provided further—

5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained

for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI. Operation of Extensions—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall be governed by and included in all of the general provisions of the contract with relation to operation and the division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

(c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII. Supervision of Contracts and Accounting—That the right be retained, through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in such profits are based.

Terms Applying to the Interborough Company.

We propose that any contract made with the Interborough Company shall, in addition to the general terms prescribed, include the following:

I. Leveling of Leases—That, as part consideration for the lease of new lines for the fixed period of 49 years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases from its existing lines so that these shall expire coterminously, 49 years from the beginning of operation of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the Company, through its right of 25 years renewal, would remain in possession until 1979. The lease with Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with the renewal period, in 1968. Under the leveling process, all of the leases, new and old, revert to the City in 1964.

II. Exchange of Lower Manhattan Lines—That, as further consideration for the lease of new lines, the Interborough Company consent to the modification of Contracts Nos. 1 and 2 so as to provide that the City at any time after ten years may, if it so elects,

(a) Take over that portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn; or

(b) That portion of the existing subway running northward from 42d street to 96th street, with its Van Cortlandt Park and West Farms extensions; the company in such event to receive in exchange a lease upon either

(a) The 7th avenue line, from 42d street south to Borough Hall, Brooklyn; or

(b) The Lexington avenue line, from 41st street to The Bronx, with its projected extensions, for the balance of the term of forty-nine years from the beginning of operation as herein defined.

—the purpose of this clause being to give the City the right to take over a continuous north and south line, if it so desires, at any time after ten years, giving the company in exchange a continuous line under the conditions of its present lines, and to reserve to the City the option of taking whichever of the two lines may better suit its needs and purposes under the conditions that may exist when the exchange is effected; also

That in the event of an exchange the respective values of each extension affected shall be appraised on the basis of the earning capacities at the date of appraisal; the difference in value, if there by any as so determined, to be adjusted by the payment by the City to the company of any excess found in favor of the lines taken over by the City, or payment by the company to the City of any excess in value found in its favor; the company, in any event, to reserve trackage rights for the elevated trains from White Plains and Jerome avenue lines and the right to connect the southerly end of its Lenox avenue extension, under the terms of Contract No. 1.

Provisions to be embodied in the contract that will enable the City to take either line subject to any mortgages now liens thereon, or to compel the company to assign its rights to a third party designated by the City; the company to co-operate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract.

III.—Purchase of Existing Lines—That the City be given the right to take over the lines of the present subway

at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment to the company of the sum equal to the company's aggregate estimated profits for the unexpired portion of the lease, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization.

Terms Applying to the Brooklyn Company.

We propose, further, that any contract made with the Brooklyn Company shall, in addition to the general terms prescribed, include the following:

I.—Earnings of Existing Lines—That, in lieu of all earnings on its existing lines, the company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated to be pooled with the receipts of the City-built lines, for distribution in accordance with the general terms agreed upon.

II.—Leased Lines—That the company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now holds under lease, and that no allowance be made under the head of operating expenses for further rental of any of such leased lines.

III.—Examination of Plant—That the company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or

current earnings to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before the lines pass into the proposed new system.

IV.—Management—That the entire system of subways and elevated lines shall be under the management of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commissions Law.

Terms Applying to the Manhattan Elevated Lines.

We propose that any contracts made with the Interborough Company and the Manhattan Company for extensions to and third tracking rights upon the lines of the Manhattan Company shall include the following terms:

I.—That the net profits upon all the elevated lines operated by the Interborough Company, in excess of the average net profits for the two years from July 1, 1899, to June 30, 1911, proper deduction having been made for depreciation, shall be divided equally between the company and the City.

II.—That the City shall have the right to take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another operator; such operator to pay the amount specified in the certificates to the Interborough Company direct.

III.—That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV.—That the payment to be made for equipment, in the event of recapture, shall be fixed with due regard to its then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V.—That the rate of fare shall not exceed five cents.

Results the City Should Secure.

If the course of action we propose meets with the approval of the Board of Estimate and Apportionment, the result, in our judgment, must be a solution of the transit problem that will conform with the general principles we have set forth, and that will permit an early start upon a comprehensive system of rapid transit lines meeting the needs of the City for some time to come.

It would add to that part of the City's system at present operated by the Interborough Company every line embraced in the company's offer of December 5, 1910, except:

(a) The Lafayette avenue line in Brooklyn, which, although a necessary line under certain circumstances, the conferees believe should be withheld until it is apparent whether or not a sufficient measure of relief is secured to the Eastern District through the other new lines proposed; and

(b) The Fourth avenue line, which the company did not seek, and which it has declined to operate upon any other basis than an assumption of all operating losses by the City.

It would link with the present system of the Brooklyn Rapid Transit Company all of the lines embraced in that company's proposition of March 2, except the Eastern parkway line.

It would add to the Interborough system, in addition to the lines originally proposed by the company,

(a) The Proposed new Manhattan-Queens lines running easterly from Times square by way of the Steinway tunnel to the Queensboro plaza and branching to Astoria and Corona;

(b) The further extension of the Jerome avenue and White Plains road lines;

(c) The proposed extensions from the Eastern parkway through Nostrand avenue and Livonia avenue in Brooklyn.

It would add to the Brooklyn company's system, in addition to the lines originally proposed:

(a) The line from Union square, Manhattan, to the Eastern District; and

(b) The projected tunnel line to Staten Island.

It would add, in all, 87 miles of new rapid transit railways to the City's present system, and would carry all but a slight percentage of the passengers of rapid transit lines, to their normal destination, for a five cent fare.

The City's Control.

If the adjustment that we propose is adopted, there will be six systems of new lines subject to recapture separately by the City after ten years, and susceptible of rearrangement in any future combination of lines for independent operation that the City may choose to make. These groups would be:

(a) The Lexington avenue and 7th avenue lines of the Interborough system, with their north and south extensions, which would be subject to recapture for independent operation either through the building of a new crosstown line between 34th and 40th streets, reversing the route of the present lines, or through the exercise of the City's right to exchange the paralleling sections of the system south of 42nd street;

(b) The Queens-Manhattan lines through 42d street and under the East River to Astoria, Woodside and Corona;

(c) The Eastern parkway line, with its extensions, in Brooklyn;

(d) The Broadway (Manhattan) and 4th avenue (Brooklyn) system, running from Queens through the heart of Manhattan to Brooklyn, and branching into South Brooklyn, Coney Island and Staten Island;

(e) The Bridge Loop lines, with their control of the Brooklyn elevated system; and

(f) The line from Union square under the East River and through the Eastern District to the populous centres about East New York and Ridgewood.

With all of these strategic links subject to the control of the City, either through the exercise of the right of recapture, or through the transfer of leases from one operator to another, it is difficult to believe that the City will be unable to maintain a mastery of the rapid transit situation of the future.

The Estimates of Future Traffic.

It has been urged that the linking of the Brooklyn system with the projected Broadway line—upon which the plan for the broader relief of Brooklyn depends absolutely—would result in a reduction of the present revenues of the Interborough Company to a point that would forbid the carrying of its own proposed new lines. We believe, however, that fears of this sort are without basis. The conferees have accepted throughout their consideration of the matters before them estimates of future traffic prepared, from every available source, by the statisticians of the Public Service Commission. The figures of the past show that street railway traffic generally in New York City increases in the ratio of the square of the increase in population. Even if future growth falls beneath this rate, it is certain, at least, to increase at a rate not less than double the rate of increase of population—provided, of course, that additional rapid transit facilities are available. The rate of increase in the current decade (1910-1920) has been estimated variously from 38.7 per cent. (the rate in 1900-1910) to 45 per cent. No one has estimated it at less than 35 per cent.

With these conservative figures as a basis, it is assumed that the traffic of the next ten years will increase not less than 70 per cent. which would mean that the traffic of 1920 would give the rapid transit lines 1,000,000,000 additional five-cent fares annually. The experience of the Manhattan surface lines, as shown in the tables bearing upon this point (Appendix XV.) indicates that practically all of this increase is likely to accrue to the new lines. This would mean

an advance, at the end of ten years, of at least $50,000,000 annually in the gross receipts; indicating the ability of the traffic of ten years hence to carry an investment of $300,000,000 over the investment in the present rapid transit lines.

The conferees have recognized that the revenues derived from the growth of the future will be distributed through all parts of the extended system; but they have no doubt that the share falling to the short haul district—as well as the contributory yield of the long haul lines they are planning to link with the short haul district—would be amply sufficient to carry not only the new Manhattan lines of the Interborough Company, but the proposed line on Broadway. The Interborough Company's earnings upon its investment in the present subway are between 17 and 18 per cent. The figures of the Public Service Commission indicate that, although the percentage of profit on all the old lines must, of necessity, fall temporarily within the first years of operation of the new, the margin remaining to the Interborough Company would be ample to carry its present investment.

The City's Financial Ability.

In dealing with the financial considerations underlying the general plan proposed, the conferees have kept in mind not only the probable traffic yield of the future, but the ability of the City to carry its part in the furnishing of funds for construction.

Upon the basis of figures furnished by the officials of the City, the amount of available credit, above the constitutional margin of indebtedness, during the next five years will be as follows:

Cost of the New Lines.

Margin on June 30, 1911, general	$15,000,000 00
Special credit for transit purposes on June 30, 1911, reserved under the recent constitutional amendment exempting self-supporting investments	60,000,000 00
Ten per cent. of the additional assessed valuation of the City, becoming effective July 1, 1911	80,000,000 00
Ten per cent. of the estimated increase of assessed valuation during the four years following	120,000,000 00
Proportion of the current City debt paid annually through taxation	50,000,000 00
Total	$325,000,000 00

Allowing a deduction of $25,000,000 to take care of uncollectible taxes to be balanced, under a recent statute, through the issue of bonds, this would leave $300,000,000 for all purposes, including subways. We are advised also that, in addition to the $60,000,000 reserved specially for subway purposes, the City can readily spare $80,000,000 from this sum, for use during the next five years.

The estimates of cost of the lines at present projected, prepared by the Public Service Commission's engineers, are given in full in Appendix VI. They show that the total cost of the lines that would be constructed by the City for operation by the Brooklyn Company would be $58,400,000—in addition to $27,800,000 already contracted for or spent by the City for lines under construction—and $26,400,000 to be expended by the company—a total of $112,600,000.

They show that the lines to be constructed for the Interborough Company—if an allowance of $3,000,000 be included for the Belmont tunnel—would cost $109,600,000, half of which amount—or $54,800,000—would be borne by the City and half by the Company.

The total amount of money that the City would be called upon to invest in the new lines, in addition to its present subway investments, would be, therefore, $113,200,000; and, if there be added the allowances proposed for the South Brooklyn lines—$10,000,000—and allowances for real estate, the City's share of which is estimated at $8,000,000—the outlay in view would be $131,200,000.

The Interborough Company figures, in addition, an aggregate of $21,000,000 for new equipment, and the Brooklyn Company $24,000,000.

The total outlay, exclusive of real estate, which cannot be estimated definitely, would be, if all lines are included:

	Construction.	Equipment.	Total.
By the City	$123,200,000 00		$123,200,000 00
By the Interborough	54,800,000 00	$21,000,000 00	75,800,000 00
By the Brooklyn Company	26,400,000 00	24,000,000 00	50,400,000 00
			$249,400,000 00

It is not proposed, however, that construction work calling for all of this outlay would or could be commenced at once; nor would it be possible to enter into contracts during the coming year that would call from the City for more than $80,000,000.

The estimates submitted by the companies (Appendices VII and VIII) are somewhat higher than those of the Commission; due, no doubt, to varying bases of calculations; the Interborough Company including, for instance, an allowance of 20 per cent. for extras upon all of its construction work, as against 5 per cent, figured by the Commission's engineers.

If the Interborough Company fails to accept the leases proposed for it, the total cost to the City for carrying a comprehensive system operated by the Brooklyn Company would be not more than $10,000,000 in addition to the figure indicated as the aggregate of the City's share of the separate systems.

It would appear, therefore, that the carrying out of the plan we proposed, as well as the adoption of any of the alternatives offered, would be well within the City's means;

and that there is no reason why a start upon actual construction should not be made immediately after the decisions of the Board of Estimate and Apportionment have been reached.

While concurring in the general findings and recommendations of this report, Commissioner Maltbie remains of the opinion that the construction of a complete system wholly from public funds, and leased as a unit to an operating company under the ten-year recapture plan provided in the Rapid Transit Act, would, in his judgment, "give to the City greater control over the transit situation of the future and afford the needed relief from present congestion at an earlier date."

We have included in the appendices to the report tables showing in addition to estimates of cost, the relative mileage of the systems of operation proposed, the relative areas served for a five-cent fare by each of the lines projected and the aggregate of such service under the pending proposals, the comparative mileage of routes and trackage under pending proposals upon which the City would share profits, the legal status of the proposed new routes, and the probable periods of duration of construction work; believing this method to be, perhaps, the most convenient for the presentation of these details. Respectfully submitted,

For the Committee of the Board of Estimate and Apportionment:
George McAneny, Chairman,
Cyrus C. Miller,
George Cromwell.

For the Public Service Commission: William R. Willcox, Chairman; William McCarroll, Edward M. Bassett, Milo R. Maltbie, John E. Eustis.

New York, June 5, 1911.

1.—Proposal of the Interborough Rapid Transit Company, Dated December 5, 1910, With Supplementary Letter of the Same Date.

Interborough Rapid Transit Company, 165 Broadway, New York, December 5, 1910.

Hon. WILLIAM R. WILLCOX, *Chairman, Public Service Commission for the First District, State of New York,* Tribune Building, New York City:

Sir—At a time when the City must decide whether its capital available for subway construction shall be invested in an entirely new rapid transit enterprise, or be devoted to perfecting that system of subways the title to which is already vested in the City, it is proper that the responsible public authorities should have before them the most favorable proposal which the lessee of the City's existing subway lines, after full consideration, is able to offer. In our consideration of the subject, we have had in mind not only the routes necessary to afford an efficient service to the City, but changes in the present subway contracts and the additional obligations that the Company will be called upon to assume.

The Interborough Rapid Transit Company, therefore, begs leave to submit the following proposition:

It proposes the construction of the following natural extensions to the present subway:

West Side Lower Manhattan and Brooklyn Extension.

From Times square under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street in Brooklyn, and under Pineapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as

a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern Parkway to Utica avenue as a four-track road, and from Utica avenue to Buffalo avenue under Eastern parkway as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenues, Brooklyn, under Lafayette avenue to Broadway.

East Side Upper Manhattan and Bronx Extensions.

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lexington avenue, thence under Lexington avenue and the Harlem River to a point south of 149th street as a four-track road; thence dividing with two tracks to a connection, east of Mott avenue station, with the West Farms branch of the existing subway; thence two tracks under Mott avenue, 153d street, and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a connection will be made with the Jerome avenue extension of the 9th avenue elevated line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern boulevard and Whitlock avenue, to a point in private property south of Westchester avenue; thence as a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway at about 179th street, over private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public streets to Bear Swamp road and White Plains road;

thence over White Plains road to a connection with the proposed extension of the 3d avenue line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains road and Gun Hill road.

The cost of constructing and equipping the foregoing lines is estimated at $128,000,000. The Interborough Company hereby offers to build and equip the same for the sum of $53,000,000, to be furnished by the City, the City to provide in addition the necessary easements and rights of way, and the Company to supply the funds necessary to defray the additional cost of construction and equipment, which, upon the basis of the above estimate, would amount to $75,000,000. The work will be done as "extras" under the terms of the rapid transit contract of February 21, 1900, under which the original subway was constructed and is operated, except so far as the terms thereof may be modified by the provisions of this offer; and the lines when constructed and equipped will be operated by the Interborough Company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

1. The net profits from operations, to be arrived at as hereinafter provided, shall be disposed of as follows:

(a) The City to take all net profits for the first five years from the time of beginning operations on any portion of the new subway extensions;

(b) The net profits after five years to be equally divided between the City and the Interborough Company.

2. The net profits shall be determined by deducting from the gross revenue of the extensions charges for the following items, in the order named:

(a) Maintenance of equipment, including an allowance for depreciation;

(b) Maintenance of ways and structures, including an allowance for depreciation;

(c) Traffic expense and cost of conducting transportation;

(d) General and administration expenses;

(e) Taxes, if any;

(f) The actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of 1 per centum per annum to meet obsolescence, and for carrying that portion of the cost of construction, not met by the funds contributed by the City and providing a sinking fund of 1 per centum thereon;

(g) Interest on bonds issued by the City to defray the cost of construction, plus 1 per centum per annum as a sinking fund.

3. The gross operating revenue of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or, if deemed advisable by either the City or the Company, from the number of tickets deposited in the chopping boxes on the new extensions or by such other method as upon full consideration may be agreed upon between the parties.

4. If the gross income in any year after providing for the charges above mentioned shall be insufficient to meet the interest and sinking fund upon the construction and equipment bonds issued by the Interborough Company, the deficit for such period shall be borne by the Interborough Company, and shall not be a cumulative charge against future earnings.

5. If the gross income in any year, after providing for all charges above mentioned, including interest and sinking fund upon bonds issued by the Interborough Company to defray the additional cost of construction and equipment, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained by the City for such period shall accumulate and be a charge against the future profits before any division thereof shall be effected between the City and the Interborough Company.

6. The City will retain the right, now provided for by law, to take over the extensions at any time after ten years

from the time that any portion thereof may be put into operation, upon paying to the Interborough Company, (a) the amount of its investment in construction over and beyond the $53,000,000 supplied by the City, plus 15 per centum, which sum shall decrease as the term continues, so that at the end of the full term of contract under which the said extensions may be built as extras no amount will be required to be paid by the City, and (b) the then reasonable value of the equipment.

If this proposition be accepted, we are prepared to immediately enter into contracts to carry the same into effect. After public bidding, the contracts will be awarded by us under the supervision of your Commission to responsible bidders for the construction of the lines in sections; and construction work thereupon will be commenced in each Borough and upon all sections at once. Each part of the road as completed will be immediately opened for operation, so that the outlying territory in Brooklyn and The Bronx will have the earliest possible relief, and all other lines will be hurried to completion within an estimated period of five (5) years.

We have considered your suggestion that the present subway cases should be so altered that the terms thereof and of all extensions thereto operated by the Interborough Company should end at the same time. Contract No. 1, under which the Manhattan portion of the subway was built, provides for an original term of fifty years, with the right to renewal for additional term of twenty-five years. Contract No. 2, under which the line from the City Hall Park to Flatbush avenue in Brooklyn was built, provides for an original term of thirty-five years, with the right to renewal for an additional term of twenty-five years. We are willing, if it can be legally arranged, that these contracts should be so modified that the original terms thereof and of all extensions built as extras under Contract No. 1 should be fixed at forty-nine years from the date of the

completion of the extensions, and that the privilege of the renewal terms of twenty-five years should be cancelled.

The Interborough Company also offers to equip and operate, under a lease for a term equal to the unexpired term of Contract No. 1, under which the original subway was built, the Fourth Avenue Subway in Brooklyn, including extensions to Fort Hamilton and Coney Island, when completed, as part of the present subway system, for a single five-cent fare, upon the following terms:

The gross earnings of the 4th avenue division, of which a separate account shall be kept between the City and the Interborough Company, shall be ascertained from the tickets deposited at the stations upon the division.

From the gross earnings thus ascertained shall be deducted:

1. (a) All station expenses;
   (b) Maintenance of way and structures;
   (c) Damages for accidents happening on the division.

2. Other operating costs to be determined according to unit costs on the Interborough's system, upon a car-mileage basis;
   (a) Conducting transportation;
   (b) Maintenance of equipment and depreciation;
   (c) Cost of power;
   (d) General and administration expenses;
   (e) Taxes, if any.

3. After the payment of the foregoing charges, the actual annual charges of the Company carrying the cost of equipment and providing a partial sinking fund of three-fourths of 1 per centum per annum to meet obsolescence.

4. From the balance of the income then remaining shall be paid interest and sinking fund upon bonds issued by the City to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid annually by the City, but that portion thereof which represents payments made by the City upon bonds issued by the City as hereinbefore provided for shall accumulate and be a charge against future profits, before any division thereof shall be effected between the City and the Interborough Company.

5. The net profits remaining after providing for the foregoing charges shall be equally divided between the City and the Company.

The right will, of course, be reserved by the City, under existing provisions of law, to supervise accounts relating to construction and operation, and to terminate the lease after ten years.

In the event that the foregoing propositions be accepted and incorporated in formal contracts, the Interborough Company will further agree, upon the same terms and conditions as hereinbefore set forth with respect to the operation of the Fourth Avenue Subway, or upon such other terms as may be agreed upon between the City and the Company, to operate such additional extensions to the system herein outlined as may hereafter be constructed by the City; provided, however, that the Interborough Company shall not be called upon to operate any extensions the operation of which would result in a financial loss to the company, unless the City shall undertake to make good such loss.

The proposition herewith submitted is believed to embrace the following advantages over any other now before the City:

1. Citizens of Brooklyn, Manhattan, Queens and The Bronx may be transported upon the enlarged subway system, which may best be described as a four-borough system, to any point, including the shopping and theatre districts of Manhattan, for a single five-cent fare; whereas, under any other plan, to obtain a similar advantage in

almost every case an additional fare of five cents would be required.

2. The extensions proposed can all be completed within a period of five (5) years from the time when the right to begin construction is given; whereas, under any other plan now before the City, a longer period for actual construction would not only be required, but the final completion would be further delayed by the inadequacy of the City's debt margin.

3. The plan above set forth is the only plan which limits the City's contribution to subway construction to the funds which the City now has available for subway purposes; thus leaving free for additional extensions, or for such other purposes as the City may determine upon, the funds which will be available in each succeeding year.

4. The City, under the plan proposed, would have in operation a harmonious subway system, with a through four-track line upon the East Side and a through four-track line upon the West Side of Manhattan, with suitable extensions to The Bronx and Brooklyn; whereas, under any other plan now under consideration, the City would have a duplication of rapid transit service upon the upper and lower East Side of Manhattan, the present single line only upon the up-town West Side of Manhattan, and no rapid transit line at all upon the West Side down-town section of Manhattan.

5. If competition with the Interborough Company be the prime consideration, it is believed that by the construction of the proposed extensions the City will be in a position to establish an independent competitive line at an earlier date than would be possible. Under recent provisions of law the West Side down-town extension and the East Side up-town extension in Manhattan, together with The Bronx and Brooklyn extensions, could be taken over after ten years from the time when the line or any part thereof were put into operation. By the construction of a short cross-town line between 7th avenue and Lexington

avenue, in the vicinity of either 34th or 42d streets, the City would then possess upon the island of Manhattan a subway system which would be the exact reverse of the subway system now operated by the Interborough Company, with the additional advantage of more comprehensive extensions to parts of Brooklyn and The Bronx, which in the meantime, by reason of these very extensions, will have developed into profitable territory.

It can hardly be expected that within an equal length of time the City's credit would so expand as to enable it to complete an entirely independent system to a point where it would furnish the City with equal competitive advantages. It is suggested, however, that the advantage of competition is not so apparent in the case of City subways as in other avenues of transportation. The usual advantages of competition are a reduction of transportation charges and an improvement of service. But there is no prospect, so far as fares are concerned, that for so extensive a service as would be furnished by either rapid transit system now under consideration less than five cents would ever be charged; nor is there any prospect that the present five-cent fare upon the existing system would ever be increased. Upon the other hand, so far as service is concerned, the Public Service Commission is vested with full powers of supervision, and can enforce by direct order the performance of that efficient service which, under other circumstances, is produced only as the result of active competition.

In conclusion, the Interborough Company begs to refer to its proposition to complete the third track upon its elevated system and to build certain elevated extensions in The Bronx, to be operated in connection therewith, and to complete and put in operation as a part of the subway system the so-called Belmont tunnel, which proposition has received the approval of your Commission. The cost of carrying out the elevated improvements is estimated at

$32,000,000, all of which will be furnished by the Interborough Company. The Belmont tunnel when completed will represent a total investment of approximately $10,000,000, all of which, likewise, except $1,500,000, to be contributed by the City toward the completion thereof, will have been furnished by the Interborough Company. It will therefore be perceived that the contribution which the Interborough Company proposes to make from its funds towards the establishment of a well-rounded rapid transit system in this City, approximates a total of $107,000,000, against a contribution of $53,000,000 on the part of the City.

Respectfully submitted,
INTERBOROUGH RAPID TRANSIT COMPANY,
(Signed) By T. P. Shonts, President.

(Copy.)

Interborough Rapid Transit Company, 165 Broadway, New York, December 5, 1910.

Dear Sir—Referring to our proposition relative to subway extensions sent you to-day, I think you understand from our personal conferences that this subway proposition, the same as all of our previous ones, is predicated upon the acceptance by the City authorities of the offer of this Company covering the elevated improvements and the completion and operation of the Belmont tunnel, although the latter proposition is not in any way dependent upon this subway offer. I find upon re-reading our letter of even date, I did not mention this fact therein, and in order to prevent any misunderstanding am writing this note calling your attention to it, and also reminding you that our understanding with the bankers is also based on this view of the matter. Inasmuch as your Commission has already approved our elevated offer, we assume that the same will be accepted by the Board of Estimate and

Apportionment as well, and that, therefore, the condition herein referred to has practically been complied with..

Respectfully submitted,
INTERBOROUGH RAPID TRANSIT COMPANY,
(Signed) By T. P. Shonts, President.

Hon. WM. R. WILLCOX Chairman, Public Commission, New York City.

II.—Proposal of the Interborough and Manhattan Companies, Dated June 10, 1910.

Interborough Rapid Transit Company, 165 Broadway, New York, June 10, 1910.

Dear Sir—Our further study of the rapid transit situation in this City pursuades us that with the greatest despatch upon the part of the City authorities consistent with duty, some time must yet elapse before the actual construction of new subways can be commenced, and that it cannot reasonably be expected that such subways will be available to relieve the traffic congestion of this city within a period of from at least five or six years from the present time. This circumstance, the ever increasing pressure upon the existing subway and elevated lines, particularly the excessive crowding upon the East Side elevated roads, and the passage by the recent Legislature of a bill which, if approved by the Governor, will enable the improvement of the elevated lines to proceed without undue delay incident to the settlement of property damages, lead us to now propose the construction of the following elevated railroad improvements:

1. Second Avenue Line.

The completion of the third track from City Hall station to 129th street.

Queens County Extension—The construction of a two-track extension from the 2nd avenue elevated line across Queensboro Bridge to the Queensboro Bridge Plaza. The

extension when constructed will enable us to operate through elevated trains from Long Island City to Brooklyn Bridge and South Ferry, and afford the citizens of Queens the benefit of free transfers, upon the payment of a single five cent fare, to all parts of the elevated system in Manhattan and The Bronx.

2. Third Avenue Line.

The completion of the third track from Pearl and Chambers streets to about 147th street, with the privilege of thereafter extending the third track to the present terminus of the 3d avenue line at Bronx Park. This extension involves the construction of a new bridge across the Harlem River, and, because of the junction at the Harlem River with the 2d avenue line, the construction of a four-track line between the Harlem River and 145th street.

We propose to build at this point, through private property and public streets, not at present occupied by elevated structures or covered by any franchises, a two-track connection from about 143d street, through Willis and Bergen avenues, to a connection with the West Farms division of the subway at or about Brook avenue. This connection will enable a diversion of West Farms trains to the 2d and 3d avenue line, and will relieve the pressure upon the Broadway and Lenox avenue divisions of the subway.

Becker Avenue Extension—The extension of the 3d avenue line from Pelham avenue through Webster avenue, Gun Hill road and White Plains avenue to Becker avenue as a two-track line, with the privilege of hereafter building a third track from the intersection of White Plains avenue and Gun Hill road to Becker avenue, in order to provide for the better terminal facilities that will be essential to the satisfactory operation of the enlarged elevated system.

3. Ninth Avenue Line.

The completion of the third track from Rector street to 155th street.

Jerome Avenue Extension—The construction of a two and three-track elevated road from about 149th street and 8th avenue across Macombs Dam Bridge to about 162d street and River avenue, thence up River and Jerome avenues to about 194th street, with the privilege of hereafter constructing a third track between 162d and 194th streets. The portion of this line from 162d street and Jerome avenue north may either be built as an elevated extension to be jointly used by the new East Side subways, or may be built by the City as a subway extension under a traffic agreement whereby it may be used by the elevated road. If built as a subway extension, work should be first begun upon it, so that the structure would be completed in time to operate in connection with the other elevated improvements hereinbefore referred to.

The cost of the construction and equipment of the above extensions may be roughly estimated at approximately $30,000,000, and this, of course, will be entirely borne by the Manhattan Railway Company and its lessee, the Interborough Transit Company, with the possible exception of that part of the Jerome avenue line north of 162d street. In view of the very heavy special franchise taxes already paid by the Manhattan Company, aggregating on the basis of the last assessment $46,000 a mile, the cost of acquiring additional easements from abutting property owners over virtually the whole system; the circumstances that this new franchise must be largely confirmatory of what are apparently valid and surviving grants already possessed by the Company; and that the construction of the third tracks will not occupy any substantially greater portion of the surface of the streets than is now occupied by the existing structure; it would seem only fair that your Commission should fix the rental for the proposed new third-tracking grant at some very moderate sum, certainly not exceeding two per centum of the increased receipts from stations served by the new third track.

If the enabling act now before the Governor shall be

approved and our present proposition should be accepted we should expect to begin work at once. The advantages of allowing us to immediately proceed may be summarized as follows:

(a) The third-tracking improvements can be put into service in approximately two years, thus bringing a by no means inconsiderable rapid transit relief to the City within at least three years less time than can be obtained by subway construction.

(b) The pressure upon the 3d avenue line, the travel on which is now more congested than upon any of the rapid transit lines in the City, will be relieved.

(c) If the third track be completed upon the 2d and 3d avenue lines, it will be possible to divert a considerable number of the trains now using the West Farms division of the subway of the 2d and 3d avenue lines. This in turn would give a superior rapid transit service to citizens of The Bronx, and would at the same time enable this Company to materially increase the train movement on the Upper Broadway division of the subway; improve the congested conditions along Lenox avenue; and thus give a more efficient service to the upper portion of Manhattan.

Steinway Tunnel.

We are aware that in our earlier conferences you urged upon us the desirability of putting the Steinway Tunnel in operation at the earliest possible moment; and that many months ago we assured you that we would be glad to do so if proper legislation could be obtained. There was passed at the recent session of the Legislature a bill, now awaiting final approval, which will make possible the operation of this tunnel. If pursuant to the terms of this act, a satisfactory franchise can be obtained from the City authorities for its operation, we propose, in addition to the foregoing elevated improvements, to complete the construction of this tunnel and to operate it as a part of the existing subway, with open communication between the tunnel and the sub-

way system at or near the Grand Central Station. An additional line of rapid transit communication will thus be established, with free transfers upon the payment of a single five cent fare, between Long Island City and all parts of Greater New York reached by the existing subway lines.

We would suggest that you kindly arrange for as early a conference as possible to act on this application.

Very respectfully,
T. P. Shonts, President.

Hon. William R. Willcox, Chairman, Public Service Commission for the First District, State of New York, Tribune Building, New York City.

3.—Proposal of the Brooklyn Rapid Transit Company, dated March 2, 1911.

Brooklyn, N. Y., Office of the President, March 2, 1911.

Hon. William R. Wilcox, *Chairman, Public Service Commission for First District*, 154 Nassau street, New York:

Dear Sir—The subway situation, as reflected by public and official discussion, may be sized up about as follows:

1. That there is a very outspoken and persistent sentiment, particularly in the Borough of Manhattan, for an independent subway route.

2. That there is an equally determined sentiment in favor of reasonable extension of existing subway lines in Manhattan and from Manhattan into the Boroughs of The Bronx and Brooklyn, this sentiment particularly favoring an extension of the present subway north of 42d street on Lexington avenue, and south of 42d street on 7th avenue.

3. That there is a stronger sentiment in Brooklyn for subway extensions from Manhattan into Brooklyn than there is any possibility for many years of satisfying with any employment of either municipal or private funds, and in consequence there is a natural reluctance, both on the part of the City and on the part of the operators of the ex-

isting subway, to assume the almost certain financial loss which would follow such extensions.

4. That there is widespread sentiment, both in Brooklyn and Queens, that the people of those Boroughs should be carried from Brooklyn and Queens to points within reasonable limits in Manhattan for no additional fare.

5. That the great expense of modern subway construction (requiring the carrying of fifty times as many passengers to pay interest on the cost as must be carried on a surface railroad, and probably five times as many passengers as are necessary to pay interest on the cost of an elevated railroad) makes it imperative that either municipal or private funds should be invested only where the investment will furnish facilities for the greatest number.

Assuming that we have correctly diagnosed the present situation, and with the desire to the extent of our opportunity and ability to assist in the proper solution of the problem, we submit for the consideration of your Commission and of that of the Board of Estimate and Apportionment a plan, which, in our judgment, will harmonize existing differences of opinion, and, taking things as we find them (including mistakes of the past on the part of the City and of the transportation companies, all, nevertheless, representing capital invested in good faith) will give to the people of all boroughs the immediate relief which they most need, and present a scheme of transportation, which, in addition to satisfying present demands, may be gradually extended to meet all reasonable requirements of the future.

In general, we propose:

1. That the desired extensions through Manhattan and The Bronx of the present Interborough system on the East Side, north of 42d street, and on the West Side, south of 42d street, be allowed.

2. That a new subway be constructed in Manhattan from the Battery to 59th street, via Church street, Broadway and 7th avenue, with an extension eastwardly on 59th

street to a connection with the Queensboro Bridge, through which subway passengers on all of our existing rapid transit lines in Brooklyn and Queens, and on proposed extensions, subway and elevated, may be carried either without change of cars or by transfer, as traffic conditions demand, without additional fare.

3. That an additional tunnel be constructed under the East River, from the vicinity of the Battery to Brooklyn, connecting both with the proposed new subway in Manhattan and with the subway lines in Brooklyn, now under construction, and others to be constructed.

The accompanying map indicates the manner of carrying out the above plan. It involves:

In Brooklyn.

(a) The 4th and Flatbush avenue subway, now under construction from Manhattan Bridge to 43d street, connected at or near its southerly terminus with four rapid transit lines, extending southward and eastward, of which one will be the extension of the 3d avenue elevated to Fort Hamilton, another, a four-track elevated on New Utrecht avenue, from 39th street to 62d street, with a double-track elevated extension over the old West End route to Coney Island, a third will be a three-track elevated on the Sea Beach right of way from 62d street to Coney Island, and the fourth will be a double-track elevated railroad on the old Culver route from 10th avenue to Coney Island—including the elimination of present or future grade crossings on all of these former steam railroads.

(b) A proposed tunnel under New York Bay, between the 4th avenue subway and Staten Island.

(c) A four-track subway on Flatbush avenue, from a connection with the 4th avenue subway, easterly to Park Circle, thence separating into two branches, one branch being a two-track subway on Flatbush avenue to a junction with the Brighton Beach railroad, entirely reconstructed

as a four-track railroad, and the other branch being a two-track subway, eastwardly, on Eastern parkway to Pitkin avenue, thence a two-track elevated railroad to a connection with the former Kings County Elevated tracks at Snediker avenue.

(d) An extension of the Kings County Elevated Railroad from old City line eastwardly through the Borough of Queens to Jamaica as a two-track elevated railroad.

(e) A third track on the Fulton street elevated from Brooklyn Bridge to East New York.

(f) A third track on the Broadway elevated from Williamsburgh Bridge to East New York.

(g) A connection between the Myrtle avenue elevated railroad and the Broadway elevated railroad, and a third track on the Myrtle avenue elevated railroad from Broadway to Ridgewood.

(h) The elevation of the Lutheran Cemetery railroad from Ridgewood to Fresh Pond road with three tracks.

(i) A new elevated railroad from the Williamsburgh Bridge up Grand street to Leonard street, northwardly on Leonard street and Manhattan avenue to Newtown Creek, thence over Newtown Creek and on Jackson avenue to a connection with the Queensboro Bridge. (It might be desirable to choose different streets for a portion of this route.)

In Manhattan.

(a) The construction of a subway on Church street and Broadway from the Battery to 42d street, thence on 7th avenue to 59th street and easterly on 59th street to a connection with the Queensboro Bridge. The subway to be four tracks from City Hall to 59th street, two tracks from 7th avenue, on 59th street, to Queensboro Bridge, and partly three tracks and partly two tracks south of City Hall, via Church street to the Battery.

(b) Connection between the Williamsburgh Bridge, via Delancey and Spring streets and the Broadway subway.

(c) Connection between the Manhattan Bridge, via Canal street and the Broadway subway.

(d) Connection (if grade permits) between the Brooklyn Bridge and the Broadway subway.

(e) An extension of the Centre street subway with two tracks through Nassau and Broad streets to Beaver street and thence to a connection with the proposed subway on Church street.

(f) A new tunnel connecting with the Church street-Broadway subway and with the extension of the Centre street subway in lower New York and extending under the East River to Montague street, Brooklyn, and thence via Montague, Fulton and Willoughby streets to a connection with the 4th avenue subway on Flatbush avenue extension; this route to be changed in Brooklyn if deemed desirable to serve better the needs of Brooklyn Heights and the shopping district in Fulton street.

(g) The use of the Centre street subway to the extent that it may offer terminal and connection facilities, particularly with reference to traffic over the three Brooklyn bridges and as a part of the Nassau-Broad street subway extension.

The above plan covers, generally, every section of Brooklyn and part of Queens and furnishes sixteen independent rapid transit lines, mostly equipped for express and local service, from Brooklyn and Queens into Manhattan, with through transportation or free transfer to points in Manhattan reached by the Broadway subway between 59th street and the Battery, and by the extended Centre street subway between Delancey and Beaver streets.

It offers a maximum flexibility of operation and of distribution of passengers between Manhattan and Brooklyn, easily adapted to changing currents of travel.

It furnishes, with the Centre street and 4th avenue subways now under construction, the use of twenty-three miles of additional subways and the effective utilization therewith of sixty-seven miles of elevated railroad routes.

It brings into service, as great highways of travel, four East River bridges instead of one and creates one additional East River tunnel.

By arrangement with the Hudson and Manhattan Railroad, passengers on the Broadway, Manhattan, subway line could be transferred to the Grand Central Depot, and an interchange of travel with the Jersey tubes would be made easy, both at Church street and at 33d street. The Pennsylvania Railroad station, on 7th avenue, could be made readily accessible.

Not of small importance, either, is the opportunity permitted by the elevation of the present steam railroads in South Brooklyn and the Ridgewood section to eliminate grade crossings—now a menace to life and a deterrent factor in the development of those localities.

As compared with the principal offer now under consideration by your Commission and the Board of Estimate, our plan would furnish 82.37 miles of rapid transit routes in Brooklyn and Queens, as against 17.6 miles covered by the other offer, with better facilities for the distribution of this traffic in Manhattan over the territory where 98 per cent. of the people want to go—namely, between 59th street and the Battery. It would involve probably no greater investment of City capital than the City would immediately be committed to in good faith by the acceptance of the other proposition, with the assurance of much greater return on that investment. And assuming that the present subway lines will be extended north and south on the east and west sides of Manhattan, this supplementary plan would give for the entire City as nearly perfect a system of transportation for the capital invested as any system which could be devised, having due regard to existing conditions and capital already invested by the City.

No other subway or elevated plan is possible of realization within the next generation, at least, which would serve so large an area or satisfy the requirements of so many

people. Its proposed and existing lines directly traverse every ward in Brooklyn, reaching 1,600,000 inhabitants, and with Manhattan and Queens connections, the total population to be directly served and benefited is not less than four millions. Development would be stimulated in 23,000 acres in Brooklyn alone, now substantially unoccupied—an area one and six-tenths as large as the Borough of Manhattan, and likely, within ten years after the inauguration of this transportation plan, to house at least a million additional people.

It is our suggestion that the City should construct the subways and that we should equip and operate them upon such terms and for such period as may be agreed upon, in connection with our existing and proposed elevated railroads. We should expect the City also to assume, as heretofore, its reasonable share of the cost of eliminating crossings of streets at grade over the lines of the former steam railroads. The estimated expense to which the company would be subjected for carrying out its part of the above plan is between fifty and sixty millions of dollars. The cost to the City, in addition to what has already been contracted for, would probably not exceed the amount to which the City would morally (if not legally) commit itself by the promised extensions in Brooklyn of subways now under construction and others covered by the Interborough offer. Instead, however, of this sum being invested in routes which will concededly be unprofitable and will serve only a small fraction of the population, it will be invested in routes which will serve practically all the population of Brooklyn, a large part of the population of Queens and all of the population of Manhattan Island south of 59th street. Moreover, the proposed investment by the City would fit in perfectly with any future subway extensions or plans either in Manhattan, Bronx, Queens, Brooklyn, or the Borough of Richmond.

If the plan which we have outlined appeals to the judg-

ment of the Commission and of the Board of Estimate and Apportionment as having merit, we shall be pleased to take up with you and the Board of Estimate the question of terms and division of cost.

We may say, generally, that the terms proposed by us would not be less favorable than those presented in any offer now under consideration by your Commission and the Board of Estimate.

The offer would include an agreement, under equitable arrangement, to operate any extensions of the above routes in any of the five Boroughs which might be necessary in the future for the development of transportation facilities.

The accompanying map also includes the proposed subway on Lafayette avenue. We think this is a mistaken route and a questionable investment of capital, and we suggest that it be eliminated, for with the adoption of our plan the people in the section covered by that route would have facilities better than those offered by the construction of this subway. Nevertheless, it may be included in the general proposition if deemed wise by the City.

Respectfully submitted,
BROOKLYN RAPID TRANSIT COMPANY,
By T. S. Williams,
President.

IV. Supplementary Proposals of the Brooklyn Rapid Transit Company, dated April 25 and May 2, 1911.

Brooklyn Rapid Transit Co., 85 Clinton street, Brooklyn, N. Y., Office of the President, April 25, 1911.

HON. GEORGE MCANENY, Chairman, Special Committee, Board of Estimate and Apportionment; HON. WILLIAM R. WILLCOX, Chairman, Public Service Commission for the First District, New York City:

Gentlemen—Referring to our transit proposition of March 2, 1911, and to the situation as it has since developed

in many conferences with your joint committee, we respond to your request for a formal statement as to our attitude toward a possible enlargement of the scheme of transportation outlined in our previous communication, and as to detailed terms and conditions under which we will agree to equip and operate, in connection with our own rapid transit lines as proposed to be improved and extended, certain subway and elevated lines to be constructed by the City.

In one essential respect the situation has radically changed since our proposition of March 2 was presented.

The purpose of that offer was primarily to enable us to furnish adequate transportation facilities to the people of Brooklyn and part of Queens, with the possible extension thereof to the Borough of Richmond. These three Boroughs embrace a population of over two millions, or nearly as much as the population of Manhattan. A large part of the people of these three Boroughs goes daily to and from Manhattan. No plan of transportation will be sufficient or satisfying which does not, so far as practicable, convey such persons without change of cars and for no additional fare within reasonable limits in Manhattan. To meet this requirement we suggested, not only some amplification of existing subway facilities in lower Manhattan and a new tunnel under the East River, but a trunk distributing subway on Broadway from the Battery to 7th avenue, thence to 59th street and under 59th street to the Queensboro Bridge.

The desirability of this plan has been generally conceded. Indeed, there has, in seven weeks' public discussion, been practically no criticism of it or objection to it as a transportation plan. It has received continuous and painstaking scrutiny by your Committee. The proposal did not conflict or interfere with any logical development of subways in Manhattan. It furnished a much-needed relief for Manhattan transportation south of 59th street. It covered no streets there for subway construction in which other applications were pending. In short, it was not in fact, or in purpose, a competitive proposal—for, except as to compara-

ought not to interfere with immediate transit needs, but in any event if we should receive a contract for equipment and operation under the indeterminate franchise plan the objection would not be an obstacle to the carrying out of such future plans, or the construction in the Bowery and Park Row might be so designated as to provide for both proposed Lexington avenue and future 3d avenue routes.

We, therefore, hereby repeat our willingness to operate, in addition to the lines specified in our proposition of March 2, that portion of the Tri-Borough route referred to north of 9th street, or north of Chambers street, if the route be extended southerly through Bowery and Park Row. The remainder of the original so-called Tri-Borough route from 9th street to the Battery on Broadway and Church street was, of course, included in our proposition of March 2.

In case the City should desire to make a different disposition of this East Side-Manhattan-Bronx line, either as embodied in the Interborough plan or otherwise, we are perfectly willing that such a course should be taken—provided that this disposition will not deprive the people of Brooklyn, Queens and Richmond of the use of Broadway as a distributing Manhattan subway, or not postpone such use to some indefinite time in the future.

A Five-Borough Route.

If, however, the operation of the additional East Side line which we have described should fall to us, then our proposition becomes no longer a three-borough but a five-borough proposition, and imposes considerations and responsibilities from which we have no disposition to shrink, but which, accompanied by these severe terms insisted upon by your committee as to revocable franchises, rates of fare and equal division of profit, necessarily require conservative judgment in the expenditure of private capital and a limitation of risk in the equipment and operation of extensions. We have been perfectly frank with the public and with the City's representatives, and desire to be now,

in the assumption that the maximum available amount of either municipal or private capital for transit facilities shall be expended where it will furnish the greatest relief to the greatest number. A disproportionate expenditure in districts of scant population may be, from some points of view, justice to those localities, but it may also be an absolute injury and injustice to much larger numbers of people. We believe that it is the first duty of the company and the City to take care, within the measure of their respective abilities, of the transportation requirements of the people of the congested territory, but in discharging that duty to lay out routes which while now and probably indefinitely in the future serving the greatest number, will present the framework of a comprehensive and logical system, permit the possibility of extension along consistent territorial lines, and allow the greatest flexibility of operation as tides of travel change.

With this principle in view, so far as it can be applied under existing conditions, and recognizing the desirability of incorporating in our proposition a method whereby extensions may be constructed and operated from time to time as deemed wise by the City, and at the same time an automatic check may be applied to prodigal expenditures for this purpose, we propose, for convenience in statement of terms and conditions, that the lines under discussion with your committee and those embodied in our plan be classified in two divisions—one comprising those now constructed and operated, those under process of construction and those to be immediately constructed, these three being designated as "Original Lines"—and the other comprising branches, additions and extensions, or new lines, to be designated as "Extensions." Under the head of "Original Lines" we propose to include the following:

Original Lines.

(a) Subway from Battery to 59th street, via Church street, Broadway and 7th avenue and on 59th street from 7th avenue to the Queensboro Bridge.

(b) Centre street subway with extensions through Nassau and Broad streets.

(c) Connections between Manhattan and Williamsburg Bridges and Broadway (Manhattan) subway and between Brooklyn Bridge and Centre street subway, and the necessary use of the bridges.

(d) Tunnel under the East River from lower New York to Flatbush avenue or 4th avenue via Pineapple street route or such other route as may be agreed upon.

(e) That portion of the Triborough route from 9th street and Broadway north to the points in The Bronx covered by the bids recently taken by the Public Service Commission, or, if said route be extended southerly via the Bowery and Park Row to Chambers street, then from Chambers street north to the aforesaid points in The Bronx (Mott and River avenue, 157th street, 3d avenue and 138th street).

(f) The 4th avenue subway now under construction from Manhattan Bridge to 43d street, Brooklyn.

(g) The proposed subway on Flatbush avenue from an intersection with the 4th avenue subway to the junction of the Brighton Beach Railroad at Malbone street.

(h) Subway on Eastern parkway from Flatbush avenue to Buffalo avenue.

(i) Existing elevated lines of the Brooklyn Union Elevated Railroad Company and leased lines.

(j) Elevated extension from Queensboro Bridge via Long Island City and Greenpoint to a connection with the Williamsburg Bridge and with the Broadway or Myrtle avenue elevated lines of the Brooklyn Union Elevated Railroad Company.

(k) Extension of the Myrtle avenue elevated railroad to Lutheran Cemetery.

(l) An extension of the Kings County elevated railroad from old City line to Jamaica.

(m) Extension of the 3d avenue elevated railroad to Fort Hamilton.

(n) Rapid transit extensions from the terminus of the 4th avenue subway through South Brooklyn (subject to possible consideration outlined further on in this communication).

Extensions.

Under the head of "Extensions" will be included any possible future extensions, with the expectation that the construction of all or part of the following will be contemplated by the City, as soon as practicable, and the equipment and operation undertaken by the Company under the terms applicable to "Extensions."

Bronx—River and Jerome avenue extension. Southern boulevard and Westchester avenue extension.

Staten Island—Tunnel to St. George.

Brooklyn—Nostrand avenue extension. Livonia avenue extension. Utica avenue extension. Eastern District line connecting with tunnel under East River and subway under 14th street, Manhattan—precise route in Brooklyn to be determined later.

Queens—Astoria and Woodside-Corona lines.

Terms and Conditions of Proposed Contract.

I.—Division of Cost.

Except as possibly modified in the contingency suggested in paragraph VI. below, we do not care to change the terms of our proposal as to division of cost—namely, that the City should pay the cost of construction of subways and extensions or connections thereof, and that we should pay the cost of elevated extensions of our existing rapid transit lines and the cost of equipment of all lines, and that we should operate all rapid transit lines, new and old, and future extensions, as one system.

II.—Rates of Fare.

The fare to be five cents for one continuous ride over any part of the said system, including "Original Lines" or

"Extensions," with the exception that fares to or from the Coney Island district shall be ten cents; provided, however, that the said fare of ten cents may at any time and for any period be reduced to such figure, not less than five cents, as will be sufficient to yield from such Coney Island operation the fair cost thereof, plus a reasonable profit.

III.—Tenure of Contract.

We agree that the contract for equipment and operation of all lines, subway or elevated, constructed by the City, and of the new elevated extensions constructed by the Company on public streets and places, may be terminated by the City after ten years, pursuant to the provisions of the Rapid Transit Act, except that the tenure of possession of the so-called Centre Street Loop as extended through Nassau and Broad streets, and the connecting bridges, shall be for twenty years, with the privilege of renewal for twenty years additional. This exception is necessitated by the fact that the large expenditure required for the reconstruction and third-tracking of our elevated lines intended to be operated over the Williamsburg and Brooklyn Bridges into said subway would not be justified if at the end of ten years the use of the bridges and the terminal connections in Manhattan was to be taken away.

IV.—Terms of Operation—"Original Lines."

All "Original Lines" enumerated above to be operated by us on the following basis as to receipts and expenditures:

The gross receipts from the operation of all such lines to be pooled and from the total of such gross receipts the following deductions to be made:

Operating expenses, provision for depreciation, renewal and obsolescence.

The balance of receipts shall be applied as follows:

1. To be retained by the Company an amount equivalent to the net earnings of the existing lines operated by the Brooklyn Rapid Transit system in connection with the

proposed new lines as of the year preceding the beginning of operation under the proposed contract with the City.

2. Interest and amortization upon the new capital supplied by the Company for construction.

3. Taxes, insurance and rentals of leased lines, if any.

4. Interest and amortization upon the cost to the City of the lines constructed by it.

The balance of receipts after making the foregoing deductions to be divided equally between the City and the Company.

The contract shall contain a separate provision as to terms of compensation for the use of the Centre street subway and connecting bridges to go into effect in case the City shall exercise its option to terminate the remaining franchises after ten years. Until such termination of course the general terms outlined above will include the operation of the Centre street subway and connecting bridges.

V.—Terms of Operation—"Extensions."

Supplementing the memorandum filed with you on March 14, we will undertake to operate all "Extensions," including those specifically enumerated above under the division of "Extensions," on the following basis:

A.—Extensions agreed upon by the City and the Company to be governed by and included in the general provisions of the contract as to receipts and deductions therefrom, applicable to "Original Lines."

B.—Extensions required by the City and not concurred in by the Company to be operated as part of the entire plan, but the financial operations of such extensions to be kept in a special account and determined as follows:

Receipts—

(a) Tickets collected at stations on extensions.

(b) Miscellaneous earnings from stations on extensions.

(c) Pro rata of advertising.

Operating Expenses—

(a) All station expenses of stations on the extensions.

(b) Maintenance of Way and Structure on the extensions.

(c) Damages for accidents happening on the extensions.

(d) Taxes, if any, specifically applicable to the extensions.

(e) Other expenses to be divided on a cost per passenger basis to be determined according to unit costs on the entire system covered by the contract, including such extensions, to wit:

1. Conducting transportation.

2. Maintenance of Equipment, Renewals and Depreciations.

3. Cost of Power.

4. General and Administration expenses.

5. Proportionate Taxes not specifically applicable to the extensions.

After the payment of the foregoing charges there shall be paid out of the earnings the actual annual charges for carrying the cost of equipment necessarily and properly allotted to the extensions and for providing a proper sinking fund.

From the balance then remaining shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction of the extensions.

If the income shall be insufficient to meet the foregoing charges, or any part thereof, the deficit shall be paid annually by the City.

All the remaining net proceeds after the above deductions shall be divided as follows:

Three-quarters thereof to the City and one-quarter to the company as compensation for its services and facilities in carrying on the operation of such extensions.

VI.—Particular Suggestions as to South Brooklyn Lines.

Our proposition of March 2 involved the elevation of existing steam railroad lines and the connection of those

lines thus elevated with the Fourth Avenue Subway at 43d street. Inasmuch, however, as the City desires that any extensions (as in effect these would be) of the Fourth Avenue Subway should be operated on the indeterminate plan of franchise, revocable after ten years, it will be impossible for us to include such steam railroad lines thus reconstructed under such a contract on account of the leasehold and other interests involved, and on account of the fact that the rights of way of many of these lines are owned in fee and covered by mortgages, and could not thus be conveyed. Moreover, there seems to be a quite loudly expressed sentiment in that section of the City against this part of our plan and in favor of that feature of the Tri-Borough plan which involved two extensions from the Fourth Avenue Subway to be constructed by the City, one to Fort Hamilton and the other to Coney Island. We think this is a mistaken idea, for our plan gives four rapid transit lines from the terminus of the Fourth Avenue Subway through the same and greater territory, while the Tri-Borough plan gives only two. Nevertheless, in order to meet the objection created by the question of indeterminate franchise, and with the desire to acquiesce in the apparently prevailing opinion in South Brooklyn, we are prepared to suggest as a substitution for that part of our March 2 proposal, the following alternatives:

1. Either that any or all of the so-called South Brooklyn extensions be regarded as extensions of existing lines and constructed under the provisions of the Rapid Transit Act, with such modifications in route as might be necessary and desirable—which would make the franchise revocable aften ten years; or

2. That the original extensions of the Fourth Avenue Subway embodied in the plan of the Tri-Borough route be constructed by the City and included in the lines to be equipped and operated by us.

In the event that the first suggested alternative be

adopted, the company will provide the necessary money for the construction as well as for the equipment of these lines.

In the event that alternative number two be adopted, we will contract for $5,000,000 of City money, to construct and equip the proposed subway line on Broadway (Manhattan) north of 9th street, on 7th avenue and on 59th street, the City assuming the cost of real estate, easements and damages.

Estimated Costs.

We are advised by the City Comptroller that the available City capital for subway construction on July 1 next will be in the neighborhood of $80,000,000.

Our estimate of the amount of money required by the City to construct the additional subways included under the so-called "Original Lines" described above, would be $83,500,000. This is on the assumption that the size of section of subway called for in the so-called Tri-Borough specifications be adopted. If, however, the size of the tube should be reduced, the City's requirements of new capital would be reduced to $73,500,000.

Our own expenditures, if the equipment and operation of the additional East Side line from Chambers street or 9th street northwardly into The Bronx be included, will approximate $75,000,000.

If alternative number two in paragraph VI. above be adopted by the City and the lines covered therein should be classified under the division of "Extensions," then, in view of the contribution by the company of the greater part of the cost of the Broadway-59th street subway, the immediate financial requirement of the City to undertake its part of the contract would be reduced to approximately $61,000,000—leaving $19,000,000 of available City funds immediately applicable to "Extensions."

General Observations.

The adoption of the plan which we have outlined presents a comprehensive scheme of transportation reaching every borough of Greater New York and capable of indefinite expansion without unnecessary duplication of capital. It permits the realization within a few years, instead of within a generation, of a unified city transit system with through cars and a single fare. It is the only plan before the authorities which gives assurance of return on the $30,000,000 of city capital already invested or contracted for in the Centre street and 4th avenue subways. It is the only plan which assures the City interest and sinking fund requirements on municipal investments in subway construction, past, pending, and now proposed, with equal participation in additional profits which are not problematical but probable. It is the only plan which insures financial return to the City from the growth, not merely of lines embraced in new franchises now to be granted, but of sixty-seven miles of existing rapid transit routes doing a large volume of business. It is the only plan which guarantees to the City an operator of future extensions, whether offering promises of profit or not, under conditions which insure the most economical operation, create no additional fares and offer the maximum facilities for public convenience. It is the only plan which furnishes a complete trunk system from which branches may be extended according to transportation needs, symmetrically and efficiently. Each borough might by some local or less comprehensive plan get lines of rapid transit—but unless these be connected up and operated with such a widely extended trunk system as we have proposed their usefulness would be comparatively slight and the fares for transportation would be doubled or trebled. Equal advantages under any other plan could not be obtained with twice the expenditure of City or private capital.

Let it not be forgotten, either, that great projects of

municipal improvements will require in the near future millions of additional funds—and the City's ability to raise these moneys will depend largely upon its wise decision now as to expenditures for transit, for to the extent that transit lines are intelligently laid out and the City investment therein is self-supporting the sooner will there be great increases in taxable valuations and a wider and surer basis of City credit.

Respectfully submitted,
BROOKLYN RAPID TRANSIT COMPANY,
By T. S. Williams, President.

Brooklyn Rapid Transit Company, 85 Clinton Street, Brooklyn, N. Y., Office of the President, May 2, 1911.

HON. GEORGE MCANENY, *Chairman, Special Committee, Board of Estimate and Apportionment;* HON. WILLIAM R. WILLCOX, *Chairman, Public Service Commission for the First District, New York City:*

Gentlemen—Confirming our verbal communication to you at yesterday's meeting, we are willing that the operation of the following extensions may be included under the provisions of our communication of April 25, subdivision 4th, entitled Terms of Operation—Original Lines—construction thereof of course to be assumed by the City;

1. Jerome avenue extension, from Mott and River avenues to southern terminus of Jerome Park reservoir;

2. Southern boulevard extension, from 3d avenue to Bronx River;

3. Astoria extension, from Queensboro Bridge northwardly;

4. Woodside and Corona extension, from Queensboro Bridge to Junction avenue;

5. Fourteenth street—Eastern District Brooklyn extension, from Broadway, Manhattan, to East New York (precise route in Brooklyn to be hereafter determined);

6. Livonia avenue extension, from Buffalo avenue to New Lots road;

7. Nostrand avenue extension, from Eastern parkway to Flatbush avenue.

As to the other preferred extensions enumerated in our communication of April 25, 1911, we prefer to postpone our decision as to whether these shall be included under "Original Lines", as to their terms of operation, until the City shall have determined to construct the same. Respectfully yours,

T. S. Williams, *President.*

V.—Supplementary Proposal of the Interborough Company Dated May 9, 1911.

Interborough Rapid Transit Company, 165 Broadway, Theodore P. Shonts, President and Chairman of Executive Committee, New York, May 9, 1911.

Hon. William R. Willcox, *Chairman, Public Service Commission for the First District,* New York City; Hon. George McAneny, *Chairman, Special Committee, Board of Estimate and Apportionment:*

Gentlemen—In our letter of December 5, 1910, to the Public Service Commission, we submitted a comprehensive proposition for the construction of additional subway and elevated lines in four boroughs of The City of New York, which was intended to place at the disposition of the City the entire resources of the Interborough Company, relieve the City from the undivided burden of subway construction, and correspondingly release its credit to other purposes. Notwithstanding that this offer gave up so much that it left the company little margin for further concession, we have joined in a long series of conferences with the Public Service Commission and a Committee of the Board of Estimate and Apportionment, in which the entire subject of the Rapid Transit necessities of the City were again carefully considered. As the result certain modifications have been

proposed, which, after grave hesitation, we have decided to accept. But with these concessions made we can offer nothing more, because we have nothing left to give.

It is manifest that if, after extending our lines largely at our own cost, through the main arteries of travel, we should be met immediately with an unnecessary duplication of lines by the City, the result would be our financial ruin. With this in view, and for the express purpose of avoiding the need of duplicated lines, we have decided to extend our offer to cover other additional routes, so as to afford a service and a capacity equal to the growing needs of the population of this City for many years to come.

A misapprehension has long existed as to the immensity of the future profits possible to the Interborough Company if our offer of December 5, 1910—to say nothing of the additions thereto we are now prepared to make—should be accepted by the City. The non-existence of excessive profits is absolutely demonstrated by all the statistics we have been able to collect, but in order to place a limit upon such profits should they develop, we propose, as hereinafter stated, certain contractual limitations upon future profits.

It has been pressed upon us that if our future service should be unsatisfactory or inadequate, the non-terminable leases under which our present lines are held will prevent the City from supplementing the deficiency save by an unnecessary expenditure of time and money. To meet this objection we propose, as hereinafter provided, when certain difficulties over which we have no control are eliminated, to make any portion of the old subways subject to recapture by the City after a period of ten years.

It is objected that our proposed lay-out does not immediately reach the distant portions of all the boroughs. It is the only plan, however, which, while furnishing an operator at a single fare, makes feasible the construction in the near future of extensions to the undeveloped portions of the City, including the untouched territory of

Staten Island, by releasing, to the extent of the $67,500,000 which we propose to contribute ourselves to subway construction, City credit which may hereafter be devoted to that purpose.

It has been objected that under the system of leases now in effect terminating at unequal periods, a virtual monopoly of subway construction and operation is conferred upon this company; because it is said the portion of the property which might be taken over under an earlier termination could not be efficiently operated without awaiting the falling in of some other essential part of the system. To meet this argument, we first proposed the synchronizing of all leases to a uniform term of fifty-five years from the date of placing the new extensions in operation. As the result of conferences prior to December 5th ultimo we consented to reduce this period to forty-nine years.

It has been urged that the proposed elevated extensions in The Bronx should be built as extensions to the existing subway, thus reducing the term of the lease from eighty-five to forty-nine years and subjecting these lines to the profit-sharing provisions of our general proposal. We have decided to yield this point and consent that they be thrown into the proposed enlarged subway system as an integral part thereof.

It has also been urged that the third-tracking privileges on the elevated lines be likewise subjected to a profit-sharing arrangement. But inasmuch as the Interborough Company is already contributing 60.70 per centum of its profits from the elevated lines to the payment of taxes, there manifestly remains no just ground for a profit-sharing arrangement here.

It has been pressed upon us that if the leases be synchronized, and if the new extensions should be taken over under the ten-year clause, some privilege should be extended to the City after thirty-five years to take over the present subways as well, upon payment of a fixed com-

pensation for the unexpired portion of the proposed forty-nine-year term. This demand requires a material concession upon the part of the Interborough Company, inasmuch as it is estimated that at that time, through the operation of the Sinking Fund, the City bonds issued for the original subway construction will be amortized and that the profits of the Interborough Company would be correspondingly enhanced. This option we have nevertheless decided to extend to the City upon terms much less favorable to the company than if it remained in the undistributed possession of the present subway lines until the expiration of the forty-nine-year period.

Before formulating these changes in our current offer, which will then fully express our ultimate ability in the matter of subway construction, equipment and operation, we will say, in response to an inquiry that has been made of us, that if the public authorities prefer an offer upon the basis of the terms recently proposed to the City by the Brooklyn Rapid Transit Company, the Interborough Company, upon those terms, will undertake to build any road in any of the five boroughs that the public authorities may designate, including one or more through lines to Coney Island and Staten Island, and operate them all in connection with its present subway system for a single five-cent fare.

Reverting now to our original offer, we propose the following modifications:

1. In our offer of December 5 we proposed the construction of a four-track subway upon the lower West Side of Manhattan and a four-track subway down the upper East Side, with a two or three-track extension to Pelham Bay Park, thus affording The City of New York two direct north and south lines, one upon either side of Manhattan Island. We also proposed the extension of the elevated lines upon one side of The Bronx to Woodlawn Cemetery and upon the other side to within four blocks of the City

of Mount Vernon. In Brooklyn we proposed the construction of new subways through Lafayette avenue to Broadway and through Eastern parkway to Buffalo avenue—the Brooklyn system of subways to be connected with the Manhattan system by a new tunnel under the East River in the vicinity of Liberty street. In addition to these lines, to be paid for in the proportions stated in our offer, the Interborough Company now proposes to build, and at its own cost, equip and operate for a single five-cent fare in connection with its present subway, the following lines, one-half of the construction cost of which to be paid by the City and one-half by the Interborough Company:

(a) A two-track subway commencing at Lafayette avenue and Stuyvesant avenue, in Brooklyn; thence under Stuyvesant avenue, private property, Bushwick avenue, Metropolitan avenue, North 7th street, by tunnel under the East River and 14th street, Manhattan, to Broadway; thence under Union square and Broadway to Times square; thence up Seventh avenue to 59th street and easterly on 59th street to a connection with the Queensboro Bridge, omitting the two easterly blocks on Lafayette avenue heretofore proposed as no longer necessary.

(b) A two-track elevated line in Queens, commencing at the Plaza of the Queensboro Bridge at Crescent street; thence via Bridge plaza, Jackson avenue to Debevoise avenue; thence northerly over Debevoise avenue to Ditmars avenue, Astoria; the northerly one mile of this structure to be three tracks.

(c) A two-track elevated line in Queens, commencing at the present terminal of the Belmont tunnel, Van Alst avenue and 4th street, northward under Hunter's Point avenue; thence over the yards of the Long Island Railroad northward curving into Davis street; thence via Davis street, Ely avenue, Williams street, such private property as may be necessary, to the Queensboro Bridge plaza, and thence along the Queensboro Bridge plaza to Jackson ave-

nue and via Diagonal street, Thomas avenue and Greenpoint avenue to Woodside.

2. We now propose to build the proposed Jerome avenue elevated extension of the 9th avenue line north of 162d street as an extension to the subway, the term of the franchise being thereby reduced from eighty-five years to forty-nine years, the proposed consolidated expiration period for the entire subway system, at the same time reserving trackage rights to the elevated roads. It is understood, however, that the proposed line between 194th street and Woodlawn road, encompassed as it is by the Jerome Park reservoir upon the one side and the Woodlawn Cemetery upon the others, will be abandoned.

3. We also now propose to build the proposed White Plains elevated extension to the 3d avenue line north of Gun Hill road and White Plains road as an extension to the subway, reserving trackage rights to the elevated road.

The modified additional routes herein proposed will increase the total cost of construction and equipment from $128,000,000, the original estimate, to $167,745,000, of which amount the cost of the equipment to be wholly borne by the Interborough Company, will be $31,965,000. The construction cost will be $135,780,000, of which amount $67,559,500 will likewise be borne by the Interborough Company, a total of $99,524,500, this being contributed by this Company.

4. In our original offer we proposed that for five years all of the net profits of the new extensions should go to the City, thereafter to be equally divided between the City and the Interborough Company. We now propose that all profits as therein defined ultimately distributable to the Interborough Company under this provision in excess of 3 per centum upon its investment in the construction and equipment of the proposed extensions shall first be applicable to meet any deficit that the City may be compelled to pay upon additional branch lines and extensions built

under the omnibus clause of our original offer after applying to such deficit the profits received by the City from the original extensions.

5. Under the terms of our offer the periods of the termination of all subway franchises are to be synchronized at forty-nine years from the date of beginning complete operations of the new extensions. We propose, however, at any time after thirty-five years from that date, provided the City in the meantime shall have taken over the proposed extensions under the ten-year clause, to extend to the City the privilege of taking over the present subway upon tendering to the Interborough Company a sum equal to the aggregate estimated profits of the Company for the unexpired portion of the lease, estimated upon the basis of the average annual net profits of the property for the five-year period immediately preceding the time at which the City may hereunder accept said option, and upon otherwise complying with the terms of the lease.

6. If it can be legally carried out, provided the lien of any duly authorized mortgage be not disturbed, we will consent to modfy the present leases with the City so that either the present East Side subway, from 42d street south to the Battery, or the present West Side subway, from Times Square north, shall be held by the lessee under the ten-year recapture clause, thus enabling the City to possess a through line upon either the east side or the west side, in exchange for an indeterminate least of forty-nine years from the time of beginning complete operations upon, respectively, the proposed West Side subway extension from Times square to the Battery or the proposed east side extensions from 42d street north, reserving to those extensions trackage rights for the elevated lines over the White Plains and Jerome avenue lines and the right to connect the southerly end of Lenox avenue extension under the terms of Contract No. 1—the difference in value upon the exchange to be adjusted by agreement between the Interborough Company and the City, or, if they cannot agree, to

be settled by arbitration upon terms and conditions to be agreed upon.

In conclusion, we invite your attention to the fact that we have long since made the necessary financial arrangements to carry out our several offers; that if they be accepted we are prepared to immediately and simultaneously begin construction upon all lines in all Boroughs; to complete the construction within five years; to open up the lines for public use in sections as completed in connection with the existing subways, and, when the entire system is completed, to operate it for the equal benefit of the inhabitants of all Boroughs, reached for a single five-cent fare. In advance of opening up the complete system we will construct and put in operation within two years the Jerome avenue line, the White Plains avenue line, the Astoria line, the Woodside line and that portion of the new subway from Times square to Pennsylvania station and complete the third-tracking upon the elevated system, thus giving the earliest possible relief from the present aggravated condition of traffic congestion. Our proposition likewise carries with it an offer to operate all other extensions which the City may hereafter build for a five-cent fare. It is, moreover, the only offer which would at once release to the City, credit, which may be devoted to other public improvements, and leave available for similar purposes, as it hereafter accrues, all the additional debt margin of the City. Including the elevated improvements, and the Belmont tunnel, it represents a construction cost to the Interborough Company of $88,478,500, and an equipment cost of $45,346,000, or a total contribution by that Company of private capital in the amount of $133,824,500, or almost two dollars for each dollar invested by the City.

The necessity for additional legislation to render this offer fully effective indicates that, unless a year is to be lost, it must be acted upon before the Legislature adjourns.

Respectfully submitted,

INTERBOROUGH RAPID TRANSIT COMPANY,

By T. P. SHONTS, President.

VI.—Cost of Projected Lines Under Proposed Adjustment.

Estimates of the Public Service Commission.

(I.) Proposed for Operation by the Brooklyn Rapid Transit Company.

	S. or L.	Miles.	Tracks.	Cost.	Totals.
(A) Lines to be Constructed by the City.					
1. Broadway—Battery to 9th street	S	4.9	2-4	$17,200,000	
2. Broadway—Ninth to 42d, and 7th avenue, 42d to 59th street	S		4	13,500,000	
3. Fifty-ninth street to Queensboro plaza	S	2.3	2	2,500,000	
4. Battery tunnel to 4th avenue, Brooklyn	S	1.9	2	8,200,000	
5. Spring street	S	.2	2	500,000	
6. Nassau street	S	.8	2	3,500,000	
7. Union Square to Eastern District	S	4.5	2	13,000,000	
Total		14.6			$58,400,000
(B) Lines Under Construction by the City.					
8. Fourth avenue, Chambers to 40th street, Brooklyn	S	5.7	4	$20,000,000	
9. Centre street loop	S	1.5	2-4	7,800,000	
Total		7.2			$27,800,000
(C) Lines to be Constructed or Reconstructed by the Brooklyn Rapid Transit Company.					
10. Flatbush avenue connection	S	1.7	2	$ 3,200,000	
11. Reconstruction South Brooklyn lines	L	12.3	4	12,300,000	
12. 3d avenue extension to Fort Hamilton	L	1.5	2	1,200,000	
13. Long Island City extension	L	4.5	2	3,300,000	
14. Jamaica extension	L	4.	1	3,100,000	
15. Extension Myrtle avenue line to Lutheran Cemetery	L	1.	2	800,000	
16. Third tracking Fulton street, Myrtle avenue and Broadway lines	L	9.3	..	2,300,000	
17. Other existing lines	L	41.3	2	.....	
Total		75.6		.....	$26,400,000
Total mileage		97.4	Total cost		$112,600,000

(II.) Proposed for Operation by the Interborough Company.

(A) Upper Manhattan and Bronx Lines.					
1. Lexington avenue, 35th to 135th streets	S	5.1	4	$27,700,000	
2. Westchester avenue to Bronx River	S	3.1	3	8,000,000	
3. Jerome avenue to Kingsbridge road	L	4.4	3	6,000,000	
					$41,700,000
4. Westchester avenue, River to P. B. Park	L	4.1	2	2,700,000	
5. Jerome avenue, Kingsbridge to Woodlawn	L	1.7	2	1,300,000	
					4,000,000
Total		18.4			$45,700,000

	S. or L.	Miles.	Tracks.	Cost.	Totals.
(B) Upper Bronx Lines.					
1. White Plains road and Gun Hill road	L	4.8	2	$ 4,600,000	4,600,000
(C) Lower Manhattan and Brooklyn Extensions.					
1. Seventh avenue, from Times Square to the Battery	S	4.	4	21,000,000	
2. Whitehall tunnel, Borough Hall, B'klyn	S	1.7	2	7,500,000	
3. Flatbush avenue and Eastern parkway to Buffalo avenue	S	3.2	4	10,500,000	
4. Nostrand avenue to Flatbush avenue	S	2.4	2	3,700,000	
5. Livonia avenue to New Lots	L	2.4	2	1,700,000	
Total		13.7			44,400,000
(D) Manhattan-Queens Lines.					
1. Forty-second street, Times Square to Steinway tunnel	S	.2	2	$ 1,800,000	
2. Steinway tunnel adjustment at Grand Central	S	...	..	2,500,000	
3. Steinway tunnel	S	1.6	2 (at)	3,000,000	
4. Tunnel to Queensboro plaza	S	.8	2	3,700,000	
5. Astoria line	L	2.4	2	1,700,000	
6. Corona and Woodside	L	3.	2	2,200,000	
Total		8.			14,900,000
Total mileage		44.9	Total cost		$109,600,000

SUMMARY.

Brooklyn Rapid Transit Company.

Construction—			
New City lines		$58,400,000	
City lines under construction		27,800,000	
Lines to be constructed or reconstructed by the company		26,400,000	
			$112,600,000
Mileage (including present lines)—			
Subway	23.5		
Elevated	73.9		
		97.4	

Interborough Company.

Construction—			
By the City (one-half)		$54,800,000	
By the Company	$51,800,000		
Steinway tunnel	3,000,000		
		54,800,000	
			$109,600,000
Mileage—			
Subway	22.1		
Elevated	22.8		
		44.9	
			$227,200,000

VII.—Cost of Projected Lines to be Built by City Under the Proposal of the Brooklyn Rapid Transit Company.
(Principally Estimates of the Company.)

	"S" or "L".	Road Miles.	Number of Tracks.	Track Miles. Subway	Track Miles. Elevated	Cost.
(I.) Inner lines—						
Battery—Broadway to 59th	S	4.9	2–6	20.0	.....	$30,700,000
59th street to Queens plaza	S–L	2.3	2	1.7	2.9	2,500,000
Battery tunnel to 4th avenue, B'klyn	S	1.9	2	3.8	.....	8,200,000
Canal street	S	0.5	2	1.0	.....	5,000,000
Spring street	S	0.2	2	0.4	.....	500,000
Nassau street	S	0.8	2	1.6	.....	3,500,000
Flatbush avenue to Brighton Beach Railroad	S	1.7	2	3.4	.....	3,200,000
Lexington, 9th to 135th	S	6.3	4	25.2	.....	35,000,000
Eastern parkway	S	2.2	2	4.4	.....	5,000,000
Total		20.8	....	61.5	2.9	$93,600,000
(II.) Other lines to be operated as original lines—						
River and Jerome avenues to Kingsbridge road	S–L	4.4	3	3.0	10.2	$ 6,000,000
Southern boulevard to Bronx River	S	3.1	3	8.4	0.9	8,000,000
Astoria	L	2.4	2	.....	4.8	1,700,000
Corona and Woodside	L	3.7	2	.....	7.4	2,800,000
Eastern District line	S–L	6.4	2	12.8	.....	13,500,000
Nostrand avenue, Eastern parkway to Flatbush	S	2.4	2	4.8	.....	3,700,000
Livonia avenue and Buffalo avenue to New Lots	L	2.4	2	.....	4.8	1,700,000
Total		24.8	....	29.0	28.1	$37,400,000

	Road Miles.	Cost.
Immediate construction	20.8	$93,600,000
Extensions accepted as original lines	24.8	37,400,000
Grand total	45.6	$131,000,000

VIII.—Cost of Projected Lines Under the Proposal of the Interborough Company.

Half to be Paid by the City, Half by the Company. (Principally Estimates of the Company.)

	"S" or "L".	Road Miles.	Number of Tracks.	Track Miles. Subway	Track Miles. Elevated	Cost.
Lexington avenue, 41st to 135th st.	S	4.8	4	19.2	.....	$26,100,000
Westchester avenue to Pelham Bay Park	S-L	7.2	2-3	6.6	10.5	10,700,000
River and Jerome avenue to Kingsbridge road	S-L	4.4	2-3-4	3.2	9.8	7,300,000
White Plains road	L	4.8	2-3	.....	11.1	4,600,000
7th avenue, Times Sq. to Battery	S	4.0	2-4	14.8	.....	21,000,000
Liberty street tunnel to Brooklyn	S	2.3	2	4.6	.....	9,000,000
Flatbush ave. and Eastern parkway	S	3.2	4-1	12.8	.....	10,500,000
Broadway-59th street	S	3.1	2	6.2	.....	9,300,000
Eastern District to Lafayette avenue, Brooklyn	S	4.5	2	9.	.....	13,000,000
Lafayette avenue	S	2.2	2	4.4	.....	5,200,000
Steinway tunnel extension to Queens plaza	L	.8	2	1.6	.....	800,000
Astoria	L	2.4	2-3	.....	5.8	1,700,000
Corona and Woodside	L	2.	2	.....	4.	1,500,000
Totals		45.7		80.8	44.3	$120,700,000

IX—Comparative Mileage of Routes and Trackage to Be Operated at a Five-Cent Fare with Universal Transfers Within Each System Under Proposed Adjustment.

Interborough.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Elevated.	Total Mileage.
Present subway	25.9	2-3-4	56.1	16.9	73.0
Lexington avenue	5.1	4	20.4	....	20.4
Southern boulevard and Westchester avenue	7.2	2-3	9.3	8.2	17.5
River and Jerome avenues to Woodlawn Cemetery	6.1	2-3	3.2	13.4	16.6
White Plains road and Gun Hill road	4.8	2	....	9.6	9.6
42d street, Times Square and Steinway tunnel	.2	2	.4	....	.4
Steinway tunnel	1.6	2	3.2	....	3.2
Steinway tunnel extension to Queens plaza	.8	2	1.6	....	1.6
Astoria line	2.4	2	....	4.8	4.8
Woodside and Corona	3.0	2	....	6.0	6.0
7th avenue; Times Square to Battery	4.0	4	14.8	....	14.8
Whitehall tunnel to Borough Hall, Brooklyn	1.7	2	3.4	....	3.4
Flatbush avenue and Eastern parkway to Buffalo avenue	3.2	4	12.8	....	12.8
Nostrand avenue—Flatbush avenue	2.4	2	4.8	....	4.8
Livonia avenue to New Lots road	2.4	2	....	4.8	4.8
Total	70.8	2-3-4	130.0	63.7	193.7

Brooklyn Rapid Transit.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Elevated.	Total Mileage.
Present B. R. T. lines*	40.4	2-4	....	98.6	98.6
Additional tracks on present B. R. T. lines*	....	1-2	....	10.9	10.9
Extensions of present B. R. T. lines, including South Brooklyn lines, reconstructed*	17.9	2-4	....	39.8	39.8
Broadway—7th avenue, Battery to 59th street	4.9	4	19.6	....	19.6
59th street to Queens plaza	2.3	2	1.7	2.9	4.6
Battery tunnel	1.9	2	3.8	....	3.8
Spring street	.2	2	.4	....	.4
Nassau street	.8	2	1.6	....	1.6
Union Square to Eastern District	4.5	2	9.0	....	9.0
4th avenue subway; Chambers street to 40th street, Brooklyn	5.7	2-4	16.2	2.5	18.7
Centre street loop	1.5	2-4	5.0	....	5.0
Flatbush avenue connection	1.7	2	3.4	....	3.4
Total	81.8	2-4	60.7	154.7	215.4

*Note—Mileage has been subtracted from Coney Island lines south of second fare points.

X.—Comparative Mileage of Routes and Trackage to Be Operated at a Five-Cent Fare With Universal Transfers Under Pending Proposals.

Interborough.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Elevated.	Total Mileage.
Present subway	25.9	2-3-4	56.1	16.9	73.0
Fourth avenue subway	5.7	2-4	16.2	2.5	18.7
Seventh avenue	4.0	2-4	14.8	....	14.8
Lexington avenue	4.8	4	19.2	....	19.2
River and Jerome avenues	4.4	2-3	3.2	9.8	13.0
Westchester avenue	7.2	2-3	6.6	10.5	17.1
East River tunnel	2.3	2	4.6	....	4.6
Queensboro Bridge	1.5	2	....	3.0	3.0
Steinway tunnel	1.6	2	3.2	....	3.2
Woodside (from Steinway tunnel)	2.0	2	....	4.0	4.0
Astoria	2.4	2-3	....	5.8	5.8
Broadway—39th street	3.1	2	6.2	....	6.2
Eastern District	4.5	2	9.0	....	9.0
Lafayette avenue	2.2	2	4.4	....	4.4
Eastern parkway, from Atlantic avenue	3.2	2-4	12.0	....	12.0
White Plains road	4.8	2-3	....	11.1	11.1
Total	79.6	2-3-4	155.5	63.6	219.1

Brooklyn Rapid Transit.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Elevated.	Total Mileage.
Present B. R. T. lines*	40.4	2-4	....	98.6	98.6
Additional tracks on present B. R. T. lines*	....	1-2	....	10.9	10.9
Extensions of present B. R. T. lines, including reconstruction of South Brooklyn lines*	17.9	2-4	....	39.8	39.8
Battery tunnel	1.9	2	3.8	....	3.8
Broadway-Seventh avenue	4.9	2-4-6	20.0	....	20.0
59th street to Queens plaza	2.3	2	1.7	2.9	4.6
Centre street, Nassau loop	2.3	2-4	6.6	....	6.6
Spring street connection	0.2	2	0.4	....	0.4
Fourth avenue subway with Canal street connection	6.2	2-4	17.2	2.5	19.7
Flatbush avenue connection	1.7	2	3.4	....	3.4
Lexington avenue, 9th to 135th	6.3	4	25.2	....	25.2
River and Jerome avenues to Kingsbridge road	4.4	3	3.0	10.2	13.2
Southern boulevard to Bronx River	3.1	3	8.4	0.9	9.3
Astoria line	2.4	2	....	4.8	4.8
Woodside-Corona line	3.7	2	....	7.4	7.4
Eastern parkway line	2.2	2	4.4	....	4.4
Nostrand avenue line	2.4	2	4.8	....	4.8
Livonia avenue line	2.4	2	....	4.8	4.8
Eastern District line	6.4	2	12.8	....	12.8
Total	111.1	2-3-4-6	111.7	182.8	294.5

*Note—Mileage has been subtracted from Coney Island lines south of second fare points.

*Every new line built in the future by the City to be operated on same terms as Fourth avenue subway, except that after City has paid out all its profits to make good operating losses on future extensions the Company will contribute its profits on all extensions above 3 per cent. on its investment.

XI.—Proposed Division of Profits.

Comparative Mileage of Routes and Trackage Under Pending Subway Proposals in Which the City Would Share the Profits.

Interborough.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Track Mileage. Elevated.	Total Mileage.
(A) Extensions and new routes on which profits would be divided equally between Company and City, City to receive interest and sinking fund before profits are divided—all earnings pooled	48.0	2-3-4	83.2	44.2	127.4
(B) Fourth avenue subway, on which City must guarantee Company against loss in operation, with even division of profits if there are any; no participation in pooled earnings	5.7	2-4	16.2	2.5	18.7
Total	54.4	....	99.4	46.7	146.1

Brooklyn Rapid Transit.	Road Mileage.	Number of Tracks.	Track Mileage. Subway.	Track Mileage. Elevated.	Total Mileage.
(A) Lines on which earnings to be pooled and profits divided equally between City and Company after Company has received its present net earnings—no guarantee by City against loss in operation.					
Present elevated lines	45.3	2-4	....	103.9	103.9
Additional trackage on present lines	....	1-2	....	11.5	11.5
Extensions of present elevated lines	21.5	2-3-4	....	47.0	47.0
Subway lines with their elevated extensions	52.8	2-3-4-6	111.7	33.5	145.2
Total	119.6	2-3-4-6	111.7	195.9	307.6

(B) All future extensions built by City will be operated by the Company on same terms as original lines if accepted by Company—if not accepted, then no participation in pooled earnings, and profits, if any divided, three-fourths to City and one-fourth to Company. Extensions now mentioned by Company include the following:—

Westchester avenue, from Bronx River to Pelham Bay Park.

Jerome avenue, from Kingsbridge road to Woodlawn Cemetery.

Nostrand avenue, from Flatbush avenue to Sheepshead Bay.

Utica avenue, from Eastern parkway to Flatbush avenue.

Tunnel to Staten Island.

XII.—Legal Status of Proposed New Routes.

The words "authorization needed" mean that a certificate must be obtained under consents before contracts can be let.

Definitions—The words "completely legalized" mean that the necessary constitutional consents have been obtained, and the way is clear for the letting of a contract.

The words "new route" or "legalized in part" mean that additional constitutional

I.—Proposed Operation by the Brooklyn Rapid Transit Co.

Lines.	Status.
(a) Lines to be Constructed by the City—	
1. Broadway, Battery to 9th street	Completely legalized.
2. Broadway, 9th street to 42d street, and 7th avenue, 42d to 59th streets	Completely legalized.
3. Fifty-ninth street to Queensboro Plaza	New route.
4. Battery tunnel to 4th avenue, Brooklyn	Legalized in part. New route in part.
5. Canal street	Completely legalized.
6. Spring street	New route.
7. Nassau street	Completely legalized.
8. Union square to Eastern District	Legalized in part. New route in part. (See Note 1.)
(b) Lines Under Construction by the City—	
9. Fourth avenue, Chambers to 40th street, Brooklyn	Completely legalized and under construction.
10. Centre street loop	Completely legalized and under construction.
(c) Lines to be Constructed by Brooklyn Rapid Transit—	
11. Flatbush avenue connection	Partially legalized. (See Note 2.)
12. Third-tracking Fulton street, Myrtle avenue and Broadway lines	Authorization needed. (See Note 3.)
13. Reconstruction, South Brooklyn lines	Authorization needed. (See Note 3.)
14. Third avenue extension to Fort Hamilton	Authorization needed. (See Note 3.)
15. Long Island City extension	Authorization needed. (See Note 3.)
16. Jamaica extension	Authorization needed. (See Note 3.)
17. Extension, Myrtle avenue line to Lutheran Cemetery	Authorization needed. (See Note 3.)

Resumé—Legalization so near completed that on all essential subway routes the way is clear for entering into contracts.

II.—Proposed Operation by the Interborough Co.

Lines.	Status.
(a) Upper Manhattan and Bronx Lines—	
1. Lexington avenue, 35th street to 135th street....	Legalized in the main. New route in part (connection).
2. Westchester avenue to Bronx River.....	Completely legalized.
3. Jerome avenue to Kingsbridge road.....	Completely legalized.
4. Westchester avenue to Pelham Bay Park.....	Completely legalized.
5. Jerome avenue, Kingsbridge to Woodlawn.....	Completely legalized.
(b) Upper Bronx Lines—	
1. White Plains road and Gun Hill road.....	Completely legalized.
(c) Manhattan-Queens Lines—	
1. Forty-second street, Times square to Steinway tunnel	New route.
2. Steinway tunnel adjustment at Grand Central...	Partially legalized. (See Note 4.)
3. Steinway tunnel	
4. Tunnel to Queensboro plaza.....	New route.
5. Astoria line	New route.
6. Corona and Woodside.....	New route.
(d) Lower Manhattan and Brooklyn Extensions—	
1. Seventh avenue, from Times square to Battery..	Legalized in part. New route in part. (See Note 5.)
2. Whitehall tunnel, Borough Hall, Brooklyn.....	New route.
3. Flatbush avenue and Eastern parkway to Buffalo avenue	Partially legalized. (See Note 2.)
4. Nostrand avenue to Flatbush avenue.....	Partially legalized. (See Note 2.)
5. Livonia avenue to New Lots road.....	Partially legalized. (See Note 2.)

Resumé—Important lines, e. g., Seventh avenue and connection links, are not legalized. Even if other lines were constructed they could not be operated to advantage because trunk line would be unfinished.

Notes.

Note 1.—Precise route of new line not determined. If it deviates from 14th street route or Brooklyn, Manhattan and Long Island City route, heretofore adopted, consents will have to be obtained for the changed portion. Consent of Secretary of War to under-river crossing necessary in any event.

Note 2.—Resolutions adopting route and general plan for this line had been adopted by the Public Service Commission and consented to by the Board of Estimate and Apportionment and are now awaiting action by the Mayor. If the Mayor's approval be secured, it will be necessary to obtain consents of abutting property owners, or, in lieu thereof, the consent of the Appellate Division in the Second Department.

Note 3.—This work would be authorized by a certificate granted under the provisions of section 24 of the Rapid Transit Act. This involves the following procedure. The Public Service Commission prepares a certificate setting forth the terms and conditions upon which the authorization is given, in which certificate there is specified and determined a route or routes to be followed. This certificate, when granted by the Commission and accepted by the company, is submitted by the company to the Board of Estimate and Apportionment for its approval and to the local authorities for their consents to the new routes so specified and determined. Upon obtaining such approval and consents, the company must obtain the consents of the owners of one-half in value of abutting property, or if such last-named consents cannot be obtained, then the consent of the Appellate Division of the Supreme Court in the Second Department.

Note 4.—A new route, known as the Steinway Tunnel route, has been adopted by the Public Service Commission for a two-track tunnel, beginning at a point under 42d street, about three hundred feet west of Madison avenue, and extending thence under 42d street and the East River to a point in North 4th street, in the Borough of Queens, and thence under North 4th street to Van Alst avenue and under Van Alst avenue to Hunters Point road. The consents of the local authorities have been secured and also those of a large number of property owners. Negotiations are pending to obtain the consent of the New York Central and Hudson River Railroad Company, which, with the approval of the Secretary of War to the under-river crossing, will probably complete the legalization of this route.

Note 5.—As part of the 7th and 8th avenue routes, a four-track line has been legalized, beginning at 7th avenue and 42d street and extending under 7th avenue to Green-

wich avenue, thence under Greenwich avenue to West Broadway, and thence under West Broadway and Greenwich street to the Battery. The latest discussions in regard to this route contemplate the extension of 7th avenue southerly and the building of the subway under that extension and under Varick street. No consents have been obtained for such a change, to legalize which the following procedure would probably be necessary: The City would have to lay out the extension of 7th avenue on the city map and actually vest title as a basis for the adoption by the Public Service Commission of a new route. After the adoption of such new route, the consent of the local authorities and of the owners of one-half in value of abutting property, or, in lieu of the latter, the consent of the Appellate Division in the First Department would have to be secured. The obtaining of these consents would probably take several months, especially if court proceedings became necessary. If it were attempted to lay out the route in advance of vesting title to the extension for street purposes, consents would have to be obtained on all the cross streets, and it is probable that if those consents were obtained and thereafter title vested in the City, the constitutional provisions in respect of consents would then apply and new consents would also have to be obtained along the new street. Under the present City Charter, where there are buildings upon property to be acquired for street purposes, the City cannot vest title until after the expiration of six months. This would mean that there can be no foundation for route proceedings until after the expiration of that time. As already noted, those proceedings along would probably take several months. It might be considered whether an amendment to the existing Charter could not now be obtained allowing the City, in opening the street, to vest title immediately, thus saving six months.

XIII.—Probable Period of Construction.

(Time from the Signing of Construction Contracts to Completion of Work.)

(1) Proposed for Operation by the Brooklyn Rapid Transit Co.

		Years.
(A)	Lines to be constructed by the City:	
1.	Broadway—Battery to 9th street	3½
2.	Broadway—Ninth to 42d; and 7th avenue, 42d to 59th street	3½
3.	Fifty-ninth street to Queensboro Plaza	3½
4.	Battery tunnel to 4th avenue, Brooklyn	4
5.	Canal street	3½
6.	Spring street	3
7.	Nassau street	4
8.	Union Square to Eastern District	4
(B)	Lines under construction by the City:	
9.	Fourth avenue, Chambers to 40th street, Brooklyn	Being built
10.	Centre street loop	Being built
(C)	Lines to be constructed by Brooklyn Rapid Transit:	
11.	Flatbush avenue connection	3
12.	Third tracking Fulton street, Myrtle avenue and Broadway lines	1½
13.	Reconstruction South Brooklyn lines	1½
14.	Third avenue extension to Fort Hamilton	1½
15.	Long Island City extension	1½
16.	Jamaica extension	1½
17.	Extension Myrtle avenue line to Lutheran Cemetery	1½

Proposed for Operation by the Interborough Co.

(A)	Upper Manhattan and Bronx Lines:	
1.	Lexington avenue, 35th street to 135th street	3½
2.	Westchester avenue to Bronx River	3½
3.	Jerome avenue to Kingsbridge road*	1½ to 3½
4.	Westchester avenue, River to Pelham Bay Park	1½
5.	Jerome avenue, Kingsbridge to Woodlawn	1½
(B)	Upper Bronx Lines:	
1	White Plains road and Gun Hill road	1½
(C)	Manhattan-Queens Lines:	
1.	42d street, Times Square to Steinway tunnel	4
2.	Steinway tunnel adjustment at Grand Central	3
3.	Steinway tunnel	1½
4.	Tunnel to Queensboro Plaza	3
5.	Astoria Line	1½
6.	Corona and Woodside	1½
(D)	Lower Manhattan and Brooklyn extensions:	
1.	Seventh avenue, from Times Square to Battery	3½
2.	Whitehall tunnel, Borough Hall, Brooklyn	4
3.	Flatbush avenue and Eastern Parkway to Buffalo avenue	3
4.	Nostrand avenue to Flatbush avenue	3
5.	Livonia avenue to New Lots†	2

* Subway portion, 3½ years. Elevated portion, 1½ years.
† Including subway connection.

XIV.—Population and Density of Areas Tributary to Proposed Routes.

1. Proposed for Operation by Brooklyn Rapid Transit Co.

	Route, Miles.	Population Served.	Area within ¼ Mile.	Density per Sq. Mile.
(a) Lines to be constructed by the City.				
1 & 2. Broadway-7th avenue line, Battery to 59th street	4.9	189,400	2.4	79,000
3. 59th street line, 7th avenue to Queens Plaza	2.3	36,800	.4	92,000
4. East River-Atlantic avenue tunnel, Battery to 4th avenue	1.9	71,700	.6	119,500
5. Canal street, Manhattan Bridge to Broadway	.5	800	.1	8,000
6. Spring street, Centre street to Broadway	.2	3,400	.1	34,000
7. Nassau and Broad streets	.8	10,200	.4	20,500
8. Eastern District line, Union Square to Myrtle avenue	4.5	249,000	2.	124,500
	151.1	561,300	6.0	93,550
(b) Lines under construction by the City.				
9. Fourth avenue subway, 40th street, Brooklyn, to Chambers street	5.7	151,000	2.	75,500
10. Centre street, Williamsburg Bridge to Canal street	1.5	202,000	.8	252,500
	7.2	353,000	2.8	126,200
(c) Lines to be constructed by Brooklyn Rapid Transit.				
11. Flatbush avenue connection	1.7	34,900	.5	69,800
12. Reconstruction of South Brooklyn lines	12.3	84,000	6.	14,000
13. Third tracking Fulton Street, Broadway and Myrtle avenue "L" lines	.....	.....	.....	.....
14. Third avenue extension to Fort Hamilton	1.5	14,800	.7	21,000
15. Long Island City-Greenpoint extension, Queens Plaza to Williamburg Bridge and Myrtle avenue	4.5	251,400	2.3	109,300
16. Jamaica extension	4.	20,000	2.	10,000
17. Myrtle avenue "L" extension to Lutheran Cemetery (reconstruction)	.....	.....	.....	.....
	24.0	405,100	11.5	58,000
Grand total, 1-17 inc.	46.3	1,319,400	20.3	65,000

Proposed for Operation by Interborough Co.

	Route, Miles.	Population Served.	Area within ¼ Mile.	Density per Sq. Mile.
(a) Upper Manhattan and Bronx lines.				
1. Lexington avenue, 35th street to 135th street	5.1	395,600	2.5	158,250
2. East 138th street-Southern boulevard line to Bronx River	3.1	83,600	1.6	52,250
3. River and Jerome avenue line to Kingsbridge road	4.4	41,300	2.2	18,750
4. Westchester avenue line, Bronx River to Pelham Bay Park	4.1	12,100	2.	6,050
5. Jerome avenue extension, Kingsbridge road to Woodlawn	1.7	8,900	.5	17,800
	18.4	541,500	8.8	61,500
(b) Upper Bronx lines.				
1. White Plains road and Gun Hill road, West Farms, to Becker avenue	4.8	24,000	2.1	11,430
(c) Manhattan-Queens lines.				
1. 42d street, Times Square to Steinway tunnel	.2	19,000	.2	95,000
2. Steinway tunnel adjustment at Grand Central				
3. Steinway tunnel, Park avenue to Van Alst avenue	1.6	19,100	.2	95,500
4. Steinway tunnel extension to Queens Plaza	.8	1,700	.3	5,550
5. Astoria line, Queens Plaza to Ditmars avenue by Debevoise avenue	2.4	22,100	1.3	17,000
6. Woodside and Corona line	3.7	9,700	1.8	5,400
	8.7	71,600	3.8	18,840
(d) Lower Manhattan and Brooklyn extensions.				
1. Seventh avenue, Times Square to Battery	4.	215,200	2.	107,600
2. Whitehall-Montague street tunnel to Borough Hall, Brooklyn	1.7	45,300	.3	158,300
3. Flatbush avenue-Eastern parkway line, Atlantic avenue to Buffalo avenue	3.2	76,000	1.6	47,500
4. Nostrand avenue line to Flatbush avenue	2.4	28,600	1.2	23,800
5. Livonia avenue line, Buffalo avenue to New Lots road	2.4	68,800	1.2	57,300
	13.7	433,900	6.3	68,900
Grand total of a to d, inc.	45.6	1,071,000	21.0	51,000
Grand total for all proposed extensions	91.9	2,390,400	41.3	57,900

Note.—In this table the estimates of area and population served are limited to a distance of one-quarter mile on either side of each route, with the water and large park areas eliminated. No account is taken of territory and population that will receive improved service by the third tracking of existing lines.

Duplications of existing rapid transit service have not been eliminated, but duplications in the New service to be afforded within each system have been eliminated, except in Greenpoint, where about 30,000 people will have a choice between the Eastern District subway and the Long Island City and Greenpoint elevated lines, and in Manhattan south of Spring street, where about 80,000 people will have a choice between the Broadway subway and the Centre street loop as extended.

XV.—Present and Prospective Street Railway Traffic in New York City.

(Including Subway and Elevated Lines.)

Data derived from a special study "of the relation of increased traffic to increased population in New York City and other American cities, to be published in the Annual Report of the Public Service Commission for 1910."

The statistics of the past fifty years show that street railway traffic has increased in New York City in the ratio of the square of the increase in population. The statisticians of the Public Service Commission have reached the conclusion that, while the traffic of the future cannot be expected to increase as it has in certain periods of the past at this rate, it will assuredly increase at a rate at least double the rate of increase of population, provided additional rapid transit facilities be made available.

The rate of increase of population in the decade 1910-1920 has been estimated variously from 38.7 per cent. (the rate in 1900-1910), to 45 per cent.; no one has estimated it

at less than 35 per cent. Traffic, therefore, should increase not less than 70 per cent., which is equivalent to more than 1,000,000,000 additional five-cent fares. The experience of the Manhattan surface lines, as set forth in the following table, indicates that practically all of this increase is likely to accrue to new rapid transit lines.

The following table gives the statistics of recent years in detail:

Growth of Population and Traffic in New York City at Census Periods, 1860-1910.

			Passenger Traffic.				
					Elevated Railways.		
	Year.	Population.	Total Fares.	Surface Roads.	Manhattan.	Brooklyn.	Under-ground.
	1860	1,174,779	50,830,000	50,830,000	.....	.....	.....
	1870	1,478,103	148,583,000	148,583,000	.....	.....	.....
	1880	1,911,698	287,501,000	226,669,000	60,832,000	.....	.....
(d)	1890	2,607,414	600,414,000	328,703,000	190,025,000	81,686,000	.....
	1900	3,437,202	846,353,000	595,224,000	184,164,000	66,965,000	.....
	1910	4,766,883	1,531,262,000	763,140,000	293,826,000	162,494,000	311,802,000

		Decennial Increases.		Percentage Increases.		
		Population.	Traffic.	Population.	Traffic.	Fares per Capita.
	1860-'70	303,324	97,753,000	25.8	192.3	1860— 43
	1870-'80	433,595	138,918,000	29.3	94.5	1870—100
(a)	1880-'90	695,716	312,913,000	36.4	108.8	1880—150
(b)	1890-'00	829,788	245,939,000	31.8	40.9	1890—230
(c)	1900-'10	1,329,681	684,909,000	38.7	80.9	1900—246
						1910—321

(a) Manhattan Elevated railways opened shortly before and Brooklyn Elevated railways shortly after 1880.

(b) Surface railways electrified in decade 1890-1900.

(c) Elevated railways electrified, subways opened in decade 1900-1910.

(d) The census figure has been increased by 100,000 for deficiency in enumeration.

Year Ended June 30.	Hudson and Manhattan Railroad Co.	Interborough Rapid Transit Co., Subway.	Interborough Rapid Transit Co., Elevated.	Surface Railways in Manhattan	Surface Railways in The Bronx (a).	Brooklyn Rapid Transit (b)	Other Brooklyn Companies.	Street Railways in Queens.	Street Railways in Richmond.	Total for City.
				A. Number of Fares Collected.						
1898	.....	.....	.....	183,360,846	305,115,538	15,965,270	200,143,542	21,275,396	9,128,804	6,340,489	741,329,885
1899	.....	.....	.....	174,324,575	343,559,120	17,295,761	197,076,745	24,781,586	9,472,460	6,840,985	773,351,232
1900	.....	.....	.....	184,164,110	360,032,672	21,364,690	233,602,329	28,904,650	11,441,751	6,872,856	846,353,058
1901	.....	.....	.....	190,045,741	373,569,677	26,992,990	241,015,977	31,403,938	11,564,062	6,752,416	881,344,801
1902	.....	.....	.....	215,259,345	388,947,169	28,020,185	253,850,909	32,073,956	13,719,387	7,119,013	938,989,964
1903	.....	.....	.....	246,587,022	396,570,432	30,714,781	269,093,155	34,677,748	15,689,210	7,435,135	1,000,767,483
1904	.....	.....	.....	286,634,195	389,928,464	34,763,809	294,544,349	35,649,763	16,701,653	7,762,677	1,065,984,910
1905	.....	.....	72,722,890	266,381,930	374,554,075	37,124,805	317,178,793	34,742,729	20,533,487	7,743,987	1,130,982,696
1906	.....	.....	137,919,632	257,796,754	391,708,063	39,893,116	354,409,770	36,016,872	25,151,054	8,945,914	1,251,841,175
1907	.....	.....	166,363,611	282,924,273	377,017,192	42,186,533	372,979,840	35,423,544	28,514,743	9,971,652	1,315,381,388
1908	.....	4,363,722	200,439,776	282,845,864	366,690,345	44,237,229	384,816,060	33,842,809	29,797,750	10,966,852	1,358,000,407
1909	.....	14,192,352	238,430,146	276,250,196	362,077,665	50,671,779	386,790,947	32,091,690	30,545,776	11,367,091	1,402,417,642
1910	.....	42,839,999	268,902,115	293,826,280	375,888,469	56,524,261	415,277,754	31,801,359	34,430,074	11,712,623	1,531,262,914
				B. Annual Increase in Fare Passengers. (c)						
1898-99	.....	.....	.....	*9,036,271	38,443,582	1,330,491	*3,066,797	3,506,190	343,656	500,496	32,021,347= 4.3%
1899-00	.....	.....	.....	9,839,535	16,443,552	4,068,929	36,525,584	4,123,064	1,969,291	31,871	73,001,826= 9.4%
1900-01	.....	.....	.....	5,881,631	13,567,005	5,628,300	7,413,648	2,499,288	122,311	*120,440	34,991,743= 4.1%
1901-02	.....	.....	.....	25,213,604	15,377,492	1,027,195	12,834,932	670,018	2,155,325	366,597	57,645,163= 6.5%
1902-03	.....	.....	.....	31,327,677	7,623,263	2,694,596	15,242,246	2,603,792	1,969,823	316,122	61,777,519= 6.6%
1903-04	.....	.....	.....	40,047,173	*6,641,968	4,049,028	25,451,194	972,015	1,012,443	327,542	65,217,427= 6.5%
1904-05	.....	.....	72,722,890	*20,252,265	*15,374,389	2,360,996	22,634,444	*907,034	3,831,834	*18,690	64,997,786= 6.1%
1905-06	.....	.....	65,196,742	*8,585,176	17,153,988	2,768,311	37,230,977	1,274,143	4,617,567	1,201,927	120,858,479=10.7%
1906-07	.....	.....	28,443,979	25,127,519	*14,690,871	2,293,417	18,570,070	*593,328	3,363,689	1,025,738	63,540,213= 5.1%
1907-08	.....	4,363,722	34,076,165	*78,409	*10,326,847	2,050,696	11,836,220	*1,580,735	1,283,007	995,200	42,619,019= 3.2%
1908-09	.....	9,828,630	37,990,370	*6,595,668	*4,612,680	6,434,550	1,974,887	*1,751,119	748,026	400,239	44,417,235= 3.2%
1909-10	.....	28,647,627	30,531,969	17,576,084	13,810,804	5,852,480	28,486,807	*290,331	3,884,298	345,532	128,845,272= 9.2%

Note—The records of the Public Service Commission as to travel over the East River bridges are more or less incomplete, as they do not include the statistics of the New York and Brooklyn Bridge local railroad when operated by the bridge trustees. The vast majority of these passengers used the bridge cars merely to complete the continuous trip started or finished on some Brooklyn railway where they paid another fare, but those whose journey was confined to the bridge escaped counting. In 1898, however, the Brooklyn Rapid Transit system took over the (elevated) railroad on the bridge and the local bridge fares were thereafter counted among the elevated passengers until 1908, when the local bridge traffic was transferred to the surface cars and divided among the Brooklyn Heights, the Nassau Electric and the Coney Island and Brooklyn railway companies (the Associated Trolley Companies). Surface cars began running over the Williamsburgh Bridge in July, 1904, but the fares are not included until July 1, 1907, owing to the fact that the Bridge Operating Company is not a railroad corporation and did not report to the former State Railroad Commission; the number of such fares unrecorded (being at the rate of 2½ and 3 cents, as on the Brooklyn Bridge), was approximately 3,000,000 in 1905, 4,200,000 in 1906 and 6,000,000 in 1907. Since July, 1, 1908, this traffic has been divided equally between the Metropolitan and the B. R. T. systems; in 1909 it aggregated 8,600,000 fares.

(a) Includes Westchester Electric Railroad. (b) As now constituted. (c) The prefix * designates decreases.

XVI.—The Operating Basis: Contribution from the Earnings of Profitable Inside Lines to Help Support Less Profitable or Outlying Lines.

The Per Passenger Method.

The effort of the conferees has been to bring about a large extension of the five-cent fare zone and to safeguard the future growth of the City so that the increased and more profitable short haul traffic of the inside districts shall to a large extent be used to project the benefit of the five-cent fare into more distant localities. If the City adopted a zone fare of one cent per mile, it is apparent that the rider going from City Hall to the Battery would only pay one cent, but the rider going from City Hall to Jamaica or Bronx Park, a distance of ten miles, would pay ten cents. Zone fares prevail in European cities, but in New York and other American cities the flat rate of five cents seems to have obtained a permanent foothold. In this city, therefore, the short hauls support the long hauls. The inside short haul traffic, however, is highly lucrative, perhaps the most so of any city in the world. Every short rider pays an excessive sum, but he obtains a corresponding benefit when he takes a ten-mile ride for five cents. The future population of the City will increase the excessive earnings of the downtown districts, but if those excessive future earnings are used to project the five-cent fare into outside areas that will gradually be filled up with the future population, then the balance between short haul profits and long haul projection of the five-cent fare is maintained. If this is not done the City cannot tolerate the giving of short haul operating rights in the heart of the City for forty-nine years at a five-cent fare. It follows from this that the future increased short haul earnings must help to support outside lines, both those which are named in the report and future extensions that the growth of the City may demand.

The present effort to obtain a comprehensive rapid transit system for the future city will have been in vain if out-

lying lines and future extensions do not receive assistance from the future multiplying of five-cent fares on the inside lines. The rapid transit congestion that has been so long endured and which it is now hoped will be alleviated has been largely caused because of the desire of the operating companies to keep the benefits of the short haul business and free themselves from the necessity of caring for outlying districts. They have wanted an increase of inside lines, but as a rule have either refused outside lines or have desired them on such terms that the traveling public would pay an increased fare. The present crisis has been largely caused because the City has not had the power to compel the rapid transit operators to project their five-cent fare into outlying districts even if the City paid the entire cost of construction of the new lines or even if the average profits of a five-cent fare in the old and new districts would have been a handsome return on the investment. If the solution that is now sought does not care for the future growth it will soon be followed by congestion and blocking and the City will again need to go through the turmoil and stress of the last few years. And in that case the City would not be in as fortunate a position as at present because to-day the City has many routes in downtown Manhattan and lower Brooklyn that can be used for independent subways, but in fifteen years from now it will have fewer left.

All depends on the arrangement made between the City and the forty-nine-year operator for the operation of future extensions. If the basis is one that assigns to the extensions the fares collected, and charges against the extension the pro rata of car miles operated, then the extension will be starved. For the substantial riding on the extensions will be mornings and evenings only and fares will be received at the stations on the extensions only in the morning. On such a basis a future extension standing by itself will produce a deficit indefinitely and if the City pays the deficit to the operator, the future drain on the City will be

great. This, however, is the basis insisted upon by the Interborough and which the conferees reject.

If the operator does not contract that he will operate at a five-cent fare future extensions built at City expense, and contribute part of the short haul benefits so that the payment of deficits by the City will after a time come to an end, the City will become discouraged by paying deficits on extensions and will build no more. Then the demand will arise for the building of an independent trunk line through the fertile part of the City so that extensions can be added to it and the benefits of the short haul be donated to the support of the desired extensions. If operating contracts are now drawn so that future extensions are starved, the present effort will be no solution of the problem, but only a temporary loosening up and in a few years another crisis will arise.

For instance, if extensions are made to stand on their own earnings, the City paying the deficit without aid of the short haul profits, and if the demand should arise for two more extensions in The Bronx and two more extensions to the Eastern parkway line in Brooklyn, the same old question would arise again. The City would be paying deficits and would not want to pay more. It would refuse to build. Then the demand would appear for a new trunk line so that the short hauls on it would support the two new extensions in The Bronx and the two new extensions in Brooklyn. If, however, the operating contracts are now so arranged that the increase of future short haul traffic will help support future extensions, then in all probability they could be built by the City, operated at a five-cent fare and within a reasonable time become self-sustaining.

The conferees have given a great deal of attention to this problem in an endeavor to find a method of financing the operation of extensions that would be both fair to the operator and fair to the future growth of the City. If the income credited to an extension is the fare collected at its stations, and if the amount charged against it is the propor-

tionate expense of the car miles operated on the extension, then it is not fair because it leaves the company with the full benefits of the increase of short haul profits, and it leaves the City to the indefinite payment of deficits. The conferees have concluded that the income and expense of each segregated extension should be that proportion of the whole income and expense which the fares collected on the extension bear to the total fares collected on the system. This is the so-called per passenger method of estimating expense in contradistinction to the so-called per mileage method.

The per passenger method of estimating expense applies only to that part of the expense of an extension that cannot be localized. Every extension has to stand on its own bottom as to the interest on the cost of its construction, manning stations, repairs to track and stationary equipment, and accidents on that extension. The per passenger method divides the general expenses of operating the system and moving its cars, so that these general expenses that cannot be localized are divided in the same ratio between the extension and the whole system as the fares are divided. This method brings to the aid of the extension part of the excess earnings of the short hauls. It has been worked out by application to many cases and shows that the outcome is not unfair to the operator or overgenerous to the extension. The extension always will have the smaller earnings power, yet will need to stand localized burdens of interest, manning and repairs. The per passenger basis does not put the extension on an equal footing with original lines, but simply divides the non-localized expense so that part of the profits of the short hauls help to support the extensions. The Brooklyn Rapid Transit Company has adopted this method in its last proposal.

The Broadway branch of the present subway north of 96th street is commonly looked upon as one of the important earning sections of the Interborough system, yet until

within the last year if that branch had been operated on the car mileage method the City would under the plan proposed by the Interborough have been compelled to pay annual deficits to the Interborough, although the Interborough on its entire system would have been earning a handsome profit.

The Interborough reserves its present profits on its existing subways, which, figured on its actual investment, are about 17 per cent. Part of this high rate of return is undoubtedly due to abnormal congestion, and when new lines are built it is expected that this abnormally high rate of return will not continue. If the Interborough operates the proposed new Lexington avenue line, a pasenger from the present West Farms branch who is going downtown in the morning will pay his fare on the present West Farms line and ride down the new Lexington avenue line to 42d street. The new line gives him a long ride, but collects no morning fare. In the evening he deposits his fare in some station of the present subway south of 42d street, rides home most of the way on the new line and again the new line receives none of his fare. If now the Lexington avenue line between 149th street in The Bronx and 42d street in Manhattan is to receive neither morning nor evening fares from a large body of passengers, it will be adding to the earnings of the present Interborough lines with no corresponding benefit to itself. The application of the car mileage method proposed by the Interborough would mean that the unlocalized expense of operating cars through the new Lexington avenue line would be charged against the new line in proportion to the car miles now operated, but it would be deprived both morning and evening of the fares of those passengers for whom the trains will be mainly run. Such a method of starving the new line and adding to the profits of the old lines is unthinkable. The application of the per passenger method of estimating general expenses will serve to make a fairer division between the old and new. Indeed, it will probably be found necessary to go even

further in giving this portion of the Lexington avenue line a greater credit for carrying passengers who pay all their fares elsewhere.

If the Interborough becomes the operator of the Eastern parkway line to New Lots road a passenger boarding a train at Brownsville will be carried five miles to Atlantic avenue, whence he will proceed about two and one-half miles more through the present subway to City Hall, or four miles if he goes to 14th street. He will pay his morning fare on the new line and his evening fare on the old subway. The train he rides on will earn many more fares in the short haul in the subway than while it runs on the new line. In other words, the major mileage is on the new line and the major fare receipts are on the old line. If now the division of general operating expense is divided between old and new lines according to the proportion of car miles operated the new line is starved and the old line is fattened. Here again the application of the per passenger method becomes plainly necessary.

Illustrations of Per Passenger Method.

Broadway Branch Interborough Subway—

It is generally conceded that the least profitable part of the subway is the upper portion of the Broadway branch where large areas of ground are still vacant and where traffic is not at all dense. On the basis of tickets sold the Broadway branch north of 137th street originates only 3.2 passengers per car mile. At five cents per passenger this would mean a revenue of only sixte. a cents per car mile compared with an average of 28 cents per mile on all the street railway lines in New York City. On the trunk of the subway below the Grand Central Station the density is more than twice as great and reaches the ratio of 8.2 passengers per car miles for the Brooklyn line byond Bowling Green, and 14.2 passengers per car miles from South Ferry to the Brooklyn Bridge. It may be remarked in passing

that this contrast in density of traffic is essentially the result of short-distance riding, contributed to the subway to a large extent by passengers brought downtown by the so-called unprofitable extensions.

Whether the Broadway subway north of 137th street is profitable or not has in effect been answered by the operating company which has made proposals for additional extensions in The Bronx to points even further distant from the City Hall than the terminus of the present Broadway branch. An engineer would advise this course without making any very extended analysis of earnings and expenses. Thus he would see from the records that the number of tickets collected at stations on the subway north of 137th street in the fiscal year ended June 30, 1910, was $16,435,932. Of these, approximately 800,000 were northbound, and it may be assumed that an equal number of persons made a return trip from the northern terminus to stations on this division. Subtracting these purely local passengers, there would remain approximately 15,000,000 who ended their journey on the main line of the subway and upon their return would pay fares at main-line stations. The main line would also get the benefit of the short-distance riding of the 15,000,000 passengers who travel downtown. Such short distance riding would be estimated at from 10 to 30 per cent. of 15,000,000. The additional business brought to the subway by the division under consideration would, therefore, be represented by 33,000,000 fares as follows:

Fares paid on the division (local and through traffic)	16,435,932
Return fares paid on main line	15,000,000
Short-distance riding on main line (10 per cent.)	1,500,000

To handle this additional traffic the company would figure that it would not be obliged to increase its train service on the main line to any considerable extent and would have

very slightly increased expenses for general administration. The average cost per passenger would in all probability remain about the same. This cost on the subway, including charges on the City's bonds issued for construction and a 6 per cent. return on the cost of equipment furnished by the company, is 3½ cents. On each of the 33,000,000 passengers, therefore, the company would make about 1½ cents, or a total of $495,000.

It is possible that a more detailed analysis of the various elements of expense might reduce this favorable balance somewhat, but no reasonable method of calculating the profits of the division would fail to show a substantial profit on its operations. If we reckoned the earnings of the division on the basis of length of line as provided in the standard form of franchise granted by the Board of Estimate and Apportionment, the division would receive 22 per cent. of the total revenues of the subway, or slightly more than $3,000,000, and if the expenses were charged against the division of the car-mileage basis proposed by the Interborough they would not exceed $1,000,000, leaving a net profit of $2,000,000.

If expenses were still charged to the division on the car-mileage basis and revenues were apportioned on the same basis on the theory that earnings accrue at the place where service (represented by car mileage) is performed, then the division would receive revenues of upwards of $1,400,000, and would show profits of nearly $500,000.

If, in the third place, the division be credited only with the passenger traffic that originates directly on the division, and expenses be charged against it in the same proportion that this traffic bears to the entire traffic of the subway, the division would receive 6.11 per cent. of the earnings ($850,000) and would be charged with the same percentage of operating expenses, leaving a surplus over all charges of about $100,000.

If, however, the apportionment of earnings and expenses be made on the basis of the Interborough's offer,

the division would receive only $820,000 revenue and would be charged with $960,000 expenses, leaving a deficit of $140,000. Such a result is obviously unfair to the extension. The method entirely fails to credit the extension with any portion of the short-haul traffic that it brings to the main line, and it imposes upon the extension pro rata charges for general administration that are not perceptibly increased by the operation of the additional track, thus adding to the profits of the main line in two ways.

Proposed Lexington Avenue Subway—

The defects of this plan of apportioning earnings and expenses appear even more glaringly when applied to the east side subway on Lexington avenue. In the calendar year 1910 there were 20,000,000 passenger tickets sold at stations of the West Farms branch of the subway north of Mott avenue. Almost all of these passengers travel to lower Manhattan and with the Lexington avenue subway built would take trains running down the east side. Making ample allowance for those traveling to the west side, there would remain at least 15,000,000 persons (and a still larger number in future years) who would pay their fares to existing uptown stations in the morning and at existing downtown stations at night, so that the existing lines could count upon the 30,000,000 fares ($1,500,000) to augment their revenues, while the larger part of the cost of transporting these passengers would be assessed against the new lines. The charge against the Lexington avenue subway, including interest and amortization would approximate 3½ cents a passenger, as the distance from Mott avenue to 42d street is more than five miles and the average cost of carrying a passenger one mile is about ¾¢, as shown in the statistical report of the Public Service Commission for 1909 (Vol. III, page 501). On this basis the new lines would have the privilege of contributing upwards of $1,000,000 a year toward the expenses of the Interborough Rapid Transit Company in return for which they would not receive any revenue whatever.

Two Methods of Calculating Profits of the Broadway Branch of the Subway North of 137th Street.

	Entire Subway.	Division	
		Total.	Proportion.
Revenue car miles	50,258,774	†	†
Active passenger car miles	49,877,018	5,077,348	10.18%
Passenger—tickets sold	268,962,315	16,435,932	6.11%

	Subway Aggregates.	Division Results—Car Mileage Basis. (10.18%)	Division Results—Average Passenger Cost. (6.11%)
Passenger revenue	$13,435,535 36	$821,796 60	$821,796 60
Deductions:			
Operating expenses	4,756,449 54	484,206 56‡	290,619 07‡
Taxes	225,279 95	22,933 50	13,764 60
Rent due City	2,181,204 01	309,825 00*	309,825 00*
6% on Company's investment in equipment†	1,800,000 00	142,189 00†	142,189 00†
Total	$8,962,933 50	$959,154 06	$756,397 67
Surplus	$4,472,601 86		$ 65,398 93
Deficit		$137,357 46	
Add operating revenues other than passenger	496,720 21	30,349 60 (6.11%)	30,349 60
Final—			
Surplus	$4,969,572 07		$ 95,748 53
Deficit		$107,007 86	

* The cost of construction of the road is estimated as follows: 2.53 miles of triple tracks and 3.09 miles of double track, total 13.77 miles at $500,000 a miles equals $6,885,000. Bonds were issued by The City of New York at 3½ per cent. interest, which is paid by the lessee together with 1 per cent. sinking fund instalment.

† The cost of additional equipment provided by the Company under Contract No. 2 was $1,150,000, representing cost of real estate, sub-station and electric lines from Ann street to Atlantic avenue (6 2/3 miles or $172,100 per mile of track). On this basis the equipment for this division (13.77 miles of track) would cost $2,369,817, on which a carrying charge of 6 per cent. is figured to cover interest and obsolescence.

‡ All the proposed methods of ascertaining operating expenses of a division provide that such expenses as can be localized (for example, maintenance of track and stations, wages of station employees, etc.) shall be direct charges. The direct charges will ordinarily amount to about one-fourth of all operating expenses, and these would be the same on the car mileage basis as on the average passenger cost basis, and would to some extent diminish the difference between the two methods, reducing the deficit in the one case by a few thousand dollars and also reducing the surplus in the second case.

Short Distance Riding and its Relation to the Per Passenger Method.

The existence of short-haul traffic of large dimensions is revealed by an analysis of the ticket sales, earnings and expenses of the subway. The Chief Statistician of the

Public Service Commission has calculated the average cost of carrying a passenger one mile on the subway, including in such cost a 6 per cent. return on the Interborough Rapid Transit Company's investment, and found it to be ¾c. (See Public Service Commission Annual Report, 1909, volume III., page 501.) If passengers rode seven miles on the average, the cost to the Company would exceed the 5 cents paid for the ride, and the Company would be losing money instead of making 17-18 per cent. on its investment. The difference between the 17-18 per cent. of profits realized and the 6 per cent. assumed in the calculations of cost shows that the long-haul traffic represented by the passengers carried back and forth from The Bronx and upper Manhattan is counterbalanced by short-haul traffic of large dimensions. The fact is that the average length of ride on the subway as determined by the statisticians of the Commission is only five and one-half miles, and on the Manhattan elevated lines slightly more than six miles. Some idea of the dimensions of the short-haul traffic may be gained by referring to the table of subway ticket sales, which show that about 82,000,000 tickets are sold at stations above 96th street. Making allowance for local riders, it is clear that the larger part of these are carried to lower Manhattan and must also return from thence, thus accounting for more than one-half of the total subway traffic (268,762,000). The short-haul traffic is discovered in the 66,000,000 riders to and from Brooklyn and the 40,000,000 tickets sold at stations between 96th street and South Ferry, to other travelers than the two classes already mentioned.

The following statistics and interpretation are from the forthcoming report of the Public Service Commission for 1910:

The next table (numbered 4) contains ticket sales by sections for the fiscal years 1909 and 1910. The ticket sales of the stations to which the car mileage of a section is figured are divided between adjacent sections in a way to

compare passengers (or ticket sales) with car mileage of the stretch of road where their journeys begin. Thus passengers entering the 137th street station are included in the Dyckman to 137th street section, if northbound, but in the 137th to 96th street section if southbound. This requires the use of estimation for the division of express station figures by direction. It happens also that the boundaries taken for the sections are usually express stations.

TABLE 5.

Computed Car Miles and Tickets Per Car Mile by Sections.

	1909.	Tickets Sold Per Car Mile, 1900.	1910.	Ticket Sold Per Car Mile, 1910.
180th street (Lenox) to 3d ave. (south)	{ 3,548,938 } { 143,808 }	4.13	{ 3,962,640 } { 131,402 }	4.55
3d avenue (south) to 135th street (north)	1,632,856	3.04	1,823,198	3.05
145th st. (Lenox) to 135th st. (not incl.)	312,858	4.50	324,226	4.69
135th st. (Lenox) (so.) to 96th st. (no.)	4,482,360	4.89	4,877,900	4.86
145th to 96th (Lenox)		4.86		4.85
242d street to Dyckman street (north)	{ 1,403,686 } { 85,090 }	2.03	1,610,782	2.41
Dyckman st. (south) to 137th st. (north)	3,241,394	3.28	3,466,566	3.69
137th street (south) to 96th st. (north)	3,486,900	3.94	3,654,308	4.35
96th street (south) to 72d street (north)	4,147,132	2.76	4,432,878	2.81
72d st. (south) to Grand Central (north)	7,080,634	4.36	7,482,992	4.56
Atlantic ave. to Bowling Green (south)	3,297,860	8.58	4,105,856	8.23
South Ferry to Bowling Green (not incl.)	240,308	7.65	208,988	8.99
Bowling Green (no.) to B'klyn Bor. (so.)	1,722,510	13.90	1,879,056	14.78
South Ferry to Brooklyn Bridge		13.18		14.20
City Hall to Brooklyn Bridge (not incl.)	195,354	3.24	200,272	3.11
Brooklyn Bridge (no.) to 14th st. (so.)	5,891,318	6.16	6,297,242	6.11
City Hall to 14th street		6.07		6.02
14th st. (no.) to Grand Central (south)	4,908,294	7.00	5,246,486	7.17
Total	45,741,300	5.21	49,714,792	5.41

Attending for the time being only to the ratios for 1910, we note the range between the minimum ratio of 2.41 for the 242d to Dyckman section and the maximum of 14.78 for the Bowling Green-Brooklyn Bridge section is 12.37 points, or over five times the minimum. The order of the sections, as it appears below, in respect of the size of this ratio is even more noteworthy. The single station stub or loop sections

are, for this purpose, combined with the adjacent sections. They have in general, separately taken, even less individual significance than the others.

Section.	Ratio in 1909.	Ratio in 1910.
242d-Dyckman	2.05	2.41
96th-72d	2.76	2.81
3d avenue-135th	3.04	3.05
Dyckman-137th	3.28	3.69
137th-96th	3.94	4.35
180th-3d	4.13	4.55
72d-Grand Central	4.36	4.56
145th-96th (Lenox)	4.86	4.85
City Hall-14th	6.07	6.02
14th-Grand Central	7.00	7.17
Atlantic Avenue-Bowling Green	8.58	8.23
South Ferry-Brooklyn Bridge	13.13	14.20

The order of the sections in 1909 was the same as in 1910. The minimum ratio pertains to the extreme end of the Broadway branch, the maximum to Manhattan south of Brooklyn Bridge. In general the downtown sections (including among them the Brooklyn extension) show the highest ratios, the outlying northerly sections the lowest. The 96th to 72d street section, ranking next to the lowest, is an exception, perhaps owing to its population being largely served by other means of transit than the subway, while it is at the same time a section through which the necessary car miles must be operated to provide for all the passengers from the north.

These ratios have, as such, very little positive significance. They do have a good deal of negative interest, however, as showing how not to compute the earnings of the different parts of the subway. It should be clear that the locus of earnings is where the service is performed. The performers and their aids in a theatre, not those who sell the tickets, are the ones who earn what is paid for admission. Similarly, it is the car miles operated to accommodate a particular class of passengers that earn what is paid for the service. The locus of the earnings is the place where the car miles are operated, not the station where the tickets are sold. The service is proportioned to passenger

miles, or rather to the car miles necessary to accommodate the passengers. This quantity will, in a general way, vary with passenger mileage, but not exactly so. The most important difference between the two in the present connection is that, in proportion to passenger mileage, car mileage at the outlying extremes of a line is likely to be large while in peak-load districts it is bound to be, by comparison, small. Passengers cannot be put out of a car, and the car turned back, as soon as there begin to be several empty seats. Passengers insist, perhaps to an unreasonable extent, on remaining in the same car to their destination. Even where they would be discommoded but little, e. g., by the dropping of single cars from a train as passengers riding become fewer, the managers do not, in fact, adjust mileage closely to volume of transit at the ends of the line. The difference between centre and extremes of road, even though susceptible of great reduction, is bound to remain of this nature. Car mileage and passenger mileage, moreover, may be assumed to be much farther apart on the outlying sections of a line than are care service and ticket sales, for the reason that a terminal is likely to be to some extent a delivery district, though nowhere nearly so important as downtown.

The bearing of these considerations upon what should be the proper form of an operating contract for subway extension is too obvious to require specific discussion. It is sufficient here to make available the fundamental figures necessary for the detailed reckoning of operating "costs" and "earnings" according to methods proposed by possible operators.

The column of differences (Table 5 and the summary following it) between the ratios for the two years give the rather remarkable result of a maximum increase in the maximum ratio of ticket sales to car miles. In general, however, it is the stations at the northerly ends of the line which show increases in these ratios. The downtown sections, with the exception of the 14th to Grand Central and

also the one above noted, show decreases in their ratios. The Brooklyn section also shows a slight decrease. Thus it appears that the stations that would naturally be entered by those taking the shorter rides are relatively at least not gaining ground. But the ratio could as well be changed through the care mileage factor as through the other. Hence it is of interest to consider the tendency of ticket sales at various parts of the subway as regards their absolute numbers, and also other data or computations throwing light on the tendency of the average length of ride.

XVII.—The Relation of Discounts to Recapture.
What Is "Actual Cost"?

In every plan which involves the termination of the operating lease at the end of ten years or thereafter and the recapture of such rapid transit railroad by the City, the amount which must be paid to the operating company is a most important factor. The Rapid Transit Act specifies the terms and conditions for such recapture. The provision concerning the amount to be paid to any company which has constructed or which has contributed to the construction of any road is that the City shall pay an amount not to exceed the "actual cost" of such construction plus 15 per cent. thereof. One of the companies wishing to make a contract with the City has urged that "actual cost" should be construed to include discount on bonds in addition to the 15 per cent., and thus far has refused to accept any limitation of the discount. The other has taken no such stand.

If this demand should be granted, the effect upon the amount paid in case of recapture might be very serious, and if no limitation were placed upon the amount of discounts, the lessee company could fix a price to be paid by the City in the case of recapture which would be so out of proportion to the money cost of the property as to reduce the value of such right of recapture.

To make clear what such a proposition means, let it be assumed that certain lines are to cost in cash $100,000,000 and that in order to attract sufficient capital to build these lines the company must pay in one form or another what is equivalent to an interest rate of 5.2 per cent. The following table shows under varying rates of interest the discount at which the bonds could be sold in order to net 5.2 per cent. interest, the par value of the bonds which would need to be issued in order to provide $10,000,000 to build the road, the amount which the City would have to pay if the 15 per cent. bonus at the end of ten years were computed upon the face value of the bonds, and the per cent. of bonus upon the basis of actual money cost which such payment would mean:

Nominal Interest Rate.	Price of Bonds on 5.2% Basis.	Bonds Necessary to Build $100,000,000 Road.	115% of Bonds.	Bonus in %.
5.2	$100.00	$100,000,000	$115,000,000	15
5	96.45	103,680,664	119,232,764	19.2
4½	87.57	114,194,359	131,323,513	31.3
4	78.69	127,080,950	146,143,092	46.1
3½	69.82	143,225,436	164,709,251	64.7
3	60.94	164,095,832	188,710,207	88.7

For illustration: If the company should decide to issue 5 per cent. bonds and the City were to recapture the road at the end of ten years, it would have to pay a bonus of 19.2 per cent. instead of 15 per cent. compelled by the law. If the company were to issue 4½ per cent. bonds, the bonus would be 31.3 per cent.; and if a 4 per cent bond were issued, the bonus would be nearly one-half the cash cost of the road.

The provisions of the Rapid Transit Act relating to recapture were drawn by the Public Service Commission and were enacted by the Legislature at its request. At the time the proposed amendments were under discussion within and without the Legislature, it was frankly stated by the Public Service Commission that some inducements in the form of a bonus should be allowed in case the City

should recapture a road at the end of ten years, and that this bonus should decrease thereafter and within a reasonable period disappear. It was generally recognized that a maximum limit to the amount of bonus to be allowed should be prescribed by law, so that the City could not be mulcted to an unreasonable amount. After considerable discussion, the maximum was fixed at 15 per cent., with the idea in mind that in many instances it would not be necessary to pay the maximum.

It is evident that if discounts without limit may be added to cash cost, the limitation is meaningless, and that instead of a statutory maximum there is no maximum whatever, for discounts can be made sufficiently large virtually to provide for any bonus. If such were the intent of the framers of the law and of the Legislature, nothing was gained by inserting a maximum limit of 15 per cent., and those who considered such limit was a safeguard against improvident contracts were mislead. When the amendments were drawn, the Public Service Commission had in mind this very question of discounts, and one reason for placing the limit so high as 15 per cent. was that bonds might be sold at a discount and all of that discount might not be amortized within ten years.

It is not maintained that the par value of bonds may not exceed the amount of money which a company must raise. It is conceivable that it would be more advantageous to a company to issue a 4 per cent. bond and sell it at a discount than to issue a 5 per cent. bond and sell it at par. The natural interpretation of the Rapid Transit Law would not interfere with the former plan, but if such a course were followed, the City ought not to be compelled as a direct result to pay many millions more than it otherwise would. It is self-evident that neither the cash investment nor the value of the property has been increased by the issuance of a 4 per cent. bond as compared with one bearing a higher rate of interest.

If the proposition is sound that discounts should be added to the money cost in order to determine actual cost, the converse must be true, viz., that if bonds are sold at a premium the amount of such premiums must be deducted from money cost to determine actual cost. It follows that the present subway has cost the City not $52,000,000, which was the amount of cash actually disbursed for construction up to a recent date, but $50,000,000, which represents the amount of bonds issued to provide $52,000,000 of cash, the City's bonds having been sold at a premium. It has been suggested that if the proposal is sound the wise thing to do would be to compel the lessee company to issue 6 per cent bonds, sell them at a premium, compute the 15 per cent. upon the face value of the bonds, which would be considerably less than the money cost of the road, and thereby reduce and possibly wholly eliminate any bonus whatever. But naturally this proposition has not been received with favor by the company.

The statement has been made that there is no precedent for the exclusion of discounts from "actual cost," and that discounts are and always have been included in cost. Regarding this assertion, it should be noted in the first place that this is a question as to the amount which the City should pay under an indeterminate franchise at the end of ten years or thereafter. There are, therefore, few cases that have been found that are similar to the one under discussion. The nearest approach is the provision in the franchises of the Hudson and Manhattan Railroad granted in 1905 and 1909. These franchises reserve to the City the right to purchase at any time after 1935 at an appraised valuation "not to exceed the actual cost in money of the construction of the railroad." It should be noted that these franchises not only fail to provide for any bonus whatever, but specifically limit the cost to cost in money, which eliminates discounts entirely.

The Chicago Street Railway franchises of 1907-1910 provide for municipal purchase at any time. When the set-

tlement was made, the existing property was valued and this valuation includes a lump item of 10 per cent. to cover legal expenses, interest during construction, contingencies and brokerage. In case the City takes over the lines, there will be added to the above valuation the cost of all additions. To the actual cost of such additions, there is to be added 10 per cent. "as a fair and proper allowance to the company for conducting the said work and furnishing the said equipment," and 5 per cent. "for its services in securing funds therefor, including brokerage." Thus under the Chicago basis the bonus is limited to much less than 10 per cent. on the original lines and 15 per cent. upon additional expenditures, which removes the possibility of securing an additional bonus by including bond discounts. The freight subway franchise is even less generous, as only 5 per cent. is allowed for compulsory sale.

The Cleveland Street Railway settlement franchise of 1909 also contains a provision for municipal purchase at any time and contemplates additional expenditures by the company. The valuation upon which the settlement was based and which is to serve as the basis for municipal purchase of existing lines, contains no allowance for brokerage or bond discount, and the bonus is limited to 10 per cent. To the above original valuation will be added, in case of municipal purchase prior to the expiration of the franchise term, the par value of any stock or bonds issued to pay for the construction of additions to property plus a bonus of 10 per cent. Stocks may not be issued at less than par, and bonds may only be issued at less than par with the consent of the City. Furthermore, the City has the option of taking over the property subject to outstanding bonds, and in such case the par value of the bonds is subtracted from the purchase price before the 10 per cent. bonus is added. It is evident that, in view of all of these limitations, and particularly of the limitation of the bonus to 10 per cent., that the terms are much more rigid than those proposed in this report.

A case which very closely parallels the present question is a decision in City of Galveston *v.* Heard, 54 Texas, 420, 449. The City Charter provided that the cost of construction of sidewalks shall be defrayed by the owners of the land fronting thereon and that the cost might be collected by sale of the lot, etc. The court held that where the sidewalks were paid for by bonds and the City's credit was such as to cause these bonds to be sold at a loss, that loss should not constitute a part of the legitimate cost of the work chargeable on the lot, but that the cash paid out represented the actual cost of the work.

The question of including discounts in actual cost has most frequently arisen in rate cases, and thus far no final judicial decision has been found where discounts have been included in the fair value of the property. Certain decisions indicate that some consideration has been given to the amount of stocks and bonds issued, following the suggestions made in the celebrated case, Smyth *v.* Ames, but the decision in this case does not state that the par value of stocks and bonds is to be considered as a determining factor, but only to the extent that they may throw light upon the actual cost or present value. Justice Harlan, who wrote the opinion, stated, 169 U. S., 466:

> "If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization."

In the case of Steenerson *v.* Great Northern Railway, Justice Canty says, 69 Minn., 353:

> "In determining what are reasonable rates, it is perfectly immaterial whether the railroad is mortgaged for two or three times what it would cost to reproduce it, or whether it is free from incumbrance * * *. It

is immaterial how the property has been split up into different rights, interests and claims."

In the recent opinion of Judge Otis, Special Master in Chancery, in the Minnesota rate cases, the admission of bond discount in determining cost is squarely denied. Judge Otis says:

> "It cannot be said, however, that it is money which has actually gone into the road, but rather an expense which the company incurs for the purpose of procuring such money. If rate-making is to be based upon actual cost, it would seem that such cost must be measured by the money necessarily expended in producing the construction, without regard to whether those undertaking the enterprise have the same or must borrow for the purpose—a matter in which the public has no concern. If allowed interest during construction on the money invested, more should not be asked; otherwise the rate would be directly affected by the good credit or otherwise of those undertaking the work."

The findings of Judge Otis have been just recently approved by the Circuit Court of the United States (see Shepherd vs. Northern Pac. Ry. Co., 184 Fed. Rep. 764).

The attitude of the Interstate Commerce Commission and the New York Public Service Commissions of the First and Second Districts is shown in the systems of accounts now applicable to the corporations under their jurisdiction. Discount on bonds may no longer be included in construction cost. It must be charged to a separate account and amortized during a period not in excess of the life of the bonds. This practice is approved by the best writers on accountancy and has been adopted by many corporations upon their own initiative. Discount on bonds is practically interest in another form, and cannot properly be considered as part of the cost of the property.

XVIII.—Communication from the President of the Borough of Richmond With Relation to the Projected Line to Staten Island.

Borough Hall, New Brighton, New York City,

June 5, 1911.

Hon GEORGE MCANENY, *Chairman, Board of Estimate Special Subway Committee*, Hon. WILLIAM R. WILLCOX, *Chairman, Public Service Commission, and Fellow Conferees*:

Gentlemen—As you know, during our consideration of the almost countless phases of the transportation proposition for New York City, I have consistently and persistently kept to the front the matter of including the Borough of Richmond as territory into which immediate subway construction should be carried, in connection with the main proposition rather than as an extension to be considered at some indeterminate later date.

New York City consists of two great parts: first, the area within its corporate limits; and second, a wide area surrounding it, whose population contributes to its prestige and power, therefore deserves consideration, but does not contribute directly to paying its bills or raising its taxes.

Throughout our conferences, I have endeavored to dissociate borough considerations, but always considered the City as a geographical whole. By common consent, the City Hall has been considered as the focus of civic life, the point in general to which the moving population wishes daily access and from which it must pass to its homes. There are other centres, and as the City grows in population, other centres will increase in importance, and in our studies of the transportation question, we must keep that fact in mind so that transportation will not only be provided for the great centre but freely between the other centres; for thus, only, can the terrific congestion which

to-day prevails in certain portions of the City be relieved and other portions of the City be accommodated.

No one locality or borough can arrogate to itself the making of New York City; every locality has had its powerful influence. No one thinks of charging the bridges, with their enormous cost of construction and maintenance, to any particular borough. No thinking man charges to any borough the cost of constructing terminals and ferryboats and operating them. No thinking man should charge to any locality or borough the cost of constructing and operating municipal transit lines. The smallest taxpayer on the outskirts of The Bronx, Queens, Brooklyn or Richmond is entitled to the same consideration as is he who owns property near the City Hall in Manhattan.

As a matter of fact, he pays relatively higher taxes for what he gets in return and may be an even more valuable citizen.

The transit problem before The City of New York today is twofold: first, and more important, to relieve the terrific crowding of the transportation lines at present in operation; second, and of vast importance, furnishing access to all parts of the City as yet undeveloped, so that they may become attractive places of residence for the workers in our office centres and for the establishment of factories and workshops to which operators can have ready access and from which they can reach the different business and recreation centres.

In considering, however, these most essential features of the case, it would be improper for me, as an elected representative of a borough, large in area and great in possibility, not to insist to the utmost that its special needs be cared for. If nature had placed it geographically so that it was only separated from the other boroughs by a narrow stream, or without such physical division, there is but little doubt that subways would have been cheerfully considered and planned for as a part of the main great system, but be-

cause nature has placed a magnificent body of water between Richmond and its nearest neighbor, Brooklyn, its position as an integral part of the great city is largely denied, and whatever is done towards its development seems to be considered by some as a charity instead of being its right.

The distance by water between the boroughs should, therefore, be entirely eliminated from the estimates as being changeable to a specific locality, but should be charged as a part of the general cost of the whole transportation system.

The Borough of Richmond is to-day dependent upon ferry service for connection with the other portions of the City; yet, but a few months ago, a strike demoralized the service and practically cut off communication. The borough should not be dependent solely upon ferry service. If bridges were practicable, it should have bridge connection; as they are not, it should have the next best means of communication, tunnels.

Twice or thrice there has been a large increase in the assessed valuation of property in Richmond under the City's avowed policy of increasing assessments so as to increase the bonding capacity for the construction of subways; yet, for other than a some time possible extension, Richmond gets little but consideration.

Let me remind my associates that among the most powerful men who made the old City of New York, Richmond's taxpayers were the leaders, and to-day in that honor roll Richmond's residents name a proportionate number. We claim, therefore, our rightful share of the City's wealth to render accessible the homes of Manhattan business men. We also call attention to the constantly increasing army of office workers south of Chambers street; they are being rapidly driven to New Jersey for homes, for though they can reach parts of Brooklyn and The Bronx and upper Manhattan for a five-cent fare, the trip is so uncomfortable

that they prefer a greater expense to get across the Hudson where the railroad companies at least try to furnish a seat for every passenger. Many of these thousands would be glad to come to Richmond, but they have a fear of the water, unjustifiable, perhaps, but nevertheless a fact. No amount of argument or reference to the small percentage of delays through fogs, ice or other causes in the years past can convince many people that there is actually equal safety and less average delay by boat than there is by train.

Richmond County is one of the healthiest counties in the State. For a great many years past, malaria even has been a practically unknown disease in Richmond, fewer cases having been observed than in the Riverside section of the Borough of Manhattan. Our water supply is reasonably satisfactory for present needs, and in quality is better than Croton, but the quantity must soon be augmented, and full relief is soon to be given by the extension of the Catskill system.

The proposed extension of the Catskill water system will involve a large expenditure for the duplicate water mains under the Harbor from Brooklyn to Richmond, several millions of dollars having already been appropriated for that purpose. I have taken up with the engineers of the Board of Water Supply and other prominent engineers of the country the question of the saving that might be accomplished to the City by uniting the construction of these water mains with the proposed tunnel construction. I am advised that such construction is not only perfectly feasible, but desirable, and that the saving in cost to the City by such joint construction would be fully $1,000,000.

Practically every argument that has been or can be raised against a vast population settling in the Borough of Richmond, closely analyzed, comes down to the lack of suitable transportation connection between that borough and the other portions of New York City. For beauty, for healthfulness, for intra-borough access, for local markets,

for churches, schools; every advantage is here. It has the best water-front to-day within the City limits available for ocean-going vessels. It has factory sites innumerable, and it has what no other borough or portion of New York City possesses, direct connection by bridge with most of the trunk line railroads, the Central Railroad of New Jersey, the Delaware, Lackawanna and Western, the Erie, the Lehigh Valley, the West Shore, and the Baltimore and Ohio, making possible the reception and shipping of freight in bulk without lighterage, the rock that has pretty nearly wrecked the shipping prestige of New York. It would not only be quite possible, but relatively economical, to construct between Brooklyn and Richmond a four-track subway instead of a two-track that has been under consideration. Two tracks of such a system could be used for through freight. Continuing those tracks would bring to the Bush Terminal and to the proposed Jamaica Bay Terminal bulk freight from the west without trans-shipment. Continuing such tunnels from the Bush Terminal along the Brooklyn waterfront and by an additional twin tunnel to the lower end of West street, Manhattan, would give physical connection to the great railroad waterfront development proposed for the west side of Manhattan. This would result in practically a complete elimination of lighterage in the Harbor of New York, and would give to all of the other trunk line railroads the advantages that are now proposed to be furnished to the New York Central Railroad. The Pennsylvania Railroad, through the expenditure of private capital, has secured for itself practically all of the facilities that it requires. The New York Central and the New York, New Haven and Hartford, also, at private expense, have secured very great advantages. The other great railroads which are of so much advantage to The City of New York also have little present opportunity of serving the City, and under plans heretofore proposed would be under perpetual handicap.

We have no means of learning whether these other railroad companies would, or would not, contribute to the cost of the passenger subways between Richmond and Brooklyn as a part consideration of securing franchises for freight business, but believe that such a proposal would meet favorable consideration. Aside from that possible factor, however, Richmond needs a passenger railroad connection with other parts of New York City, on the same basis in the transportation plan that is proposed to be accorded to other portions of the City, but we would not stop at stating Richmond's needs for facilities, but base the claim on the fact that the City, as a whole, needs the granting of these facilities for access to Richmond. It should be the City's policy to encourage its business men and women to reside within its own limits, but if there be no pride in securing that result, the financial gain could well be considered due to the increased taxpaying ability of the City to continue its great work of proper development.

I therefore suggest that we recommend to the Board of Estimate and Apportionment that, of the City's moneys to be set apart now for subway construction, at least $5,000,000 be for application to subways to Richmond, in addition to such sums already appropriated as can be saved by a joint construction of the proposed water mains with the proposed subways, the balance of the total cost of construction to be provided by the operator in part consideration for his franchise.

Very truly,

GEORGE CROMWELL,

President of the Borough of Richmond.

His Honor, the Mayor, then stated that consideration of the report would be deferred until June 21, 1911, as recommended by the Committee of the Whole.

There being no objection, it was so ordered.

O. At a meeting of the Board of Estimate and Apportionment held on June 21, 1911, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways; Extensions to the Existing System; Also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads, and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company, to construct, maintain and operate certain extensions to the existing Rapid Transit Railway, conditional upon favorable action upon the proposition of said Company to third-track and build additions to its 2d, 3d and 9th avenue elevated roads, and to build and put in operation the Steinway tunnel and requesting a statement of the position of this Board on the subject.

At the meeting of June 13, 1911, a report was received from the Conference Committee and this day was fixed as the date for consideration of the report and the recommendation therein contained.

The President of the Borough of Manhattan, on behalf of the Conference Committee, offered the following:

Whereas, The Public Service Commission for the First District, under date of December 20, 1910, submitted to the Board of Estimate and Apportionment a proposition of the Interborough Rapid Transit Company, dated December 5, 1910, for the construction for the City and for the equipment and operation by that company of certain additions to the present subway system; and

Whereas, The Commission, in its letter of transmittal, stated that it would be pleased to receive a statement of the position of the Board of Estimate and Apportionment with relation to this proposition, and a statement in particular of any objections to the form of contract proposed that would, unless properly met, render impossible the consent of the Board to the forms of contract as finally submitted; and

Whereas, The Public Service Commission stated further that it would be pleased to confer with this Board, or with any Committee thereof, on the general subject; and

Whereas, The Board of Estimate and Apportionment, in pursuance of this invitation, under date of January 19 last, authorized the appointment by the Mayor of a Conference Committee, with power to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it," such Committee, as subsequently appointed, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond; and

Whereas, The aforesaid Committee of the Board, in conference with the Public Service Commission, has considered not only the original proposition of the Interborough Company, but certain propositions subsequently received from the Brooklyn Rapid Transit Company, as well as a modified proposition from the Interborough Company, all with relation to the construction, equipment and operation of new rapid transit railways; and

Whereas, The Committee of the Board, in a report dated June 5, 1911, in which the members of the Public Service Commission join, has recommended a course of action on the part of the Board with relation to the several propositions from the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company now pending before the Commission, the adoption of which would serve as an answer to the inquiries of the Commission addressed to the Board in December last; and

Whereas, The recommendations in question offer to the Board an opportunity to lay down a policy under which it will in future consider and pass upon all matters with relation to the existing transit situation and the proposals of particular companies; therefore be it

Resolved, That the Board of Estimate and Apportionment hereby approves and accepts the recommendations of its Committee, and of the Public Service Commission, as submitted under date of June 5, 1911; and be it further

Resolved, That, in pursuance of the recommendations aforesaid, the Board of Estimate and Apportionment requests the Public Service Commission for the First District to prepare contracts for the construction, equipment and operation of rapid transit lines upon the following basis:

With Relation to the Construction and Equipment of Particular Routes.

I.—That the City construct, at its own expense, a new subway connecting with the 4th avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occasion may require, and four tracks from 9th street northward;

...

(d) A two-track line from 59th street easterly to and over the Queensboro Bridge, there to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan Bridge by way of Canal street to Broadway.

II.—That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III.—That the City construct, also at its own expense, the following two-track extensions of the Bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg Bridge by way of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn Bridge to the Wall street district—by way of Nassau and Broad streets.

IV.—That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the Bridge Loop lines with their proposed extensions, in such form as to link these lines with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

V.—That the City construct, at its own expense, a new two-track subway, proceeding from Union square in Manhattan easterly under 14th street and the East River to the Eastern District of Brooklyn, and thence to a point to be later determined; and that, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the Com-

pany's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI.—That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that action upon the alternatives presented for routing and construction be withheld temporarily and referred back to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII.—That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of rapid transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th and Southern boulevard to Westchester avenue; and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times square under 7th avenue, as extended, Varick street, West Broadway and Greenwich street to the Battery, as far as possible as a four-track road;

(d) A two-track tunnel via Whitehall street to the Borough Hall in Brooklyn.

VIII.—That if an agreement be reached upon terms; the City enter into a separate contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times Square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line;

(c) To Woodside and Corona; and

(d) To Astoria.

The lines converging at the Queensboro Plaza, if this contract be accepted, to be connected also by way of the Queensboro Bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the construction cost of the continuous line proposed, the tunnel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX.—That, if an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

(a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern Parkway to Buffalo avenue; also a two-track subway extension from the Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern Parkway by way of Buffalo and Livonia avenues through the Brownsville district to New Lots road.

X. That the cost of construction of all of the lines to be built and operated by the Interborough Company under these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI.—That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII.—That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII.—That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union Square or 9th street; and that, if an agreement on terms be reached with the Brooklyn Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV.—That, if the Interborough Company fails to accept a lease for the operation of the proposed line from 42d street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro Bridge.

XV.—That, if the Interborough fails to accept a lease for the operation of the Eastern Parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI.—That, if a contract be made with the Brooklyn Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

XVII.—That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union Square, Manhattan, and the projected Lafayette avenue line from Broadway to Flatbush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII.—That, if neither the Interborough Company nor the Brooklyn Company accept leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so-called Tri-Borough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX.—That the Public Service Commission, in any event, proceed to prepare and award contracts for the construction of the lines to be built and owned by the City, as rapidly as practicable, in order that the work may be started immediately.

XX.—That the franchises sought by the Interborough and Manhattan Companies for the third tracking and extensions of their elevated line in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

With Relation to Operating Terms as Applied to Any Operator.

I. Rate of Fare—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II. Terms of Leases—That all contracts for the operation of lines, title to which is vested in the City, whether such lines be constructed by the City or by the Company,

or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company, may be leased for twenty years with the privilege of renewal, upon an adjustment of terms, for twenty years in addition.

III. Provision for Recapture—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine-year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus fifteen per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

IV. Cost of Construction—That the costs of construction, whether borne by the City or by the operator, or upon a basis of division between the City and the operator shall be the cost in money and shall include

(a) All contracts for original construction work, or

(b) For station finish;

(c) All carrying charges during construction;

(d) Engineering expense;

(e) Extras and damages;

(f) Real estate and easements; and

(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V. Division of Profits—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of

(a) The value of the tickets collected at stations;

(b) Miscellaneous earnings from stations;

(c) A pro-rata of advertising and other general receipts.

The fixed cost of operation shall include:

(a) Station expenses;

(b) Maintenance of way and structure;

(c) Damages for accidents; and

(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;

(f) Maintenance of equipment, renewals and depreciation;

(g) Cost of power;

(h) General and administration expenses; and

(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charge of the operator for carrying the cost of equipment: with provision for a sinking fund not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent.) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs

of construction or costs of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum; provided

4. That if the gross income in any year, after providing for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the

5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI. Operation of Extensions—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall be governed by and included in all of the general provisions of the contract with relation to operation and the division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

(c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII. Supervision of Contracts and Accounting—That the right be retained, through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions or receipts and expenditures and the determination of the City's share in such profits are based.

VIII. Operation and Management—That clauses be inserted in the contract embodying the essential provisions of the Public Service Law with relation to both operation and management, and such added guarantees as to the character and sufficiency of the equipment to be furnished, and of the service to be given, as the City may require.

With Relation to Terms Applying Particularly to the Interborough Rapid Transit Company.

I. Leveling of Leases—That, as part consideration for the lease of new lines for the fixed period of forty-nine years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases for its existing lines so that these shall expire coterminously, forty-nine years from the beginning of operation of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the Company, through its right of twenty-five years renewal, would remain in possession until 1979. The lease of Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with the renewal period, in 1968. Under the

leveling process, all of the leases, new and old, revert to the City in 1964.

II. Exchange of Lower Manhattan Lines—That, as further consideration for the lease of new lines, the Interborough Company consent to the modification of Contracts Nos. 1 and 2 so as to provide that the City at any time after ten years may, if it so elects,

(a) Take over that portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn; or

(b) That portion of the existing subway running northward from 42d street to 96th street, with its Van Cortlandt Park and West Farms extensions; the Company in such event to receive in exchange a lease upon either

(a) The 7the avenue line from 42d street south to Borough Hall, Brooklyn; or

(b) The Lexington avenue line from 41st street to The Bronx, with its projected extensions, for the balance of the term of forty-nine years from the beginning of operation as herein defined.

the purpose of this clause being to give the City the right to take over a continuous north and south line, if it so desires, at any time after ten years, giving the Company in exchange a continuous line under the conditions of its present lines, and to reserve to the City the option of taking which ever of the two lines may better suit its needs and purposes under the conditions that may exist when the exchange is affected; also

That in the event of an exchange the respective values of each extension affected shall be appraised on the basis of the earning capacities at the date of appraisal; the difference in value, if there be any as so determined, to be adjusted by the payment by the City to the Company of any excess found in favor of the lines taken over by the City, or payment by the Company to the City of any excess in value found in its favor; the Company, in any event, to reserve trackage rights for the elevated trains from White

Plains and Jerome avenue lines and the right to connect the southerly end of its Lenox avenue extensions, under the terms of Contract No. 1.

Provisions to be embodied in the contract that will enable the City to take either line subject to any mortgages now liens thereon, or to compel the Company to assign its rights to a third party designated by the City; the Company to co-operate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract.

III. Purchase of Existing Lines—That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment of the Company of a sum equal to the Company's aggregate estimate profits for the unexpired portion of the lease, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization.

With Relation to Terms Applying Particularly to the Brooklyn Rapid Transit Company.

I. Earnings of Existing Lines—that, in lieu of all earnings on its existing lines, the Company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from the operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated

to be pooled with the receipts of the City built lines, for distribution in accordance with the general terms agreed upon.

II. Leased Lines—That the Company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now holds under lease, and that no allowance be made under the head of operating expenses for further rental of any of such leased lines.

III. Examination of Plant—That the Company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or current earnings to cover such deferred maintenance as the Commission, upon the advice of the engineers, may require to be met before the lines pass into the proposed new system.

IV. Management—That the entire system of subways and elevated lines shall be under the manegement of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commissions Law.

With Relation to Terms Applying Particularly to the Extension, Third Tracking and Subsequent Operation of the Manhattan Elevated Lines.

I.—That the net profits upon all the elevated lines operated by the Interborough Company, in excess of the average net profits for the two years from July 1, 1909, to June 30, 1911, proper deduction having been made for depreciation, shall be divided equally between the Company and the City.

II.—That the City shall have the right to take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another

operator; such operator to pay the amount specified in the certificates to the Interborough Company direct.

III.—That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV.—That the payment to be made for equipment, in the event of recapture, shall be fixed with due regard for its then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V.—That the rate of fare shall not exceed five cents.

and be it further

Resolved, That the Special Committee of the Board be hereby continued, with authority to communicate, in conjunction with the Public Service Commission, to the Interborough Rapid Transit Company, to the Brooklyn Rapid Transit Company and to the Manhattan Elevated Railways Company the terms herein set forth, upon which the City would be willing to enter into contracts for the construction, equipment or operation of the rapid transit lines for which the said Companies have severally applied; the said Committee to receive and communicate to the Board of Estimate and Apportionment the replies of the Companies aforesaid for the final consideration of the Board not later than Wednesday, June 28, 1911; and be it further

Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the Fourth avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of the same; and be it further

Resolved, That the Committee of the Board be hereby continued for the purpose of further conference with the Public Service Commission upon such matters as may render consultation desirable during the formulation of

contracts for construction, equipment or operation, based upon the finding and recommendations of the joint report of June 5, 1911.

amendment to the resolution of the President of the Borough

The President of the Board of Aldermen offered as an of Manhattan, the following:

Resolved, That the operating terms applying to the Interborough Company proposed by the conferees in their report at pages 36 and 37 be amended so that paragraph II of the subdivision entitled "Terms Applying to the Interborough Company," and dealing with the exchange of leases, be stricken out and in its place the following be inserted:

II.—That the Interborough Rapid Transit Company be required to consent to the immediate modification of contracts 1 and 2 so as to provide that the portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn, shall be held under an indeterminate lease, terminable at any time within 10 years from the opening of the proposed 7th avenue extension, receiving as consideration for such modification a lease upon the said 7th avenue extension from 42d street, south, to Borough Hall, Brooklyn, for 49 years from its completion and opening for operation.

The modification of the existing leases shall be simultaneous with the making of the proposed contract.

The new lease for the present subway south of 42d street shall provide that upon the exercise of the option of the City to terminate the same its value and the value of the lease of the 7th avenue extension shall be appraised on the basis of their respective earning capacities at the date of appraisal. The differences in value, if any, so determined, shall be adjusted by the payment by the City to the Company of any excess found in favor of the lease taken over by the City or by the payment by the Company to the City of any excess in value found in favor of the 7th avenue extension.

Provisions to be embodied in the contract that will enable the City to compel the Company to assign its rights to a third party designated by the City; the Company to co-operate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

Which amendment was accepted by the President of the Borough of Manhattan.

The amendment was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn and Queens—14.

Negative—The Presidents of the Boroughs of the Bronx and Richmond—2.

The President of the Borough of Queens offered the following:

Resolved, That the proposed routing terms suggested by the conferees of the Interborough at page 29, under paragraph VIII., subdivision (b) which now read:

> "(b) The Steinway tunnel continued as a two-track road to Queensboro Plaza, and thence as a two-track elevated line; (c) to Woodside and Corona; (d) to Astoria."

—be amended to read as follows:

> "(b) The Steinway tunnel continued as a two-track road to Queensboro Plaza, and thence (c) as a three-track elevated line to Woodside and Corona, and (d) as a two-track elevated line to Astoria."

—and that the routing terms as thus amended be submitted as final to the companies for their acceptance.

Resolved, That the proposed operating terms offered to each company shall include a requirement that the Interborough Rapid Transit Company jointly operate the Woodside-Corona and Astoria extensions; that is, that each company be required to run its trains over each of these extensions, the Interborough to run the Second Avenue Elevated and Steinway tunnel trains, and the Brooklyn Rapid Transit Company to run its Broadway-59th street trains and its Eastern District loop trains over those extensions, and that the operating terms as thus amended be submitted as final to the companies for their acceptance.

Resolved, That the terms to be offered to the Brooklyn Rapid Transit Company shall require it to extend the elevated lines along Jamaica avenue from Crescent street at Cypress Hills to Grand street, Jamaica, and the extension of the elevated line along Liberty avenue to Lefferts avenue and thence by two surface lines, one to Jamaica by the most direct route and the other along Lefferts avenue southerly to Jamaica South Plank road.

The President of the Borough of The Bronx offered the following:

On page 30, section 9, for subdivision A, substitute the following:

A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to the Gun Hill road, and a three-track elevated line along the White Plains road from the Gun Hill road to its projected terminus near the City Line.

Page 31, insert new section 18½ to read as follows:

That if the Interborough Company fails to accept a contract for the construction, equipment and operation of the extension of an elevated line as provided on page 30 of this report, section 9, subdivision A, from the West Farms division of the present subway via the White Plains road to its projected terminus near the City Line, then the extension

for an elevated structure on the White Plains road from and along the Gun Hill road to and along the White Plains road to 241st street be offered to the Interborough Company as an elevated extension from the proposed Webster avenue line north of the Gun Hill road on the White Plains road on the same terms as other Interborough elevated extensions are offered, and to be included within the provisions of section 20, page 31, of this report. Trackage rights to the City for a subway extension from West Farms to be reserved.

The President of the Borough of Brooklyn offered the following:

Resolved, That the Allied Board, consisting of the Ridgewood Board of Trade, the Broadway Board of Trade, the Twenty-eighth Ward Taxpayers' Association, the Wyckoff Heights Taxpayers' Association, whose members are residents of the Eastern District of Brooklyn, and many other civic bodies from other sections of the Borough, emphatically protest against the adoption of the so-called McAneny report, unless the Lafayette avenue subway to Broadway, the Ridgewood and East New York sections is included therein; and that if the railroad companies bidding for the contracts are not willing to build and operate subways in said section, that the City proceed immediately with the building of the so-called Tri-Borough route, the bids for which have long ago been advertised and received for; and be it further

Resolved, That we respectfully request a hearing before your Honorable Board before you take final action upon the said report.

Which were severally referred to the Conference Committee by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Board of Aldermen offered the following:

Resolved, That the operating terms applying to the Interborough Company proposed by the conferees in their report at page 38, under subdivision III., relating to recapture of existing lines, be amended so as to read as follows:

> "That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment to the company of a sum equal to the then value of the unexpired portions of the Company's leases under contracts Nos. 1 and 2, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization."

—and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Manhattan offered the following:

Resolved, That the Board of Estimate and Apportionment hereby approves the following corrections in and modifications of the joint report of its Special Committee and of the Public Service Commission under date of June 5, 1911, with relation to the terms for the routing and oper-

ation of rapid transit lines to be offered respectively to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company.

1. That it be stipulated with the Brooklyn Rapid Transit Company that if the City recapture the Fourth Avenue (Brooklyn) line at any time after ten years, the Brooklyn Company be given traffic rights over lines entering Manhattan for the operation of its Brighton Beach trains.

2. That the requirement that the Brooklyn Company subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its "existing surplus or current earnings" to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be made before these lines pass into the proposed new system, be modified so as to provide that the provision in question may be made from either the surplus or current earnings, "at the option of the company".

3. That the Interborough Company and the Manhattan Elevated Railway Company be also required to subject their plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision either from existing surplus or current earnings, at the option of the companies, to cover such deferred maintenance as the Commission, upon the advice of the engineers, may require to be met before any basis of even division with the City of the future increase in net profits of the Manhattan elevated lines is accepted.

4. That the Interborough Company shall not be required to proceed with the construction of the proposed new Whitehall tunnel under the East River until it has been determined by the Public Service Commission that such tunnel will be needed to carry the company's future Brooklyn traffic, and then to proceed on order from the Commission.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Brooklyn moved that the Fourth Avenue Subway be constructed to Fort Hamilton and Coney Island.

Which matter was referred to the Conference Committee by the following vote:

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

Hon. Seth Low, chairman of the Chamber of Commerce, Merchants' Association Committee, appeared on behalf of the Citizens' Committee on rapid transit, and presented a memorandum unanimously adopted at a meeting of said committee, approving the report of the Conference Committee as follows:

At a meeting of the Citizens' Committee on Rapid Transit, held at the Chamber of Commerce, Tuesday, June 30, 1911, Seth Low presiding, the following report, presented by Mr. Low, was unanimously approved, and made the report of the Committee:

Acting upon the authority which you conferred upon me when you last adjourned, I have asked you to meet this afternoon for the purpose of considering the report and recommendations on rapid transit, now pending before the Board of Estimate and Appointment, submitted by the Joint Committee on Conference of the Board of Estimate and Apportionment and the Public Service Commission, under date of June 5, 1911.

Since this Citizens' Committee adjourned the situation has changed vitally. In December, 1910, we were passing upon a proposition made to the City on behalf of the Interborough Rapid Transit Company. Today we are met to consider a proposal suggested to be made by the City to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, respectively. This change in the aspect of the question may properly be described as vital. Whatever may be said in regard to the details of the proposal, I think the City owes an infinite debt of gratitude to the Conferees for taking the position that the City is entitled, in the matter of rapid transit, to say what it wants, and that it is not shut up, and must not be shut up to accepting only what somebody is willing to do. In other words, the situation which confronts the Board of Estimate, and the situation which this Committee is asked to consider, is simply whether the report of the Conferees shall be accepted or rejected. Personally, I hope that this Committee will urge its acceptance without hesitation.

Two qualities stand out in the report that ought to command the enthusiastic approval of the citizens. The first is a most painstaking desire to secure for the City a comprehesive system of rapid transit, with an eye not only to the present but also to the future, upon terms which, in the long history of the City, will make its rapid transit system of the maximum value of a distributor of population.

The report recognizes that, whereas Manhattan is like a ruler, Brooklyn is like a fan; so that no possible service can be given to Brooklyn without destroying facilities that already exist, to compare with the results that may be obtained through co-operation with the Brooklyn Rapid Transit Company and the utilization of its facilities. The report recognizes, also, that the East River Bridges in which the City has invested $80,000,000, should be used as thoroughfares, and not for shuttle trains, and provides for this larger and better use. The second quality is the evident

intention of the Conferees to be absolutely just in their recommendations as between the City and the private enterprises affected. There may be differences of opinion as to the propriety of some of the terms proposed to one company or the other, but I think there can be absolutely no difference of opinion as to the intention of the Conferees to make recommendations, the justice of which, in every instance, they are prepared to support.

One result, at least, has followed from the high quality of service thus given by the Conferees. There is substantially no difference of opinion on the subject of routes. There may be differences of opinion as to whether a certain route should be given to one company or the other; and there may be differences of opinion as to the wisdom or the fairness of the terms proposed; but nobody disputes that the rapid transit development which the Conferees are endeavoring to make possible for the City is a comprehensive system and entirely worthy of The City fo New York. No one disputes, or can dispute, that such a development if obtainable, would tend to distribute the present and future population of the City as fairly as possible through all the Boroughs of the City; for the plans not only make provision for immediate construction, but they provide for the construction of desirable additions from time to time as circumstances may require.

This being the case, the question before the Board of Estimate, and the question which this Committee must consider is, whether the realization of this broad scheme of rapid transit development for The City of New York can be best advanced by favorable action on the report of the Conferees, or by unfavorable action. I say, without the slightest hesitation, that a fortunate solution of the problem, in the interest of all concerned, requires now the prompt acceptance of the report of the Conferees by the Board of Estimate and Apportionment.

It may be objected that such action carries with it:

First—Upon the face of the proposal, a five-cent fare over two separate systems, instead of a five-cent fare for a single system, thus possibly hazarding the ultimate acquirement of a five-cent fare, with universal transfers, over the whole City;

Second—That it may involve the City in the construction of the Tri-Borough Road, with suitable modifications, without the assurance in advance of commanding an operating Company; and

Third—That should the Interborough refuse to co-operate with the City on the terms proposed, it will involve the City in a policy of competition with its own subway instead of leading to the development of the City's subway.

Before discussing these propositions in detail, though I recognize that every one of them is important if not fundamental, let me point out that the effect of the refusal of the Board of Estimate to adopt the report of the Conferees will be to throw the whole situation into chaos.

The Conferees ask the City to take, now and once for all, the attitude that in solving its rapid transit problem it will ask private capital to cooperate with it to carry out the City's plans, and that the City will no longer be content with simply saying yes or no to what private capital wishes to do. If the Board of Estimate fails to support the Conferees in this attitude, it will, in my judgment, entirely misinterpret the mind of the City, and it will do the City a grievous and enduring wrong. Upon this aspect of the question, The City of New York is in the Valley of Decision; and I earnestly hope that this Citizens' Committee will unanimously urge the Board of Estimate and Apportionment to accept the risks that are involved in acting upon this determination, rather than now to embark, without a rudder, on another sea of negotiations.

With this preliminary observation, let me discuss for a moment the possible objections to this course which I have already indicated. The first relates to the effect upon the

ultimate acquirement by the City of a universal five-cent fare, if the proposal of the Conferees be adopted, assuming that both the Interborough Company and the Brooklyn Company accept what they are offered. It will not be disputed that in such a case each company offers a notable addition to the single fare privilege at present enjoyed by the population of many parts of the City. In such a case, the City and the two companies become allies; and whenever the City is ready to bring about a universal five-cent fare, it will be in a position to do so by offering to the private capital concerned terms which such capital can affford to accept. In other words, in such a case the City becomes the dominant partner, in two enterprises covering the whole City having a common object. I cannot imagine any situation out of which a universal five-cent fare can more easily grow than such a relationship.

The second possible objection is this: That it may involve the City in the construction of the Tri-Borough Road, with suitable modifications, without the assurance in advance of commanding an operating company. If the City were to offer the Tri-Borough franchise on terms equivalent to those offered to the Brooklyn Rapid Transit or the Interborough, bidders are not likely to be lacking. But whatever the risk may be, I believe that it is inevitable that the City shall now accept this risk. To decline to do so is to admit that the City is helpless; and that it can secure now, and at any other time in the future, only what companies controlled by private capital are willing to offer. For one, I hope the City will never be deliberately placed in a position so undesirable. The time has fully come when the City, on its part, must decide whether it will devolep its rapid transit system, if it cannot do so in co-operation with private capital, at its own expense and in accordance with its own judgment; and when private capital on its part must decide, whether in the matter of rapid transit, it prefers the City for an ally or a competitor. So far as the City is concerned, I am confident

that public opinion, by an overwhelming majority, would sustain the proposal of the Conferees, if the City can command the co-operation of neither the Interborough Company nor the Brooklyn Company in the execution of a joint plan.

The third possible objection is that through the refusal of the Interborough to co-operate with the City on the terms proposed, the adoption of this report may involve the City in a policy of competition with its own subway instead of in the development of the City's subway.

Every effort certainly should be made to avert this misfortune even now. The benefits to be derived from the plan as a whole through the co-operation of both companies, or either of them, are so great that no financial detail should be permitted to stand in the way of an agreement between the City and the two companies. As to one point, the report itself indicates that neither the "car mile" nor the "passenger mile" offers a wholly satisfactory basis on which to found operating relations. In the time at the command of the Committee, it has been impossible to form an opinion on the merits of this question. This illustrates the necessity of striving still to make the financial basis of the arrangement such that it will secure in each case the co-operation of the company concerned.

Let me sum up: I believe that this Committee should ask the Board of Estimate to adopt, without delay, the report of the Conferees as submitted. The situation calls for prompt action. Nothing whatever is to be gained by delay, and nothing but disaster to the City and to the companies concerned can follow from hesitation now, on the part of the authorities. Shall the City be the ally or the competitor of its transportation companies in the matter of rapid transit? By the system of alliance and co-operation with private capital, the City has built up a wonderful Museum of Art, an incomparable Museum of Natural History, great Botanic and Zoological Gardens, an Aquarium, in which every citizen has pride, and a Public Library

system without an equal. The same co-operation in the field of rapid transit will yield equally valuable results. It is harder to attain to this sort of co-operation in rapid transit, because this sort of joint service of the community in rapid transit involves the element of private profit; but the difficulty of the undertaking is a challenge to the public spirit of The City of New York and of its citizens, and that is a challenge which both citizens and City ought not to hesitate to accept.

Ira I. Ettinger appeared on behalf of the United Real Estate Owners' Association of New York in opposition to permitting the operation of a subway under Broadway by the Brooklyn Rapid Transit Company.

Andrew Colvin appeared on behalf of the Flatbush Taxpayers' Association in favor of the report of the Conference Committee.

The President of the Borough of Manhattan presented communications as follows:

From the Brooklyn Central Labor Union in favor of the report of the Conference Committee.

From Max Sondheim transmitting petitions signed by property owners of lower Broadway and others, in favor of the construction of a subway in that locality.

From Hon. Edward M. Grout on behalf of certain property owners in the Eastern District of Brooklyn, who protested against the portion of the report of the Conference Committee assigning the Fourteenth Street-Bushwick Avenue Subway to the Brooklyn Rapid Transit system.

The resolution of the President of the Borough of Manhattan as amended by resolutions offered by himself and by the President of the Board of Aldermen, and which amended resolution is as follows, was then offered:

Whereas, the Public Service Commission for the First District, under date of December 20, 1910, submitted to the Board of Estimate and Apportionment a proposition

of the Interborough Rapid Transit Company, dated December 5, 1910, for the construction for the City and for the equipment and operation by that company of certain additions to the present subway system; and

Whereas, The Commission, in its letter of transmittal, stated that it would be pleased to receive a statement of the position of the Board of Estimate and Apportionment with relation to this proposition, and a statement in particular of any objections to the form of contract proposed that would, unless properly met, render impossible the consent of the Board to the forms of contract as finally submitted; and

Whereas, The Public Service Commission stated further that it would be pleased to confer with this Board, or with any Committee thereof, on the general subject; and

Whereas, The Board of Estimate and Apportionment, in pursuance of this invitation, under date of January 19 last, authorized the appointment by the Mayor of a conference Committee, with power to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it," such Committee, as subsequently appointed, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond; and

Whereas, The aforesaid Committee of the Board, in conference with the Public Service Commission, has considered not only the original proposition of the Interborough Company, but certain propositions subsequently received from the Brooklyn Rapid Transit Company, as well as a modified proposition from the Interborough Company, all with relation to the construction, equipment and operation of a new rapid transit railways; and

Whereas, The Committee of the Board, in a report dated June 5, 1911, in which the members of the Public Service Commission join, has recommended a course of action on the part of the Board with relation to the several propositions from the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company now pending before the Commission, the adoption of which would serve as an answer to the inquiries of the Commission, addressed to the Board in December last; and

Whereas, The recommendations in question offer to the Board an opportunity to lay down a policy under which it will in future consider and pass upon all matters with relation to the existing transit situation and the proposals of particular companies; therefore, be it

Resolved, That the Board of Estimate and Apportionment hereby approves and accepts the recommendations of its Committee, and of the Public Service Commission, as submitted under date of June 5, 1911; and be it further

Resolved, That, in pursuance of the recommendations aforesaid, the Board of Estimate and Apportionment requests the Public Service Commission for the First District to prepare contracts for the construction, equipment and operation of rapid transit lines upon the following basis:

With Relation to the Construction and Equipment of Particular Routes.

I. That the City construct, at its own expense, a new subway connecting with the Fourth Avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occa-

sion may require, and four tracks from 9th street northward;

(d) A two-track line from 59th street easterly to and over the Queensboro Bridge, there to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan Bridge by way of Canal street to Broadway.

II. That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III. That the City construct, also at its own expense, the following two-track extensions of the Bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg Bridge by way of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn Bridge to the Wall street district—by way of Nassau and Broad streets.

IV. That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the Bridge loop lines with their proposed extensions, in such form as to link these lines with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

V. That the City construct, at its own expense, a new two-track subway, proceeding from Union Square in Manhattan easterly under the 14th street and the East River

to the Eastern District of Brooklyn, and thence to a point to be later determined; and that, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI. That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that action upon the alternative presented for the routing and construction be withheld temporarily and referred back to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII. That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of rapid transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th street and Southern boulevard to Westchester avenue; and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times Square under 7th avenue, as extended, Varick street, West Broadway and possibly as a four-track road;

(d) A two-track tunnel via Whitehall street, Greenwich street, to the Battery, as far as to the Borough Hall in Brooklyn.

VIII. That if an agreement be reached upon terms, the City enter into a separte contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times Square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line;

(c) To Woodside and Corona; and

(d) To Astoria.

The lines converging at the Queensboro Plaza, if this contract be accepted, to be connected also by way of the Queensboro Bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the construction cost of the continuous line proposed, the tunnel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX. That if, an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

(a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern Parkway to Buffalo avenue; also a two-track subway extension from the Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern Parkway by way of Buffalo and Livonia avenues through the Brownsville district to New Lots road.

X.—That the cost of construction of all of the lines to be built and operated by the Interborough Company under

these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI.—That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII.—That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII.—That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union square or 9th Street; and that, if an agreement on terms be reached with the Brooklyn Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV.—That, if the Interborough Company fails to accept a lease for the operation of the proposed line from Forty-second street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro Bridge.

XV.—That, if the Interborough fails to accept a lease for the operation of the Eastern Parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI.—That, if a contract be made with the Brooklyn

Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

XVII.—That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union square, Manhattan, and the projected Lafayette avenue line from Broadway to Flatbush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII.—That, neither the Interborough Company nor the Brooklyn accept leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so called Tri-Borough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX.—That the Public Service Commission, in any event, proceed to prepare and award contracts for the construction of the lines to be built and owned by the City, as rapidly as practicable, in order that work may be started immediately.

XX.—That the franchises sought by the Interborough and Manhattan Companies for the third tracking and extensions of their elevated lines in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

With Relation to Operating Terms as Applied to Any Operator.

I.—Rate of Fare—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II.—Terms of Leases—That all contracts for the operation of lines title to which is vested in the City, whether such lines be constructed by the City or by the Company, or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company, may be leased for twenty years with the privilege of renewal, upon an adjustment of terms for twenty years in addition.

III.—Provision for Recapture—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine-year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus fifteen per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

IV.—Cost of Construction—That the costs of construction, whether borne by the City or by the operator, or upon a basis of division between the City and the operator shall be the cost in money and shall include

(a) All contracts for original construction work, or

(b) For station finish;

(c) All carrying charges during construction;

(d) Engineering expense;

(e) Extras and damages;

(f) Real estate and easements; and

(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V.—Division of Profits—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of

(a) The value of the tickets collected at stations;

(b) Miscellaneous earnings from stations;

(c) A pro-rata of advertising and other general receipts.

The fixed cost of operation shall include:

(a) Station expenses;

(b) Maintenance of way and structure;

(c) Damages for accidents; and

(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;

(f) Maintenance of equipment, renewals and depreciation;

(g) Cost of power;

(h) General and administration expenses; and

(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charges of the operator for carrying the cost of equipment; with provision for sinking fund not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent.) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs of construction of costs of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum; provided

4. That if the gross income in any year, after providing for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the deficit for such period shall be borne by the operator solely; and provided further

5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds the deficit sustained for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI.—Operation of Extensions—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall

be governed by and included in all of the general provisions of the contract with relation to operation and division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

(c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII.—Supervision of Contracts and Accounting—That the right be retained through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in such profits are based.

VIII.—Operation and Management—That clauses be inserted in the contract embodying the essential provisions of the Public Service Law with relation to both operation and management, and such added guarantees as to the character and sufficiency of the equipment to be furnished, and of the service to be given, as the City may require.

With Relation to Terms Applying Particularly to the Interborough Rapid Transit Company.

I.—Leveling of Leases—That, as part consideration for the lease of new lines for the fixed period of forty-nine years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases for its existing lines so that these shall expire coterminously, forty-nine years from the beginning of operation

of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the company, through its right of twenty-five years renewal, would remain in possession until 1979. The lease of Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with the renewal period, in 1968. Under the leveling process, all of the leases, new and old, revert to the City in 1964.

II.—Exchange of Lower Manhattan Lines—That the Interborough Rapid Transit Company be required to consent to the immediate modification of Contracts 1 and 2 so as to provide that the portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn, shall be held under an indeterminate lease, terminable at any time within 10 years from the opening of the proposed 7th avenue extension, receiving as consideration for such modifications a lease upon the said 7th avenue extension from 42d street, south, to Borough Hall, Brooklyn, for 49 years from its completion and opening for operation.

The modification of the existing leases shall be simultaneous with the making of the proposed contract.

The new lease for the present subway south of 42d street shall provide that upon the exercise of the option of the City to terminate the same its value and the value of the lease of the 7th avenue extension shall be appraised on the basis of their respective earning capacities at the date of appraisal. The difference in value, if any, so determined, shall be adjusted by the payment by the City to the Company of any excess found in favor of the lease taken over by the City or by the payment by the Company to the City of any excess in value found in favor of the 7th avenue extension.

Provisions to be embodied in the contract that will enable the City to compel the Company to assign its rights to a third party designated by the City; the Company to cooperate with the City in procuring any legislation that will

be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract, and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

III.—Purchase of Existing Lines—That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment to the company of a sum equal to the then value of the unexpired portions of the company's leases under Contracts Nos. 1 and 2, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization, and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

With Relation to Terms Applying Particularly to the Brooklyn Rapid Transit Company.

I.—Earnings of Existing Lines—That, in lieu of all earnings on its existing lines, the company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated to be pooled with the receipts of the City built lines, for distribution in accordance with the general terms agreed upon.

II.—Leased Lines—That the company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now holds under lease, and that no allowance be made under the head of operating expenses for further rental of any of such leased lines.

III.—Examination of Plant—That the company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or current earnings to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before the lines pass into the proposed new system.

IV.—Management—That the entire system of subways and elevated lines shall be under the management of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commission law.

With Relation to Terms Applying Particularly to the Extension, Third Tracking and Subsequent Operation of the Manhattan Elevated Lines.

I.—That the net profits upon all the elevated lines operated by the Interborough Company, in excess of the average net profits for the two years from July 1, 1909, to June 30, 1911, proper deduction having been made for depreciation, shall be divided equally between the company and the City.

II.—That the City shall have the right to take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another operator; such operator to pay the amount specified in the certificates to the Interborough Company direct.

III.—That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV.—That the payment to be made for equipment, in the event of recapture, shall be fixed with due regard for its then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V.—That the rate of fare shall not exceed five cents.

—and be it further

Resolved, That the Special Committee of the Board be hereby continued, with authority to communicate, in conjunction with the Public Service Commission, to the Interborough Rapid Transit Company, to the Brooklyn Rapid Transit Company and to the Manhattan Elevated Railways Company the terms herein set forth, upon which the City would be willing to enter into contracts for the construction, equipment or operation of the rapid transit lines for which the said companies have severally applied; the said Committee to receive and communicate to the Board of Estimate and Apportionment the replies of the companies aforesaid for the final consideration of the Board not later than Wednesday, June 28, 1911; and be it further

Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of the same; and be it further

Resolved, That the Committee of the Board be hereby continued for the purpose of further conference with the Public Service Commission upon such matters as may render consultation desirable during the formulation of contracts for construction, equipment or operation, based upon

the findings and recommendations of the joint report of June 5, 1911; and be it further

Resolved, That the Board of Estimate and Apportionment hereby approves the following corrections in and modifications of the joint report of its Special Committee and of the Public Service Commission under date of June 5, 1911, with relation to the terms for the routing and operation of rapid transit lines to be offered respectively to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company.

1. That it be stipulated with the Brooklyn Rapid Transit Company that if the City recapture the 4th avenue (Brooklyn) line at any time after ten years, the Brooklyn Company be given traffic rights over lines entering Manhattan for the operation of its Brighton Beach trains.

2. That the requirement that the Brooklyn Company subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its "existing surplus or current earnings" to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be made before these lines pass into the proposed new system, be modified so as to provide that the provision in question may be made from either the surplus or current earnings, "at the option of the company."

3. That the Interborough Company and the Manhattan Elevated Railway Company be also required to subject their plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision either from existing surplus or current earnings, at the option of the companies, to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before any basis of even division with the City of the future increase in net profits of the Manhattan elevated lines is accepted.

4. That the Interborough Company shall not be required to proceed with the construction of the proposed

new Whitehall tunnel under the East River until it has been determined by the Public Service Commission that such tunnel will be needed to carry the company's future Brooklyn traffic, and then to proceed on order from the Commission.

And which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

In voting in the affirmative, the President of the Borough of The Bronx stated he desired it to be understood he was opposed to the immediate exchange of existing leases as set forth in the first amendment offered by the President of the Board of Aldermen, for the reason that he did not believe it possible to accomplish the same.

On motion, the Board adjourned to meet Thursday, June 22, 1911, at 10:30 o'clock in the forenoon.

P. At a meeting of the Board of Estimate and Apportionment held on June 29, 1911, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: John Purroy Mitchel, President of the Board of Aldermen; William A. Prendergast, Comptroller; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The President of the Board of Aldermen, Hon. John Purroy Mitchel, presided.

Rapid Transit Railways; Extensions to the Existing System; Also Third Tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Railroads; and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District submitting proposition of the Interborough Rapid Transit Company relative to the construction, maintenance and operation of of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting held this day by motion duly adopted the Board adjourned to meet at 4:30 p. m. to-day to receive the supplementary report of the conferees.

The President of the Borough of Manhattan presented the following:

City of New York, Office of the President of the Borough of Manhattan, City Hall, June 29, 1911.

To the Honorable Board of Estimate and Apportionment:

Gentlemen—Under resolutions adopted under date of June 21, 1911, the Board of Estimate and Apportionment stated the terms upon which it would approve contracts for the construction, equipment and operation of rapid transit lines by the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, respectively. Under these resolutions, your Special Committee was continued with authority, in conjunction with the Public Service Commission, to communicate to the respective companies the terms upon which contracts might be let, and to receive their replies. Letters signed by the Chairman of the Public Service Commission and the Chairman of your Committee were addressed to the companies upon the same date, and replies have since been received, each under date of June 27, 1911. The letters comprising this correspon-

dence, which are attached hereto, are submitted for the consideration of the Board.

The Interborough Company submits a general declination to enter into any contract with the City upon the terms proposed. It withdraws its specific propositions of December 5, 1910, and May 9, 1911, though leaving before the Public Service Commission its offer of June 10, 1910, with relation to the third tracking and extension of the Manhattan elevated lines, and the operation of the Belmont Tunnel.

The Brooklyn Rapid Transit Company states its willingness to accept the City's terms, if amended in certain specific particulars. Your Committee and the Public Service Commission, after further conference, have reached the conclusion that the modifications proposed by the Brooklyn Company, which involve considerations affecting the financial basis of the proposed contracts, and which do not involve considerations of principle, should, in the main, be granted.

The conferees are convinced, upon the Company's argument, that the concessions in question would be equitable and just, both to the Company and to the City. They have also considered certain modifications suggested by reference in the letter of the Interborough Company that might, in equity, be applied to either operator.

Having considered all aspects of the situation in which the transit matter now stands, the conferees recommend that the following action be taken:

1. That contracts be prepared for the construction, equipment and operation of the lines proposed for operation by the Brooklyn Rapid Transit Company under the resolutions adopted by the Board on June 21, 1911, and upon the terms therein proposed, with the following exceptions:

(a) That in the event of recapture of any of the lines operated by the Company after ten years, the City or any

second operator taking over such lines shall pay to the Company, as provided in the Rapid Transit Act, the actual cost of the equipment attaching to such lines, less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund created for the amortization of the operator's investment in equipment, and plus fifteen per cent. of the amount of the original cost, which percentage shall decrease at the rate of one per cent. per year; provision to be made for deferred maintenance, if any;

(b) That the amount to be deducted annually as compensation to the Company for use of the existing lines and stations shall be computed by one of the following methods, the precise method to be determined by the conferees;

1. An amount equivalent to forty per cent. of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

2. The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the Brooklyn and Williamsburg Bridges during the year prior to the beginning of operation in Manhattan beyond the present termini, less the operating expenses computed upon the per passenger basis; such balance not to exceed in any year $3,500,000, nor to be less than the net earnings of the Brooklyn Union Elevated Company for the year ending June 30, 1911.

(c) That the duration of grants upon extensions of the existing elevated lines shall not exceed the term proposed for the extensions of the Manhattan elevated lines, namely, eighty-five years; and that such grants shall be subject to recapture by the City in the manner prescribed by the Rapid Transit Act at any time after ten years from the date of the beginning of operation;

(d) That the amortization of brokerage charges not to exceed three per cent. be allowed on the cost of equipment as well as on the cost of construction;

(e) That where under any contract the gross profits from operation are insufficient in any year to cover the actual charges of the Company for carrying any portion of the cost of construction not met from the funds of the City, the deficits thereby sustained by the Company shall be treated as cumulative and be a charge in the Company's favor against future profits before payment of the carrying charges upon the bonds of the City proceeds;

(f) That although the cost of real estate and easements is to be treated as part of the cost of construction and amortized from the receipts of operation, any incidental fee damages for rights of way in acquiring streets allowed by the courts shall be paid by the City from its general fund and not from the subway construction fund;

(g) That the contract for the lines aforesaid shall be conditioned upon the Company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, as herein amended, the additional lines and extensions set forth in its proposition of April 25, 1911, and upon the Company's assurance to the Board of Estimate and Apportionment not later than July 6, 1911, that it will operate such additional lines if requested so to do;

(h) That if the Company operate the Jerome avenue line in The Bronx and the lines to Corona and Astoria in the Borough of Queens, it agree to the reservation of joint trackage rights in the operation of the City lines at any time that the City may so require; the line to Corona to carry three tracks instead of two, as originally proposed.

(j) That if the Company operate the Eastern parkway line in the Borough of Brooklyn, its obligation to bear the cost of construction of the proposed subway connecting the Brighton Beach and Flatbush avenue lines be limited to that section of the line lying between the Malborne station and the Prospect Park plaza.

The conferees also recommend that although the Interborough Company has failed to accept the terms proposed

to it, the Company be informed that the Board and the Public Service Commission desire, as a matter of record, to include in the terms originally proposed those modifications that should apply equally to either operator, to wit:

1. The adjustment of the basis for the payment of the cost of equipment under recapture proposed by the Brooklyn Company;

2. The extension of the allowance of three per cent. for brokerage charges to the cost of equipment;

3. The treatment as cumulative of any deficiencies met by the Company in carrying its interest and sinking fund charges and the liquidation of such deficiencies before payment of the carrying charges upon the bonds of the City proceeds; and

4. The payment of all incidental fee damages for rights of way in acquiring streets from the Citys general fund and not from the subway construction fund.

The conferees further recommend that the Interborough Company be informed that the aforesaid modifications of terms would, in its case, include also the following:

5. That if the Company agrees, as compensation for the additional franchises it seeks for its elevated lines, to pay to the City annually one-half of the increase above the average of the net profits of the two years ending June 30, 1911, and if it accepts the general proposition of the City as to the rapid transit lines, that the City agree also to treat such decreases of net profit below the amount of such annual average as cumulative and as a charge in the Company's favor to be met from future receipts before the division with the City proceeds.

6. That if forty-nine years be fixed as the term of the new subway leases and the Company's leases upon the existing lines are leveled so that they will expire coterminously, the City will agree to merge with the new leases upon the old lines such parts of the renewal periods of each contract as would remain under the leveling process. This

upon condition that the legislation necessary to permit such a readjustment of the leases, as well as the proposed exchange of the leases upon the east and west side legs of the existing subway, shall be promptly secured.

All of which is respectfully submitted.

For the Special Committee of the Board of Estimate and Apportionment—GEORGE MCANENY, President, Borough of Manhattan; CYRUS MILLER, President, Borough of The Bronx; GEORGE CROMWELL, President, Borough of Richmond.

For the Public Service Commission for the First District—W. R. WILLCOX, Chairman.

June 21, 1911.

Interborough Rapid Transit Company,
165 Broadway, New York City:

Gentlemen—Under date of December 5, 1910, the Public Service Commission for the First District received from your company a communication relative to the construction, equipment and operation of new rapid transit lines, to be operated in connection with your present system, and, under date of June 10, 1910, a communication with relation to the construction of extensions to and additional tracks upon the present elevated system operated by you under lease from the Manhattan Railway Company.

On December 20, 1910, the Public Service Commission for the First District addressed a communication to the Board of Estimate and Apportionment, requesting a statement of the position that the Board would take upon the matters covered by your communications. On January 19, 1911, the Board of Estimate and Apportionment appointed a committee of three of its members to confer with the Public Service Commission for the First District "upon the pending proposition of the Interborough Rapid Transit

Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

Since the appointment of the committee of the Board of Estimate and Apportionment, a number of conferences have been held between the representatives of your company, the committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District. While these conferences were proceeding, a further communication, embodying a supplemental proposition, was received from you by the conferees, under date of May 9, 1911.

After careful consideration of your several communications and of various other proposals before the Commission, the conferees united unanimously in a report addressed to the Board of Estimate and Apportionment, under date of June 5, 1911, submitting certain findings and recommendations, a copy of which report is presented to you herewith.

The report of the conferees was presented to the Board of Estimate and Apportionment at a special meeting held on June 13, 1911. At a further special meeting held today, the report was considered and a series of resolutions adopted, generally accepting and approving its findings. A copy of these resolutions and of certain amendments incorporated by the Board of Estimate and Apportionment is presented herewith.

Under the terms of the aforesaid resolutions, the committee of the Board of Estimate and Apportionment was continued, with authority, in conjunction with the Public Service Commission for the First District, to communicate to your company the terms and conditions, as set forth in the report and resolutions aforesaid, upon which the City would be willing to enter into contracts for the construction, equipment and operation of the rapid transit lines referred to in your communications. It is requested that you will, in further pursuance of the terms of the resolutions, sub-

mit your reply in time to allow of its consideration not later than Wednesday, June 28, 1911. Respectfully,

FOR THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,

WM. R. WILLCOX, Chairman.

FOR THE COMMITTEE OF THE BOARD OF ESTIMATE AND APPORTIONMENT,

GEO. McANENY, Chairman.

June 21, 1911.

Brooklyn Rapid Transit Company,
85 Clinton Street, Brooklyn, New York:

Gentlemen—Under date of March 2, 1911, the Public Service Commission for the First District received from you a communication in relation to the construction, equipment and operation of new rapid transit lines to be operated in conjunction with your existing system, and under date of April 25 and May 2, certain supplementary communications with further relation to the same subject.

Prior to the receipt of the proposals of your company, the Public Service Commission, under date of December 20, 1910, had addressed a communication to the Board of Estimate and Apportionment requesting a statement of the general policy of the Board in relation to certain other proposals then pending. Upon January 19, 1911, the Board of Estimate and Apportionment had appointed a committee of three of its members to confer with the Public Service Commission upon the propositions then pending "or upon any proposed modification thereof or upon any alternative plan that the Public Service Commission may present or that may be presented to it."

In pursuance of the authority so given, the Committee of the Board of Estimate and Apportionment, in conjunction with the Public Service Commission, have held a number of conferences with the representatives of your com-

pany upon the matters contained in your successive proposals.

After careful consideration of your several communications and of various other proposals before the Commission, the conferees united unanimously in a report addressed to the Board of Estimate and Apportionment, under date of June 5, 1911, submitting certain findings and recommendations, a copy of which report is presented to you herewith.

The report of the conferees was presented to the Board of Estimate and Apportionment at a special meeting held on June 13, 1911. At a further special meeting held today, the report was considered and a series of resolutions adopted, generally accepting and approving its findings. A copy of these resolutions and of certain amendments incorporated by the Board of Estimate and Apportionment is presented herewith.

Under the terms of the aforesaid resolutions, the Committee of the Board of Estimate and Apportionment was continued, with authority in conjunction with the Public Service Commission for the First District, to communicate to your company the terms and conditions, as set forth in the report and resolutions aforesaid, upon which the City would be willing to enter into the contracts for the construction, equipment and operation of the rapid transit lines referred to in your communications. It is requested that you will, in further pursuance of the terms of the resolutions, submit your reply in time to allow of its consideration not later than Wednesday, June 28, 1911. Respectfully,

FOR THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,

WM. R. WILLCOX, Chairman.

FOR THE COMMITTEE OF THE BOARD OF ESTIMATE AND APPORTIONMENT,

GEO. McANENY, Chairman.

Interborough Rapid Transit Company, 165 Broadway, New York, June 27, 1911.

Hon. WILLIAM R. WILLCOX, *Chairman, Public Service Commission for the First District*, New York City; Hon. GEORGE McANENY, *Chairman, Special Committee, Board of Estimate and Apportionment*:

Dear Sirs—We acknowledge the receipt of your letter of June 21 instant, inclosing a copy of the report of the Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District relative to the construction, equipment and operation of rapid transit lines in the City of New York, and of resolutions of the Board of Estimate and Apportionment, adopted at a meeting held June 21, setting forth the terms upon which the City proposes to enter into contract with the Interborough Rapid Transit Company for the construction, equipment and operation of certain rapid transit lines therein set forth. You request that we submit a reply to this proposal in time to allow for its consideration not later than June 28, 1911.

We regret, for the reasons set forth in the accompanying memorandum, that we are unable to accept the terms proposed; or, under the new conditions that have arisen, to continue in force our subway offer of December 5, 1910, and May 9, 1911.

We regret that we are forced to take a position which, together with the declared policy of the City authorities, necessarily leaves the City divided into two rapid transit districts, requiring a double fare to travel from one to the other; renders impossible of fulfillment the wise policy of the old Rapid Transit Commission, repeatedly declared, of developing the present subway lines so as to afford at the least possible cost through trunk lines upon the east and west sides of Manhattan, with normal feeders to the outlying boroughs; deprives the Greater City as a whole of

the benefit of a unified rapid transit system with a single five-cent fare; substitutes for a five-cent access to Coney Island from all parts of the City, a plan under which the greater portion of the citizens can reach the seaside only upon the payment of a double, and in many cases a triple, fare; cuts out the heart of the business centre of Manhattan, separates it from its own residential districts, attaches it as a terminal to the Brooklyn system alone, and necessarily unsettles and perhaps revolutionizes real estate values throughout the Boroughs of Manhattan and The Bronx; applies the credit released through the successful operation of the present subway system on the Island of Manhattan and a great portion of the additional credit hereafter available, to the development of the rapid transit system of one borough; entails upon the City, under the guarantee provision to the Brooklyn company above referred to, a large continuing deficit, of which Manhattan and The Bronx will bear the larger proportion, gives absolutely no rapid transit relief to the great residential district of the upper West Side of New York; furnishes no transit facilities to the public using the new Pennsylvania station, or to the lower West Side; leaves congestion upon the East Side for many years substantially where it stands today; only in the distant future, if the triborough route should be built, promises to extend a limited service to The Bronx; and postpones such relief as it does propose to confer upon a limited section of New York through a period of many years. In justice, however, to the holders of our stock and of our bonds—which, it must not be forgotten, were issued upon the faith of a public contract and subject to the approval of a public body—no other course is open to the company than to decline. If the City desires the co-operation of the Interborough Company, and through it the co-operation of private capital, in the execution of its general rapid transit plans, it will be necessary for the City to propose terms which will justify this company, with respect to both its old and new investment, in embarking in the project.

We are likewise compelled to decline the terms tendered for third-tracking the elevated lines. We nevertheless stand prepared, within the reasonable limits of our resources, to relieve at an early date the unfortunate condition of travel congestion in this City. Our offer of June 10, 1910, with respect to elevated improvements and the operation of the Belmont Tunnel, connecting Queens with Manhattan, upon which an agreement had been almost reached with the Public Service Commission, we still leave open for your further consideration.

Respectfully submitted,
INTERBOROUGH RAPID TRANSIT COMPANY,
By T. P. Shonts, President.

Memorandum Stating the Reasons Why the Interborough Company Cannot Accept the City's Offer of June 21, 1911, for the Construction of Rapid Transit Improvements.

On December 5, 1910, in response to the suggestion that the Interborough Company bring private capital to the City's aid in the solution of the transit problem, we offered to carry out the original plan with respect to the City's own subway, complete the natural "H," and, by the addition of logical extensions, afford the entire City the benefit of an unbroken service and a single fare. On May 9, 1911, for the expressed purpose of avoiding the need of duplicated lines, we offered to build other extensions indicated as desirable by the public authorities; and at the same time, upon the assumption that this principle might be accepted, proposed a plan for the limitation of profits, leveling leases, and, if it could be legally carried out, the privilege to exchange old legs for new. By a further public declaration, since formally confirmed by the directors, we announced our willingness, without guarantees, to equip and operate the 4th avenue subway in Brooklyn, provided Coney Island, Fort Hamilton and other extensions shown

on our advertised maps, to cost the City not to exceed $40,000,000, were added to it; thus giving the citizens of all parts of the City access to the seaside for a single five-cent fare. In the meantime, as the only possible plan by which quick relief could be brought to the prevailing conditions of travel congestion, we continued in effect our offer of June 19, 1910, to complete the third track upon the elevated system.

One-half of the subway and all of the elevated construction proposed by us in our offer of December 5 and May 9, together with the entire equipment, we offered to build with private funds at an estimated cost of $133,842,500, against a City investment of $69,720,500, thus correspondingly releasing City credit to other needed public works.

In making this offer, as we stated at the time, we reached the final point to which private capital could be induced to go. Indeed, in the most favorable aspect of the case the acceptance by the City of this offer would have involved a certain loss of earnings to the Company, to have been recouped, if ever, only in the uncertain future. Tables prepared by the Company's experts show that, upon the basis of the Committee's own estimate of travel increase for the next ten years, this loss must have amounted to not less than $17,500,000 for the first five years the new subways were in operation. Upon the basis, however, of the actual rate of travel increase upon the elevated and subway lines for the past year, which is substantially the same as the rate of increase for the decade from 1890 to 1900, or 40 per centum for the ten years, the net results to the Company might well be disastrous. Even these figures might have been largely increased by factors of which no account is taken in the calculations; a commercial crisis, an unexpected increase in the long-haul travel due to the shifting further apart of residential and business centres, an unavoidable rise in the operating ratio above the very moderate ratio of 45 per centum assumed in our calculations or other causes. Indeed, the margin of safety in our offer

of May 9 was so narrow that the introduction of the Broadway competitive route, reducing our estimated revenues by not less than $5,000,000 a year, would have made it impossible for us to carry that offer into effect.

If, therefore, our own offer went to the limits of conservatism, it must be manifest how utterly impossible for us it is to accept the City's present offer, which makes certain severe competition and imposes many additional hardships upon the Company. Our calculations show that for the first five years of operation, assuming the cost of construction and equipment to be as stated in the Committee's report and the ratio of travel increase to be as stated above, the earnings of old and new subway lines combined would be less than the fixed charges against the combined properties for the five-year period of $1,553,000; or, if the estimate of construction and equipment cost furnished us by experienced engineers should be taken as a standard, the amount earned less than fixed charges would be $10,570,000. If, however, a more normal rate of increase, such as that shown for the decade between 1890 and 1900, or as indicated by both the elevated and subway lines in The City of New York for the current year, be taken as a forecast of the travel increase during the next ten years, the sum earned by the combined subway system as tendered in the conference report for the five years ending with 1920 would amount to $13,000,000 less than the fixed charges, upon the basis of the Committee's estimate of cost, and to $21,500,000 less than the fixed charges upon the basis of the Company's estimate of cost. This showing not only would defer forever the prospect of any dividend return whatsoever to the Interborough Company, but would involve it in an actual deficit upon the bonds which it must assume as a fixed obligation.

The intrinsic risk of the City's offer is indeed quite evident apart from statistical demonstration. If the old subways with their economical construction, dense travel

and freedom from competition, can earn, as they are doing to-day, only 7.97 per centum on the actual cost of their construction and equipment, how can the new subways, costing, it is universally admitted, practically twice as much a mile to build, with their longer haul and traffic divided with the old subways, earn upon the actual cost of their construction and equipment more than a mere fraction of that percentage?

But even this is not all. Other conditions are imposed upon the Company in the City's counter offer which would still further add to our burden, and, indeed, make possible of acceptance the City's offer, were acceptance otherwise possible.

Real estate, easements and damages to abutting owners, which, under a decision of the Court of Appeals rendered since the original subways were built, might run into unknown figures, are added to the construction cost, and the Company is compelled to assume one-half. The cost of real estate and easements alone upon the lines tendered the Interborough Company by the conference report, apportioning the Committee's estimate, will not be less than $10,000,000. The consequential damages collectible under the principle of the decision above referred to cannot, of course, be forecast, but might amount to many millions of dollars. Fixing them for the purpose of estimate at only $2,000,000, we find that, due to this provision alone, the fixed charges against the property would be increased by the sum of $675,000 a year, or $3,375,000 for the five-year period; which alone would increase the deficit above fixed charges for the combined system for the five-year period as shown above to $4,928,000 if the City's estimate of construction cost be adopted, or to $13,945,000 if the Company's estimate of construction cost be adopted.

The Company is compelled, notwithstanding existing contracts, to pro rate its receipts, other than passenger revenue. From this cause, it is estimated that the net earn-

ings of the present system will be diminished by a sum not less than $100,000 per annum.

We are even required to shoulder upon the present system, now exempt from taxation, by far the greater portion of the bulk of any general taxation that may be imposed upon the new lines. This follows because the taxation of the new lines is to be pro rated over the whole system upon a per passenger basis. As the new lines would carry a relatively small proportion of passengers compared with the old lines, it will readily be seen how the taxes upon those lines would be shiften to the present tax exempt property. The direct increase in charges against the revenues of the old lines from this cause may be estimated at a sum of approximately $200,000 a year.

The Company is required to operate the new lines on a per passenger basis; that is to say, there shall be charged to the new lines only such proportion of the operating expenses of the entire system as the passengers orginating thereon bear to the passengers orginating on the entire system. This method, it is frankly admitted, requires the company to operate the new lines at less than actual cost, upon the theory that the operations of its old lines result in a profit. The report of the Joint Committee admits the drain upon the old Company's revenues from this source. Our own experts estimate that it cannot be less than $200,000 a year. The car mileage basis, insisted upon by this Company, is the one universally adopted by railroad systems all over the country as the fairest method to determine the relative actual cost of operating one line in connection with another.

The total additional burden from the foregoing causes imposed directly upon the earnings of the old lines, if the City's offer should be accepted, will thus be seen to aggregate not less than $500,000 per year.

There are other conditions imposed upon the Company, the financial burden of which it is impossible to estimate,

and still others incapable of performance for other than financial reasons.

We are asked, in effect, to waive the existing protection we have under the law, and to place upon a contractual basis the supervision by public authorities of our physical operation, including guranties as to the character of the equipment and adequacy of service.

We are compelled to operate any extensions the City may build, provided the City may take up temporarily the operating deficit upon such extensions, notwithstanding the effect of adding such extensions to the old system might be to so cripple its income as to render it insufficient to support the Company's outstanding obligations.

With respect to our equipment, the City retains the right to approve the form and supervise the execution of contracts. Under this provision all our estimates with reference to the cost of equipping the new lines may be at fault, and the additional burden imposed upon the Company may exceed by many millions of dollars the cost of that equipment assumed in our calcualtions.

Without any compensating advantage whatsoever, we are required to cut off fifteen years from the renewal term of Contract No. 1, under which the main subway was constructed, and four years from the renewal term of Contract No. 2, under which the Brooklyn extension was constructed, terminating the renewal periods in the year 1964—a provision impossible of acceptance without a retirement of all outstanding bonds and perhaps a judicial contest of doubtful issue with dissenting stockholders.

Moreover, by an amendment adopted in the full Board, a further reduction in the terms of these leases of fourteen years is made possible. The City is given the absolute right to terminate all leases in the year 1950 upon the payment of a sum equal to the then present worth of the unexpired portion of the Company's leases, estimated upon the basis of the profits for the preceding five years. Inasmuch as by reason of amortization of bonds and other causes the profits

for the final years of the leases will much exceed those for the five years in question, the Company would not receive an actual indemnity for the surrendered portion of its leases. The sum proposed to be paid for cutting off this valuable portion of the leases could not, indeed, under this amendment, exceed by much more than half the sum which this Company, by way of concession alone, was disposed to accept.

By another amendment adopted in the full Board, the Company is required forthwith, in the absence of a determination of the rights of the stockholders, to consent that the keystone of the present subway from 42d street south, under the river to Borough Hall in Brooklyn, shall be exchanged in the City for the proposed 7th avenue extension from Times square to the Battery, to be held for a term of forty-nine years, subject in turn, it seems, to a ten-year recapture right.

The resolution is silent as to whether the lien of even existing mortgages is to be left undisturbed. The report of the Committee says that the lien of mortgages now upon the property may be assumed. But as these mortgages must be immediately retired under the plan submitted, this concession amounts to nothing. Accepting the terms of the report, and not of the resolution, it appears by implication that no new mortgage will be assumed, but that the new bondholder must transfer his lien to the 7th avenue leg, thus leaving him with a mutilated and perhaps unprofitable system to support his bonds. Furthermore, the Company may be compelled, at the option of the City, to assign its lease of the present subway from 42d street to Borough Hall to any third part the City may designate. These terms are widely different from those proposed by the Interborough Company as a part of its offer of May 9, and would bind the Company to conditions probably incapable of performance.

We are also required to consent that at the City's election any other portion of the new lines or extensions, upon

payment of a contract sum, shall be directly transferred to a third party; thus enabling the City, after all the risk had been assumed by the Interborough Company, to transfer to a rival at cost any portion of the lines which may ultimately prove profitable and excite its cupidity.

All of these lines, including by reason of the foregoing provisions the present subway itself, we may be compelled at the end of ten years to surrender, and to take as compensation therefor a sum equal to the money actually invested in construction, plus a surcharge of fifteen per centum. We are allowed to deduct the amortization and perhaps brokerage charges not exceeding three per centum of the face of the bonds. This clause is inserted notwithstanding it has been the practice of Public Service Commissions in this and other States to include as an essential part of the cost of construction the cost of placing bonds to make construction possible. If the additional bonds necessary to finance the Company's share in the transit lines and improvements tendered it in the City's offer, amounting to more than $130,000,000, secured as they would be by a second lien upon old leases and a first lien upon new leases unprofitable in themselves and equipment which might have merely a scrap value, owing to the provision next referred to, could be sold at all, they must necessarily be sold at much less than par. If sold at even ninety cents on the dollar, at least seven per centum of the face amount thereof in event of redemption would be lost to the Company. The loss, together with the obsolescence and depreciation of equipment and other charges properly made aginst the bonus, would not bring the Company out whole in event of redemption. In other words, if the lines prove unprofitable they are left on hand to break the Company; if they are successful, they are taken from it at less than cost.

The equipment can be taken over at a price which would take into consideration its utility for railroad purposes and

its obsolescent condition. With the very wisest foresight, electrical equipment or any equipment furnished for the system might become technically obsolete within a period of ten or fifteen years, although still available for practical operation, and the main security for our underlying bonds upon the elevated third tracking and extensions thus arbitrarily emasculated.

The proposition to third track the elevated—as to which we are left in doubt whether it is predicated upon an obligation to accept the new subways as well—is made upon the terms of dividing with the City all profits of the entire system in excess of the average profits prevailing during the last two years. If as a result of new competition traffic should be drawn from the elevated lines to such an extent as not to meet the new fixed charges for the work of installing and equipping the new third track—which are estimated at $1,500,000 a year—and to pay a sum equal to the present profits of that system, the loss must be absorbed by the Interborough Company. Under the competitive distribution of lines now proposed this loss might be very serious, whereas a division of profits might be indefinitely postponed. Moreover, third tracking terms will be granted only upon condition that such past depreciation of the Manhattan plant as the Public Service Commission may declare to exist shall be made up by the Interborough Company before it can draw any profits whatsoever from its elevated system in excess of those it draws to-day. Inasmuch as the Manhattan Elevated system is not to be amalgamated with City-built lines, the importance of this provision to the City is not clearly seen. A technical decision upon depreciation under this provision might postpone forever any benefit to the Company from third tracking its elevated lines, while it would leave it to shoulder the great cost and certain risk of these improvements.

It may be said that many of the provisions above referred to are in terms equally applicable to the Brooklyn

Rapid Transit Company. But this observation is without force, owing to the absolute inequality in the terms separately proposed to the Interborough Company and the Brooklyn Company with respect to the proposed construction. The Interborough Company is compelled to contribute one-half of the cost of the subway lines assigned to it, and must assume its own deficit; whereas, all the subway lines assigned to the Brooklyn Company, with the exception of the connection to the Brighton Beach Line, are paid for by the City, and the Brooklyn Company is given a continuing lien upon the earnings of $122,000,000 of City money (taking the Committee's estimate), to secure to it not only the interest upon its bonds issued for elevated construction and for equipment, but a further sum equal to its current profits from its existing lines—estimated by the Committee at not less than $3,000,000 a year. As we stated in our letter of May 9, under a similar guarantee we would be willing to build anywhere in the five boroughs that the City might elect, and submit not only to these conditions affecting earnings, but to many others of a similar character that authority might choose to impose.

Brooklyn Rapid Transit Co., 85 Clinton Street, Brooklyn, N. Y., Office of the President, June 27, 1911.

Hon. GEORGE MCANENY, *Chairman, Special Committee, Board of Estimate and Apportionment;* Hon. WILLIAM R. WILCOX, *Chairman, Public Service Commission for the First District,* New York City:

Gentlemen—We acknowledge receipt of your communication of June 21, with accompanying report to the Board of Estimate and Apportionment in relation to pending transit proposals, together with copy of resolutions adopted by said Board on June 21 and copy of certain amendments incorporated in the report pursuant to the action of said Board. You request us, in pursuance of the terms of the resolutions, to submit our reply in time to allow of its consideration not later than Wednesday, June 28, 1911.

In response we beg to say that generally we are prepared to accept the recommendations of said report as applicable to the proposals made by this company and, upon the terms therein laid down, to pledge the entering into contracts for the carrying out of such recommendations, through the instrumentality of a new company to be organized for that purpose and of the existing railroad companies, the operation of whose lines is to be merged with that of new transit lines.

In making this response, however, we ask, as a condition of our acceptance, that certain matters not explicitly or fully covered in the report be made clear according to our understanding of the intentions of the conferees, and that certain modifications of the proposed operating terms be made in the light of a better appreciation of their effect or a fuller understanding of the facts upon which they were based. While there are several features of the report as applicable to us which we regard as unnecessarily severe and one in particular which we believe to be unwise from the point of view of the City, nevertheless our disposition has been from the beginning, and is now, to co-operate with the City to the extent of our ability for the solution of the transit problem. To accomplish this result we have in our conferences, as you well know, made concession after concession, until our proposition as finally shaped was almost as much the work of the City's representatives as that of the company. Notwithstanding this attitude and this result, we are asked now to make still further concessions as to important matters which were either not explicitly referred to in our conferences, or not seriously urged on behalf of the City, and which, if they had been adequately considered, would not, we believe, have formed a part of your recommendations. So much does our plan offer in the way of transit relief and for the best development of New York, that it would, in our judgment, be a public calamity if by insistence upon terms which are unreasonable either as

against the City or as against the company the negotiations which have progressed during three months should now fail of accomplishment.

Animated still by the same spirit which has marked our preliminary negotiations and relying upon the City's sense of fairness and appreciation of broad public welfare, we are willing to waive many of our objections to the terms proposed, but we feel compelled in justice to our security holders, to point out certain changes which are essential to our acceptance. These are few in number, involve no question of principle, and are based upon equity and justice.

First.—The report provides that, in the case of recapture by the City after ten years of any of the new lines covered by a forty-nine year contract, the City (or a second operator) shall pay "the then reasonable value of the equipment attaching to the line or lines." In another portion of the report the annual sinking fund allowance upon the cost of equipment is limited to not more than three-fourths of one per cent. The company's investment for equipment will be upwards of $24,000,000. The rate of amortization allowed would yield something over $2,000,000 in ten years. If "the then reasonable value," in spite of adequate maintenance expenditures, should be determined by the City, by arbitration or by the courts, at less than $22,000,000, the operator would be a loser by whatever was the difference between $22,000,000 and the appraised value. It is readily conceivable that such loss might reach many millions of dollars. No operator would, of course, take that risk. The amendment of the Rapid Transit Act providing for the indeterminate franchise expressly recognized this fact by authorizing the City, in exercising the rights to terminate a contract after ten years, to purchase the equipment for an amount "which shall not be greater than the actual cost of the same plus 15 per cent. thereof." Commissioner Maltbie in his report to the Public Service Commission dated December 29, 1908, which is the standard authority

preceding the action of the Commission in urging the indeterminate franchise amendment, said: "As profits may be small or non-existent during the first few years of a new enterprise, and as some time may be required to get under way and show what can be done, there ordinarily should be an initial period during which the purchase may be made only on payment of a prescribed bonus in addition to the actual value of the property taken." As we shall show later on, there will be no profits arising out of the carrying out of a contract with us on the terms proposed for at least nine years, and there is therefore all the more reason why the bonus authorized by the statute should be given. We cannot conceive that it was the intention of the framers of the report to impose upon the operator the risk of any loss, to say nothing of a possible loss of many millions in invested capital as a penalty for undertaking the public service compelled by the contract. We think rather it was their intention that in case of recapture the operator's investment should be made good to the extent that it had not been amortized. This might be possible in forty-nine years at the rate allowed for amortization, but not in any less time. It is essential, therefore, that this language should be changed so as to provide that in case of recapture after ten years the City or a second operator should pay "the cost of the equipment attached to the line or lines plus 15 per cent. thereof, which amount shall decrease as the term continues and the investment is amortized."

Second.—The report is silent upon the duration of lease in the case of elevated extensions of existing lines. We assume that this period will not be less than that prescribed for extensions of the Manhattan Elevated Railroad.

Third.—The prescribed formula for determinging receipts and expenditures is particularly applicable to the method of accounting embodied in the proposal of the Interborough Rapid Transit Company. It does not clearly or precisely reflect the method embodied in the Brooklyn

Rapid Transit proposal, which calls for a pooling of all receipts and which in this respect is approved by the report. We have set forth our proposed substitute for this formula in Appendix A attached, which also presents more clearly than in the report, we think, the intentions of the City's representatives as to enumeration of lines, classification of contracts, accounting upon extensions, etc. In general, this substitute does not differ from the recommendations of the Committee. In three substantial respects, however, it does differ, and to these we call attention:

1. Reservation of net earnings of existing lines.—The Committee has in its report conceded that the principal of this reservation "is perfectly proper and fair to the City." It thinks, however, that the allowance should be based upon the operation for the year ending June 30, 1911. The substitute insisted upon by us is that finally conceded by us after much discussion in our conferences with the Committee and was framed, not upon our initiative, but to embody a counter proposition suggested by the City's representatives. It prescribes a method whereby the net earnings shall be determined, eliminating all increase in revenue from operation beyond the present terminals of the bridges prior to the beginning of pooling or thereafter, as well as all revenue from new extensions. It applies the per passenger cost basis to the computation of operating expenses. It fixes a maximum reservation of $3,500,000 and a minimum of the net earnings for the fiscal year now closing—approximately $3,000,000.

So much untruth has been uttered regarding the principle of this reservation that although the Committee, after more careful examination than was given to any other feature of our proposition, has been convinced of its fairness and has so publicly declared itself, we desire in this communication to record our reasons not only for urging the principle of the reservation, but for insisting that this principle should be more equitably recognized than is done in the Committee's report. Our proposals from the beginning

have embodied the pooling of all revenue—from existing lines as well as from new. This method seemed to us the only straight, simple, and, from the City's point of view, satisfactory manner of financial accounting. It offered no opportunity for intricate mathematical manipulation of either receipts or expenditures. It made reasonably certain, by possible approximate calculation, what the City would get out of its bargain, if it made one. No other proposal has permitted such a calculation. Where new lines are operated with old lines over new joint routes and the division of receipts between old lines and new is proposed according to ticket collections upon the new lines only, no estimate of the result of such division can be made in advance within any approximate degree of accuracy. Under such arrangement the City's expectancy of return is largely guesswork.

In offering the City, therefore, the pooling of all receipts, we not only presented an open, simple method of accounting, but we have done more—we have given to the City the opportunity of sharing with us, on an equal basis, all the growth of existing lines—42 miles of existing rapid transit routes, and probably, depending upon what the City decides to do in South Brooklyn, 15 miles additional. What the possibilities of this growth are is suggested vividly by some comparisons. The passenger receipts from these 57 miles for the year ending May 31 last averaged $144,000 per mile of route. The passenger receipts from the 37 miles of route of the Manhattan Railway Company for the year ending June 30, 1910, averaged $390,000 per mile of route. If the Manhattan elevated railroads have reached their capacity, the Brooklyn elevated railroads have certainly not. The Brooklyn lines, carrying the same traffic as the Manhattan did last year per mile of route, would be earning over $22,000,000—a possible growth, in all of which the City would participate equally, of over $14,000,000 annually.

No other proposition before the City involves a contribution of earnings now and hereafter from existing lines, and if it did none could offer such an opportunity of participation in tremendous possible growth.

In making this concession, therefore, and inviting the City into partnership with us, not as compensation for new privileges which we sought, but with the idea of creating thereby new and greatly improved facilities for public travel, we merely asked that when this partnership went into effect we should be allowed to retain the net earnings we would be then making—and that all increase and all gain from saving in operating cost by reason of better facilities and terminals should be shared with the partner. These net earnings are not large. They now represent about six per cent. on the present capitalization and much less on the invested capital—for with us acquisition and consolidation of elevated lines has meant many millions of decapitalization—not inflation of capital. The Manhattan elevated railroads are capitalized at $2,700,000 per mile of route; our elevated railroads at $1,250,000. Out of these net earnings we pay more than half for interest on obligations, funded and unfunded. An amount equal to five per cent. on Brooklyn Union Elevated Railroad Company's stock is paid in dividends—the first dividend on its common stock in the history of the company having been paid last year, although some of the company's railroads are twenty-five years old. The remainder is applied to reserve and to rentals of leased lines, or carried to surplus for such deductions as may hereafter seem wise. Hereafter, if contract is made with the City, there will be other calls upon this surplus revenue, as set forth in Appendix A, and it is essential that we should continue to get substantially the full measure for the net earnings which we are now enjoying and shall be enjoying when we begin partnership with the City.

The only difference on the subject between the City's Committee and the company is, as stated before, whether

this reservation should be based on the current year's net earnings or upon those of the year before pooling. The substitute which we propose, and which we heretofore conceded at the City's solicitation, is a compromise between the two extremes. It involves a comparatively small amount of additional reservation, but we feel that it is just we should have it and we shall need it to enable us to enter into the proposed contract. Certainly when it is considered that in the terms proposed by the Committee to be applicable to the Manhattan Railway Company the City is to participate only in increase of profits over 9 and a fraction per cent. on the stock of that company, and in the terms proposed for the Interborough Rapid Transit Company the City participates neither in the earnings of existing lines nor in any growth thereon, although that company is earning over 17 per cent. on its investment, there would not seem to be equity in asking the Brooklyn company to be content with a reservation of net earnings less than it will be earning when the pooling begins, representing a moderate return compared with the figures above cited, especially when that company is offering to the City what the other companies do not and cannot offer, namely, the opportunity of sharing equally a great measure of future growth.

2. Brokerage Charges on Cost of Equipment.—The conclusions of the report permit the amortization of brokerage charges of not exceeding 3 per cent. on cost of construction, but not on cost of equipment. We see no reason for any distinction. The capital which goes into equipment is just as hard to raise as that which goes into construction, and bankers' commissions apply without discrimination.

3. Operation of Extensions.—The report provides that in the operation of extensions not accepted by the operator there shall be a separate financial basis with separate accounting of receipts and operating expenses, but fails to prescribe such a basis. We present as such a basis the same method of accounting which the City asked us to

accept in conferences and which we finally agreed to accept, with the exception that deficits shall be cumulative and charged against the surplus receipts of the system as provided in the accounting in the case of Original Lines, and that the profits shall be divided equally.

Fourth.—The terms particularly applicable to the Brooklyn company provide that "every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commission's Law." The Legislature defines corporations which shall be subject to that law, and we think this definition should not be enlarged by contract. To the extent that the furnishing of current, equipment or other property enters into the cost of operation and financial arrangements under the contract, we recognize the propriety of the City's having reasonable power of supervision, but the language of the requirement is unnecessarily broad for the accomplishment of this object.

There are details of criticism and suggestion arising out of ambiguities or omissions of language which are not necessary to refer to here and which we are quite willing to leave to adjustment at the time of framing the contract.

In conclusion, and for the purpose of fortifying the reasons advanced above for the modifications requested, we beg to call attention to the fact that in accepting the provisions of the report, as proposed by us to be modified, we can figure out no results whereby the combined new and old system can be operated so as to make divisible profits possible within a period of from nine to fourteen years from the beginning of full operation. The system will become self-supporting at an earlier date, but because of the requirement that deficits shall be cumulative until made good out of profits the operator will not get a dollar of compensation for many years. This is because of the inclusion in charges of a large amount of interest on capital invested in the Centre Street Loop and Fourth Avenue Subway, and in the Jamaica extension, the revenue from which will

not be sufficient to make these lines self-supporting, and because of the insistence of a uniform fare of five cents, including Coney Island. Certainly any other use of these unprofitable lines except in combination with our system will produce still more adverse results. Your committee has estimated that City passenger traffic will increase during the next decade at the rate of 70 per cent. This is 5½ per cent. annually, compounded. Assuming that this is a conservative estimate, we submit herewith a tabulation (Appendix B attached) showing the effect of such a rate of increase on the traffic of the lines affected, with additional allowances for new business by reason of the operation of new lines. This table shows that with this annual increase, and with these additional allowances, and applying the same rate of increase to the allowances, it will be 1923 before the system becomes self-supporting and 1929 before it yields divisible profits. The ratio of operating expense is figured at 50 per cent., including taxes. This it may be possible to reduce, but even if reduced to 45 per cent. the time for profits would not be advanced more than three years. Including the allowances for new business from new lines, the total increase shown in Appendix B, is 142.2 per cent. in ten years, showing an average annual increase of 9.25 per cent. Even if the ratio of increase as shown in that tabulation should be doubled the result would not advance the time for divisible profits more than three or four years.

The operator faces, therefore, a long wait before it may expect any compensation for carrying on the operations of a great system of transportation—yielding incalculable benefits to the territory served and to all New York, and saving millions of dollars annually in carfares to the people—and for the contribution of all increase in earning capacity of existing lines; and, in addition, by reason of the voluntary competition offered to its surface lines, the company must bear whatever loss for a few years at least is suffered by those lines. And by the time harvest

comes, if it comes, the City may exercise its privilege under the contract and turn the then profitable lines over to a new operator.

The modifications which we have requested will not hasten the harvest time—they merely offer some protection against possible loss and assist in our financing of this great project. We do not ask that the City, because adopting the absolutely uneconomic proposition of a five-cent fare to Coney Island, should bear the burden of such a policy. We do not even ask that this unreasonable condition should be eliminated from the proposed terms, although we believe it should be, but we do suggest that the City, even more than the company, has a vital interest in this matter and that before enforcing such a rate of fare for purely pleasure traffic, it should await for a reasonable period the result of operation under the present rate of fare.

We desire to say further that if the City should decide to permit substantial concessions from the terms laid down for the Interborough Company, we should expect, in fairness, and irrespective of our answer, that the same spirit of liberality should be manifested toward us. Respectfully submitted,

BROOKLYN RAPID TRANSIT COMPANY,
By T. S. Williams, President.

The President of the Borough of Manhattan moved that the report be received and Friday, June 30, 1911, at 10.30 a. m., be fixed for consideration.

Which motion was adopted by the following vote:

Affirmative—The Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The Board then adjourned to meet Friday, June 30, 1911, at 10.30 a. m.

Q. At a meeting of the Board of Estimate and Apportionment held on June 30, 1911, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways.

Extensions to the existing system, also third tracking and constructing additions to the Second, Third and Ninth avenue elevated railroads and the completion and putting in operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of June 29, 1911, a report was received from the Conference Committee and action was deferred until this day.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment on pending transit proposals and the Public Service Commission for the First District, in a joint report submitted under date of June 29, 1911, have recommended that the terms for the construction, equipment and operation of rapid transit lines proposed on behalf of the City to the Brooklyn Rapid Transit Company under the resolutions adopted June 21, 1911, be modified in certain particulars, and

Whereas, The Committee of the Board and the Public Service Commission have reported that the Brooklyn Rapid Transit Company is prepared to enter into contracts with the City for the construction, equipment and operation of the several lines and extensions proposed for operation by it upon the terms required by the City, as now modified, and

Whereas, The Board concurs in the findings and recommendations of the report as aforesaid; therefore, be it

Resolved, 1. That contracts be prepared immediately for the construction, equipment and operation of the lines proposed for operation by the Brooklyn Rapid Transit Company under the resolutions adopted by the Board of June 21, 1911, and upon the terms to the Company therein proposed, with the following exceptions:

(a) That in the event of recapture of any of the lines operated by the Brooklyn Rapid Transit Company after ten years, the City or any second operator taking over such lines shall pay to the Company, as provided in the Rapid Transit Act, the actual cost of the equipment attaching to such lines, less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund created for the amortization of the operator's investment in equipment, and plus fifteen per cent. of the amount of the original cost, which percentage shall decrease at the rate of one per cent. per year; provision to be made for deferred maintenance, if any.

(b) That the amount to be deducted annually as compensation to the Company for use of the existing lines and stations shall be computed by one of the following methods, the precise method to be determined by the conferees:

1. An amount equivalent to forty percent. of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

2. The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the

Brooklyn and Williamsburg bridges during the year prior to the beginning of operation in Manhattan beyond the present terminal, less the operating expenses computed upon the per passenger basis; such balance not to exceed in any year $3,500,000 nor to be less than the net earnings of the Brooklyn Union Elevated Railroad Company for the year ending June 30, 1911.

(c) That the duration of grants upon extensions of the existing elevated lines shall not exceed the term proposed for the extensions of the Manhattan elevated lines; namely, eighty-five years and that such grants shall be subject to recaptured by the City in the manner prescribed by the Rapid Transit Act at any time after ten years from the date of beginning of operation.

(d) That the amortization of brokerage charges, not to exceed three percent., be allowed on the cost of equipment as well as on the cost of construction.

(e) That where under any contract the gross profits from operation are insufficient in any year to cover the actual charges of the Company for carrying any portion of the cost of construction not met from the funds of the City, the deficits thereby sustained by the Company shall be treated as cumulative and be a charge in the Company's favor against future profits before payment of the carrying charges upon the bonds of the City proceeds.

(f) That although the cost of real estate and easements is to be treated as part of the cost of construction and amortized from the receipts of operations, any incidental fee damages for acquiring rights of way in streets allowed by the courts, shall be paid by the City from its General Fund and not from the Subway Construction Fund.

(g) That the contract for the lines aforesaid shall be conditioned upon the Company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board of June 21, 1911, as herein amended, the additional lines and extensions set forth in its propositions of

April 25, 1911, and May 2, 1911; and upon the Company's assurance to the Board of Estimate and Apportionment, not later than July 6, 1911; that it will operate such additional lines if requested so to do.

(h) That if the Company operate the Jerome avenue line in The Bronx and the lines to Corona and Astoria in the Borough of Queens, it agree to the reservation of joint trackage rights in the operation of the said lines at any time that the City may so require; the lines to Corona to carry three tracks instead of two, as originally proposed.

(j) That if the Company operate the Eastern Parkway line in the Borough of Brooklyn, its obligation to bear the cost of construction of the proposed subway connecting the Brighton Beach and Flatbush avenue lines be limited to that section of the line lying between the Malbone station and the Prospect Park Plaza.

2. That although the Interborough Rapid Transit Company has failed to accept the terms for the construction, equipment and operation of the new rapid transit lines proposed by the City, the Company be informed that the Board and the Public Service Commission desire, as a matter of record, to include in the terms originally proposed to it those of the modifications aforesaid that should apply equally to either operator, to wit:

(a) The adjustment of the basis for the payment of the cost of equipment under recapture as proposed by the Brooklyn Company.

(b) The extension of the allowance of three per cent. for brokerage charges to the cost of equipment.

(c) The treatment as cumulative of any deficiencies met by the Company in carrying its interest and Sinking Fund charges and the liquidation of such deficiencies before payment of the carrying charges upon the bonds of the City proceeds; and

(d) The payment of incidental fee damages, for rights of way in acquiring streets, from the City's General Fund and not from the Subway Construction Fund.

3. That the Interborough Rapid Transit Company be informed that the modification of terms herein proposed, as applied to it, would include also the following:

(e) That if the Company agrees, as compensation for the additional franchises it seeks for its elevated lines, to pay to the City annually one-half of the increase above the average of the net profits of the two years ending June 30, 1911, and if it accepts the general proposition of the City as to rapid transit lines, that the City agree also to treat decreases of net profit below the amount of such annual average as cumulative in the Company's favor to be met from future receipts before any division with the City preceeds.

(f) That if forty-nine years be fixed as the term of the new subway leases and the Company's leases upon the existing lines are leveled so that they will expire co-terminously, the City will agree to merge with the new leases upon the old lines such parts of the renewal period of each contract as would remain under the leveling process. This upon condition that the legislation necessary to permit such a readjustment of the leases, as well as to permit the proposed exchange of the leases upon the east and west side legs of the existing subway, shall be promptly secured.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Borough of Manhattan, Brooklyn, Bronx, Queens and Richmond —16.

The President of the Board of Aldermen, in explaining his vote in the affirmative, made the following statement:

> "I am in favor of the proposition and will vote for the resolutions as introduced, but in doing so I simply want to call attention to the fact, as I have in conference, that the proposition of leveling the lease terms without readjustment, I do not believe in. I realize fully that it is going to make a difference

of a great many millions of dollars to the City during the period of the renewal terms. According to calculations, based on the assumption that arbitration at that time would result in an equal division of profits between the City and the railroad company, above the rental now paid, it would amount to anywhere from forty to forty-six million dollars during that period. That, of course, is speculative. I have always felt the leveling should not be allowed without readjustment, but in view of the tremendous importance of having the question settled now and finally, I waive my judgment, which is still the same on this point, and I am prepared to vote for the resolutions introduced. I wish it noted that I do so without approving of this special provision."

On motion of the Comptroller, the Board adjourned to meet Thursday, July 6, 1911, at 10:30 a. m.

R. At a meeting of the Board of Estimate and Apportionment held on July 6, 1911, the following proceedings were had and taken:

The following matter not on the Calendar for this day was considered by unanimous consent:

Rapid Transit Railways.

The President of the Borough of Manhattan presented a communication from the Brooklyn Rapid Transit Company in reply to resolution adopted by this Board at the special meeting on June 30, 1911, as follows:

Brooklyn Rapid Transit Co., 85 Clinton Street, Brooklyn, N. Y., Office of the President, July 5, 1911.

Hon. WILLIAM R. WILLCOX, *Chairman, Public Service Commission for the First District;* Hon. GEORGE McANENY, *Chairman, Special Committee of the Board of Estimate and Apportionment,* Borough of Manhattan.

Gentlemen—We acknowledge receipt of your communication of the 30th ultimo transmitting copy of report made by you to the Board of Estimate and Apportionment, the recommendations of which were adopted by that body at a special meeting on June 30 last.

Replying particularly to subdivision G of paragraph 1 of said report,

> "That the contract for the lines aforesaid shall be conditioned upon the company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, as herein amended, the additional lines and extensions set forth in its proposition of April 25, 1911, and upon the company's assurance to the Board of Estimate and Apportionment not later than July 6, 1911, that it will operate such additional lines if requested so to do."

—we hereby formally assure you and the Board of Estimate and Apportionment of our willingness to operate such additional lines upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, and as amended in the committee's report of June 29, 1911.

We call your attention to certain language of the report as embodied in the copy transmitted to us which we assume does not fully express the purpose of your committee.

In subdivision A of paragraph 1 referring to recapture, it is provided that there shall be paid to the company the actual cost of the equipment "less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund," etc. We assume that this is

intended to mean any unexpended balance of depreciation and renewal charges.

In subdivision E of paragraph 1, we assume that the words "cost of construction" are intended to include also the cost of equipment.

In subdivision F of paragraph 1, we assume that the words "any incidental fee damages for rights of way in acquiring streets allowed by the courts" are not limited to damages for rights of way in the opening of new streets, but include generally damages for rights of way in streets already opened.

We stand ready to cooperate with the Public Service Commission and your Committee in the preparation of plans and specifications and the formulation of contracts, to the end that there may promptly be secured for the public the fullest measure of transit benefits permitted under our proposals. Respectfully submitted,

BROOKLYN RAPID TRANSIT COMPANY,
By T. S. WILLIAMS, President.

The President of the Borough of Manhattan then moved that the communication be laid on the table and taken up for consideration at the special meeting to be held Monday, July 10, 1911, at 10:30 o'clock a. m.

Which motion was agreed to.

S. At a meeting of the Board of Estimate and Apportionment held on July 17, 1911, the following proceedings were had and taken:

FINANCIAL AND FRANCHISE MATTERS.

The Board met in pursuance of an adjournment.

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens, and George Cromwell, President Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways—Extension to the Existing System; also Third-tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads; and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways, and requesting a statement of the position of this Board on the subject.

The President of the Board of Aldermen served notice on the Board that unless a decision was reached in the matter on or before the next meeting of the Board, he would at that time offer for adoption a resolution providing for the award of the extended rapid transit system pursuant to the recommendations of the conference committee.

T. At a meeting of the Board of Estimate and Apportionment held on July 20, 1911, the following proceedings were had and taken:

The Board met in pursuance of the following call:

City of New York, Office of the Mayor, July 19, 1911.

In pursuance of the provisions of Section 226 of the Greater New York Charter, the Board of Estimate and Apportionment requests the Mayor to call a meeting of said Board on Tuesday, July 20, 1911, at 10:30 a. m.

W. J. Gaynor, Mayor; Wm. A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens; George Cromwell, President Borough of Richmond.

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President

Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens, and George Cromwell, President Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways—Extensions to the Existing System; Also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads, and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District, relative to the construction, maintenance and operation of additional rapid transit railways, and requesting a statement of the position of this Board on the subject.

The President of the Borough of Manhattan, Chairman of the Conference Committee, presented the following:

July 20, 1911.

To the Honorable Board of Estimate and Apportionment:

Gentlemen—The Public Service Commission for the First District and your Special Committee pending proposals for the construction, equipment and operation of new rapid transit lines submitted to your honorable body under date of June 13, 1911, a joint report embodying recommendations with relation to the terms upon which, in the judgment of the transit conferees, contracts for such construction, equipment and operation might properly be made between the City and the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company respectively.

These recommendations, together with certain modifications thereof, were approved by your honorable Board under the resolution adopted under date of June 21, 1911, and

June 29, 1911, and the respective operating companies were subsequently advised of the action so taken.

The general plan upon which the Public Service Commission and the Board of Estimate and Apportionment agreed contemplated:

1. The laying out of a transit system that would serve as a basis for a logical and well-ordered future City plan.

2. Provision, as rapidly as the means at the City's command permitted, not only for the relief of congested areas, but for the operation of lines through those sections that, though relatively undeveloped, offer promising opportunity for the better distribution of population.

3. Automatic provision for the inclusion in either operating system of such future extensions as the City may from time to time decide to build.

4. The utilization and extension, so far as possible, of the facilities offered by existing rapid transit lines already at the service of the City, rather than to reduce the uses of such lines through competition of a wasteful nature.

5. The separation of particular routes, or combinations of routes in such manner as to secure control on the part of the City of future transit development, and the right of the City to recapture a system of lines capable of independent operation, if it so elects, at any time after ten years.

6. The release of the moneys invested by the City in new transit lines at the earliest practicable time from the restrictions placed by the constitution upon municipal indebtedness; and

7. The subjection of the operating companies to strict public regulation as a condition precedent to the granting of the new franchises or other rights.

It is not necessary at this moment to rehearse in detail the terms of the Report of the Conferees, which have been carefully considered by your Board, and which have been the subject of much general discussion. The fact should be emphasized, however, that the primary purpose of the plan

proposed by the Conferees was to secure the advantages of a transit system based upon the principles we have stated, and not to put the City in a position of sacrificing any part of its own logical development for the sake of securing the sort of returns that would accrue to a partner in a commercial railroading enterprise. The Interborough Company, which holds the City's subways under leases that secure it in possession for approximately seventy years, has informed the Conferees that it could not accept the terms proposed by the City for the operation of extensions of its system, for the reason that the private capital required to carry out its part of the plan could not be enlisted upon such terms. In order to examine the figures and data, and to hear the arguments upon which the Company's conclusion was based, the Conferees have held several further conferences with the representatives of the Company and with their bankers. As a result of these conferences the Company now submits a supplementary offer to operate all of the routes laid down in the Conferees' report, and to accept all the terms and conditions proposed by the report, with the exception of those establishing the basis of compensation to the Company. The recommendations of the Conferees under this head were:

1. That if a contract were made with the Interborough Company, the Company be permitted to retain all of the net earnings upon the lines it now operates, which for the year ending June 30, 1910, amounted to 17.3 per cent. upon its invested capital.

2. That the net profits of the new lines be estimated upon a separate accounting system based on a per passenger method of ascertaining the cost of operation.

3. That the receipts of the new lines above operation be proportioned as follows:

(a) The carrying charges upon the new capital invested by the Company and the City respectively;

(b) Each party be permitted thereafter to retain three per cent. in excess of such carrying charges;

(c) All receipts in excess of such three per cent. to be applied toward the carrying of deficits, if any, upon the cost of operating extensions; and

(d) That all profits remaining after the operation of such extensions be divided evenly between the two parties.

The Company now proposed that the gross receipts of all the lines, both new and old, be pooled, and that after the payment of operating expenses they be distributed as follows:

(a) The interest and sinking fund charges upon the bonds of the City issued for the construction of rapid transit lines under the present rapid transit contracts.

(b) An amount to be retained by the Company during the entire period of the contract equivalent to five per cent. interest and one per cent. sinking fund charges upon the capital contributed by the Company for either construction or equipment of the proposed and existing subways, with three per cent, additional as compensation to the Company for the pooling of the receipts of the existing lines with those of the new lines, the levelling of the leases upon the old and new lines, the exchange of leases upon the east and west side lines in Manhattan, and for services in connection with the operation of the property, it being understood that the amount of capital contributed by the Company to the existing subway system for construction and equipment as of June 30, 1911, amounts to the sum of $48,029,688, the basis for the allowance in question to be, nevertheless, the exact sum expended upon construction and equipment. These allowances, which are not to exceed nine per cent, in all, to be upon all capital furnished by the Interborough Company during the period of the contract, and to be cumulative; the deficits, if any, to be adjusted on a yearly basis out of a fund to be provided therefor by the Company as part of its capital investment; the allowance made to the Company upon the bonds or notes issued for this purpose not to exceed interest charges thereon.

(c) A sum representing the interest and sinking fund charges upon the capital invested by the City in said new lines; deficiencies in the amount required to meet such charges from the date of the operation of said new lines to be treated as cumulative and to be met from the receipts of the system before further distribution of profit proceeds.

(d) A sum representing the difference between the interest and sinking fund charges of the City upon its investment in the said new lines, up to and including an aggregate of nine per cent. upon the investment of the City in the new lines, before the further distribution of profit proceeds; and

(e) An even distribution between the City and the Company of all profit after the foregoing charges have been met; such division to proceed throughout the remainder of the term of the lease from the City to the Company.

The proposition of the Company, read in conjunction with the general terms of the report, which it has accepted, also covers the following points:

1. That, as set forth in the Report of the Conferees, dated June 5, 1911, the sinking fund set aside by the Company upon its investment in equipment shall meet and cover all charges for obsolescence incidental to the maintenance of such equipment.

2. That all future extensions agreed upon by the City and the Company shall be governed by and included in the general provisions herein set forth as to receipts and deductions therefrom, and that all extensions required by the City and not agreed to by the Company shall be equipped and operated as part of the entire plan upon the general lines set forth in the offers of the Interborough Company of December 5, 1910 and May 9, 1911; the operating expenses of such extensions, in that case, to be upon the cost-per-passenger basis, to be determined according to unit costs on the entire system.

3. That upon the completion of any substantial portion of the new lines the receipts of the existing subways shall

be immediately pooled therewith, and such pooled receipts divided in the manner hereinbefore provided, in the proportion which such new lines bear to the whole system, as the same may be placed in operation from time to time.

4. That the Company will commence at once the construction of all of the lines embraced in this plan that are contiguous to any of its existing lines, either subway or elevated, and that it will press the work upon all other lines with the greatest possible dispatch.

5. That the Interborough Company and the Manhattan Elevated Company will construct and operate the third track lines and extensions to the existing subway system of the Manhattan Company upon the terms proposed in the resolutions of , as modified on , with the exception that the City, in lieu of the proposed provision for examination of the lines to determine what deferred depreciation, if any, would be required to be met, will accept a clause prohibiting excessive renewal charges on the part of the Company during any one year following the new operation.

6. That the Company will accept in every other particular the terms and conditions for the construction, equipment and operation of the lines for which it has applied, or which have been assigned to it, as laid down in the resolutions of June 21, 1911, as amended on June 30, 1911.

The Conferees, having in view the pre-eminent desirability of extending under a logical plan the City lines now under lease to the Interborough Company as part of the more comprehensive system proposed in the report of June 13, 1911, and being convinced that the revised terms that they have negotiated with the Interborough Company offer the best practicable basis of settlement, do not hesitate to recommend that the substitute proposition as to financial basis be accepted.

The advantages to the City would be manifold. The Company, in return for the pooling of its revenues, for

the virtual merging of the new and old leases for the reduced period of forty-nine years, the exchange of leases upon its east and west side lines, and for its services as operator of the compounded system, would receive three per cent. above the carrying charges upon its investment. It is estimated that by the first year of operation of the new lines the Company's total investment upon the old lines for construction and equipment will be $50,000,000, and that its contribution for construction and equipment of the new lines will be $75,000,000—a total of $125,000,000. The three per cent. allowed upon this sum would amount to $3,750,000 annually. This would be the maximum sum allowed throughout the entire operation of the lease until the City also receives nine per cent. upon its investment. The Company's net profit from the subways for the year ending June 30, 1910 was $4,650,000. For the year ending June 30, 1911, figures for which are not yet in hand, the amount will be somewhat less. During this year, however, expenditures for equipment replacements have been abnormal and the net figures of the year are not to be taken as typical. It is estimated that the increase of traffic between now and the year 1915, the last year preceding the operation of the new lines, will bring the profit for that year to approximately $7,000,000. The present proposition is, therefore, in a word, that the Company will operate an expanded system, doubling the mileage of its present lines, for a profit of $1,000,000 less than it is receiving today upon its smaller system, and more than $3,000,000 less than the profit it would receive in the last year of the present operation.

It may be said that when the settlement of terms upon this principle was first proposed the Company suggested that it be given a reservation of ten per cent. upon its investment, old and new; a figure that would have more nearly approximated its present receipts, and that, although provision for the City's carrying charges should come next in order, all profit earned over City's carrying charges should be divided evenly. This proposition the Conferees declined to accept. It was then proposed that the basis be

made nine per cent., the even division to proceed immediately following the payment of the City's carrying charges. This, also, the Conferees declined to accept. As a counter proposition, they proposed that the City receive an amount above its carrying charges up to nine per cent., and upon this basis a final agreement was reached.

The Company figures, upon estimates that are considered by the Conferees to be very conservative, that any cumulative deficits in its preferred allowance would be discharged within eight years from the beginning of operation, and that the cumulative deficiencies in the City's carrying account would be discharged in five years more, thus bringing the City within thirteen years to the point at which it would derive an annual profit.

It would be difficult to indicate accurately the exact year at which this point would be reached; but it could hardly be more than one or two years beyond the date the company anticipates. If it is assumed that the new and old lines at such a date, would have reached the maximum of their carrying capacity—estimated at 800,000,000 passengers per year—the following operating results would have been secured:

Gross operating revenue (on the basis of 800,000,000 passengers per year)	$40,000,000
Less 45 per cent. allowance for operating expenses	18,000,000
	$22,000,000
Less carrying charges upon the City's present bonds	2,700,000
	19,300,000
Less taxes (city, state and federal)	600,000
	18,700,000
Add non-operating revenues	300,000
Gross income	$19,000,000

If there be deducted from this sum the proposed preferred allowance of $11,250,000 on the old and new investment of the company, plus an additional allowance of $1,000,000 on new equipment the company will be obliged to purchase in order to meet the expected growth of travel, and plus $4,950,000 representing nine per cent. to go to the City upon its new investment of $55,000,000, there would still remain a balance of $1,800,000 available for equal division between the parties within fifteen or sixteen years from the beginning of operation.

The release of the City's investment from the restrictions of the debt limit would occur as soon as its carrying charges have been met. It is to be considered, further, that the allowance to the Company of $3,750,000 annually as a preferred profit, is to be treated as preferential only during the thirteen or fourteen years prior to the payment of the City's full nine per cent. The City can borrow money more cheaply than the Company. Its bonds are apt to be sold at a rate of 4¼. It would be entitled, therefore, to 3¾ per cent. upon its proposed investment of $55,000,000, which would amount to $2,100,000 annually. From the first year of the realization of this full sum, the preferred allowance to the Company would be reduced, therefore, to $1,650,000. Throughout the remaining years of the lease, this reduced amount would stand for all that the Company surrenders in the way of its present earnings and the readjustment of its existing leases.

At the end of the leases, it would, moreover, turn over to the City a property valued at $125,000,000 and would have paid to the City during the same period an increase in taxes aggregating $20,000,000.

The Conferees, in recommending that the proposed revised basis for settlement with the Interborough Company be accepted, have in mind also the fact that the indirect benefits to the City would be vastly in excess of the direct return from its share in the revenues of operation. The President of the Department of Taxes and Assessments

informs the Committee that within five or ten years following the opening of the new transit lines to operation, taxable values will increase fully $500,000,000 beyond the estimates the department has previously furnished. At the rate of the present annual tax, this would net more than $8,000,000 annually in taxation. This consideration alone, in the judgment of the Conferees, justifies any risk that the City proposes to take in its part of the construction of any of the lines embraced in the comprehensive plan the Conferees' report proposed.

The Conferees recommend, also, that the franchises Interborough and Manhattan companies for the third tracking and extension of the Manhattan elevated lines be also granted upon the terms set forth in the report, as subsequently amended. Under this plan, the City will receive half of the increase in net operation of the elevated roads, above an average of the profits of the two years ending June 30, 1911, instead of two per cent. of the increase in the gross receipts at express stations, as the Company had first proposed. The City will also undertake to treat as cumulative any losses of income on the part of the Company below the average aforesaid, and to discharge this before the even division of profits proceeds. There can be no doubt, however, that any loss of income due to the opening of the new subways will be quickly overcome, and the advantages of an even division in all of the increase of the future, estimated roughly at forty per cent. of the present traffic, is manifest.

The resolutions herewith submitted by the Special Committee of the Board of Estimate, if adopted, will not only determine the disposition of the several routes to be embraced within the system to be operated by the Interborough Company; but will reaffirm the action previously taken by the Board with relation to the award to the Brooklyn Company of the routes assigned to it in the Conferees' report of June 5, 1911.

The Public Service Commission is already proceeding

with the preparation of formal contracts upon which the operation of the new system of the Brooklyn Company will be based. The Commission is proceeding, also, with all steps necessary to the legalization of routes embraced in any part of the City's plan that have not yet been established. The Commission will proceed with actual construction of the lines embraced in the plan to be built wholly by the City, for which bids are in hand, and with the advertisement of bids for the construction of all other such lines that have been legalized, as soon as the final action of the Board of Estimate and Apportionment is taken.

All of which is respectfully submitted.

Special Committee of the Board of Estimate and Apportionment: George McAneny, President, Borough of Manhattan; Cyrus C. Miller, President, Borough of The Bronx; George Cromwell, President, Borough of Richmond.

For the Public Service Commission for the First District: W. R. Wilcox, Chairman; Wm. McCarroll, J. E. Eustis.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment appointed to consider pending transit proposals, and the Public Service Commission for the First District, made a joint report to this Board bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railway within The City of New York; and

Whereas, This Board, at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The Interborough Company, through informal communication to the Board, has represented that it would be unable to secure the investment of private capital in the lines assigned to it upon the terms proposed by the Board and the Public Service Commission unless the said terms and conditions be modified; and

Whereas, As a result of further conferences between the representatives of the company and the Special Committee of the Board and the Public Service Commission, the Conferees have been informed by the company, in a letter dated July 19, 1911, that it will accept the part allotted to it by the Board subject to the terms and conditions contained in the report of the Conferees dated June 5, 1911, as amended June 21, 1911, if certain modifications with relation to the financial terms be made therein; and

Whereas, The Board is convinced, for the reasons submitted by the Conferees, that the said modifications may properly be accepted; therefore be it

Resolved, That the Board hereby approves the recommendations of its Special Committee and the Public Service Commission that the Commission prepare and submit to the Board contracts for the construction, equipment and operation of the lines assigned to the Interborough Company, as set forth in the Conferees' report dated June 5, 1911, as amended June 21, 1911, and upon the general and specific terms prescribed by said report, excepting in the following particulars:

I.—That the Interborough Company, in consideration of the grant of the new franchises and operating rights for the new lines it seeks and for the new lines assigned to it under the said report of June 5, 1911, be required to pool the gross receipts of all the said lines, old and new; and that its revenues from such gross receipts, after the payment of operating expenses upon the basis set forth in the said report of June 5, 1911, shall be apportioned in the following order:

(a) The interest and sinking fund charges upon the bonds of the City issued for the construction of rapid transit lines under the present rapid transit contracts;

(b) An amount to be retained by the company during the entire period of the contract equivalent to five per cent. interest and one per cent. sinking fund charges upon the capital contributed by the company for either construction or equipment of the proposed and existing subways, with three per cent. additional as compensation to the company for the pooling of the receipts of the existing lines with those of the new lines, the leveling of the leases upon the old and new lines, the exchange of leases upon the east and west side lines in Manhattan, and for services in connection with the operation of the property; it being understood that the amount of capital contributed by the company to the existing subway system for construction and equipment as of June 20, 1911, amounts to the sum of $48,029,668; the basis for the allowance in question to be, nevertheless, the exact sum expended upon construction and equipment. These allowances, which are not to exceed nine per cent. in all, to be upon all capital furnished by the Interborough Company during the period of the contract, and to be cumulative; the deficits, if any, to be adjusted on a yearly basis out of a fund to be provided therefor by the company as part of its capital investment; the allowance made to the company upon the bonds or notes issued for this purpose not to exceed interest charges thereon.

(c) A sum representing the interest and sinking fund charges upon the capital invested by the City in the said new lines; deficiencies in the amount required to meet such charges from the date of the oparation of said new lines to be treated as cumulative and to be met from the receipts of the system before further distribution of profit proceeds.

(d) A sum representing the difference between the interest and sinking fund charges of the City upon its investment in the said new lines, up to and including an aggregate of nine per cent. upon the investment of the City in the new

lines, before the further distribution of profit proceeds; and

(c) An even distribution between the City and the company of all profit after the foregoing charges have been met; such divisions to proceed throughout the remainder of the term of the leases from the City to the company.

II.—That, as set forth in the report of the Conferees dated June 5, 1911, the sinking fund set aside by the company upon its investment in equipment shall meet and cover all charges for obsolescence incidental to the maintenance of such equipment.

III.—That all future extensions agreed upon by the City and the company shall be governed by and included in the general provisions herein set forth as to receipts and deductions therefrom, and that all extensions required by the City and not agreed to by the company shall be equipped and operated as part of the entire plan upon the general lines set forth in the offers of the Interborough Company of December 5, 1910, and May 9, 1911; the operating expenses of such extensions, in that case, to be upon the cost-per-passenger basis, to be determined according to unit costs on the entire system.

IV.—That upon the completion of any substantial portion of the new lines, the receipts of the existing subway shall be immediately pooled therewith, and such pooled receipts provided in the manner hereinbefore provided, in the proportion which such new lines shall bear to the whole system as the same may be placed in operation from time to time.

V.—That the company will commence at once the construction of all the lines embraced in this plan that are contiguous to any of its existing lines, either subway or elevated, and that it will press the work upon all other lines with the greatest possible dispatch.

VI.—That the Interborough Company and the Manhattan Elevated Company will construct and operate the third track lines and extensions to the existing system of the Manhattan Company, upon the terms proposed in the reso-

lutions of June 21, 1911, as modified on June 30, 1911, with the exception that the City, in lieu of the proposed provision for examination of the lines to determine what deferred depreciation, if any, would be required to be met, will accept a clause prohibiting excessive renewal charges on the part of the company during any one year following the new operation.

VII.—That the company will accept in every other particular the terms and conditions for the construction, equipment and operation of the lines for which it has applied, or which have been assigned to it, as laid down in the resolutions of June 21, 1911, as amended on June 30, 1911; and be it further

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board and the Public Service Commission, as heretofore ratified and confirmed, the Board approves the proposed immediate preparation of contracts, under the general provisions of the Rapid Transit Act, for the construction, equipment and operation of the lines assigned to the Brooklyn Rapid Transit Company—through the instrumentality of such new railroad company as may be organized for the purpose, or through the Brooklyn Union Elevated Railway Company, or through both such companies, as may be advisable—along the lines proposed to the Brooklyn Company in the resolutions of June 21, 1911, with the modifications and exceptions further provided in the resolutions adopted on June 30, 1911; and be it further

Resolved, That the Public Service Commission be respectfully requested to submit to this Board at the earliest date practicable the form of the contracts to be entered into for the equipment, operation and maintenance of the lines of rapid transit railway proposed for operation aforesaid, either by the Interborough Company or by the Brooklyn Company, in order that all of the rapid transit lines proposed for construction, either by the City or by the respective companies, or now under construction by the City, may be promptly utilized; and be it further

Resolved, That the Public Service Commission be and it is hereby respectfully requested, at the earliest date or dates practicable, to submit from time to time for the further approval of this Board the contract or contracts to be entered into for the construction, at the expense of the City, of such portions of the said lines as are intended for operation by either of the contracting companies, or by any company, and to acquaint the Board, so far as practicable, in anticipation of such submission with the necessary plans, specifications and estimates for such construction, in order that the Board may proceed to appropriate the City funds to be expended in accordance therewith; and be it further

Resolved, That the Special Committee of this Board, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond, be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in carrying out these recommendations and in the determination of such questions of detail with relation to contracts to be entered into with either company as were left undetermined in the joint report of the conferees, as modified by the resolution subsequently adopted, including the resolutions of this date.

The following discussions ensued:

President Mitchel: Mr. Mayor, this matter is now officially before the Board for action. I have waited during the past four days—that is, since the matter was first outlined, to express my full views concerning it and now, in expressing those views and stating the reasons why I vote as I shall upon this proposition, I ask that what I say be made a part of the record of the Board.

While I am keenly alive to the advantages of the Interborough operation of the lines allotted to that Company in the report of the conferees, and would be glad to vote for a contract of operation by that Company on any terms equitable to the City, I regret to find myself in a position where I must vote against the proposition which is now put forth.

I do so only because I believe it would work most disadvantageously to the City and would be almost as unfavorable in its operation as are the terms of the present contract No. 1, under which the Interborough now operates the present subway. My reasons for objecting to the present proposal are as follows:

(1) The preferential payment to the Company of 9 per cent. on old and 9 per cent. on new capital is tantamount to insuring the Company throughout the life of the proposed contract, the full amount of the new profits which the Company is now receiving from the present subway.

The Company claims an investment of $48,029,668; 9 per cent. on $48,029,668 equals $4,332,670. The Company proposes to invest $76,970,332 of new capital, on which the carrying charges will be 6 per cent. The difference between the carrying charges 6 per cent. and 9 per cent. is 3 per cent. This 3 per cent. represents net profits. Three per cent. on $76,970,332 equal $2,309,110. The $4,332,670 being the 9 per cent. on old capital, and the $2,309,110 being the 3 per cent. net profit on new capital, together amount to $6,631,780. This sum equals 13.81 per cent. on $48,029,668.

Last year the Company's net profit from the subway was $6,769,572. This equals 14.09 per cent. on the Company's alleged investment of $48,029,668. Therefore, the proposed plan of making a preferential payment to the Company of 9 per cent. on old and 9 per cent. on new capital is tantamount to paying to the Company all of its present net profits, and assuring to it carrying charges and sinking fund on the new capital invested, and this before the City gets one cent either in the way of carrying charges or profits upon the capital which it invests in the enterprise.

It is stated that the Company is constrained to make this demand for a preferential payment of $11,250,000, namely, 9 per cent. on old and 9 per cent. on new capital, because of its obligations, and I believe this to be, in a sense, quite true. In fact, in discussing this matter with the representative of the Company, I have been informed

that the Company is not in a position to discuss with the City the equitable or inequitable character of the demand, or the adequacy of the compensation proposed for the Company, but must ask this whole amount because of the obligations which it is compelled to carry. These obligations are represented by the 9 per cent. dividend which the Company is now paying on its stock.

As we all know, that stock is owned by the Interborough-Metropolitan Company, and the proceeds of this dividend, when put into the treasury of the Interborough-Metropolitan Company, are immediately paid out again by that Company as a 4½ per cent. interest payment on the $70,000,000 collateral trust bonds which the Interborough-Metropolitan Company has issued and outstanding.

The plea of the Interborough is that unless it continues to pay the 9 per cent. on its capital stock, and thus enable the Interborough-Metropolitan Company to continue to pay the interest on its bonds, the latter Company will go into bankruptcy. Perhaps this is true, but it offers no good reason to my mind why the City should be asked to finance, for the period of the next forty-nine years, the Interborough-Metropolitan bond and stock operations.

I am fully in accord with Mr. McAneny when he says that it makes no difference to him what the Company does with the money once the City has paid it over, and that he is concerned only with the adequacy of the amount paid by the City. I am not in accord as to the fairness to the City of the price proposed. Nor do I believe that adequate relief can be had only from the Interborough Company.

(2) The Company's offer in Subdivision A, last sentence, reads:

> "This return not exceeding 9 per cent. is to be upon all capital furnished by the Interborough during the entire period of the contract and is to be cumulative and the deficits, if any, shall be adjusted on a yearly basis out of a fund to be provided therefor by the Company as a part of its capital investment."

This can mean only one thing, that the Company is to provide a fund through the issue of its bonds out of which it will meet the cumulative deficit occasioned by this preferential payment of $11,250,000 annually, as such deficit may occur. The City will then pay 9 per cent. for interest and sinking fund, plus 3 per cent. profits upon a fund which is created and used for the purpose of making good to the Company—that same interest, sinking fund and 3 per cent. profit upon the bonds issued in part to create this very fund. In other words, the City will be paying interest and profit upon interest and profit to the Interborough Company. This, it seems to me, is an unconscionable compounding of profit on profit.

I understand from the report read that it is proposed by the Committee that the offer of the Interborough Company will be modified so that only interest will be paid and not interest and profit upon the bonds issued to create this fund. That will change the situation only to this extent, that the City would then be paying compound interest on interest and profit.

President McAneny: That is to be accomplished through modification. It is already in the proposition, and is covered in the resolutions submitted to the Board. That is for short term notes and bonds, to cover these contingencies if they occur, the interest only on such notes shall be paid.

President Mitchel: The offer as now offered by the Committee contemplates only compound interest.

President McAneny: Not the proposition of the Committee.

President Mitchel: But it does not read so in the offer.

President McAneny: I have explained that; it does in the resolutions.

President Mitchel: (3) The Company's alleged investment of $48,029,668 includes $11,000,000 for the construction cost of the present Brooklyn division south of City Hall. As everybody recollects, the Company was merely a constructing contractor in building that section, and bid

$3,000,000 as the price of construction. The fact that it spent $11,000,000 in building the tunnel is no justification for a demand that the City now carry that investment for it. This arrangement will be tantamount to making the Brooklyn section cost the City $14,000,000 in place of $3,000,000, the price that it was supposed to cost. The Company is now asking the City to give up the advantages of that contract.

(4) On the Company's statement of its expectations of traffic, the cumulative deficit of the Company which must be discharged before the City gets a cent in the way of carrying charges and interest, will not be wiped out until the year 1924. The City's cumulative deficit for interest and carrying charges on its bonds will not be wiped out until the year 1929. It would not be until that year that the City would begin to get the 3¾ per cent. net profit, and it would not be until the year 1930 that the City and the Company would divide any surplus between them.

All of this is predicated upon the assumption that from 1924 on traffic will increase at the rate of 5½ per cent. a year, but, in point of fact, in the year 1924, in order to produce the gross income upon which these calculations have been based, the subway must be carrying 707,000,000, and in 1930 it would have to carry 974,600,000. The present subway, according to the figures of the Public Service Commission, is carrying 3,315,360 passengers per mile of single track per year. The present subway has 81 miles of single track. The proposed subway to be operated by the Interborough, old and new, would contain 212.8 miles of single track.

To produce the same congestion of traffic in the amalgamated subway which is now experienced in the present subway, it would have to carry only 705,508,608 passengers. In other words, in the year 1924, long before the City's cumulative deficit had been wiped out, and in fact, while it still remained at $20,015,000, the new amalgamated subway system would have reached a point of congestion

greater than that experienced in the present subway. The Public Service Commission estimates that the present subway will have reached a point of complete saturation beyond which it cannot expand, when it is carrying 25 per cent. more passengers than it it carrying at the present time. Assuming that the new amalgamated system be expanded by the same 25 per cent., this point of saturation would be reached in carrying 881,885,760 passengers. That is to say, the point of saturation would be reached in the year 1928, or one year before the cumulative deficit of the City had been wiped out. In other words, the new subways will have reached a condition of congestion far worse than the present crowding in the present subway before the City gets a cent of profit on its investment.

The first thing we have to consider is whether we want our new subway to be crowded as is the present subway. If that question be answered in the negative, then we would not wish the traffic of the new subway to increase in volume over the year 1924 before building new subways to relieve it. If that question be answered in the negative, we certainly reach the conclusion that we would not wish the traffic of the new subway to expand to the point of 881,000,000, the number necessary to carry the net return calculated for the year 1928. In other words, to produce the results on which these calculations have been based and under which the cumulative deficit of the City upon its $50,000,000 expended in construction could be wiped out in the year 1929, the new subways would have to carry more passengers than they will be physically capable of carrying, and certainly far more passengers than they could be expected decently to carry.

(5) The Company's offer at page 4, under the title of "Extensions," reads:

> "Extensions required by the City and not agreed to by the Company are to be equipped and operated as part of the entire plan upon the general line set

forth in the offer of the Interborough Company of December 5, 1910, and May 9, 1911."

So we are not to have a real pooling of the entire system after all! The City is required by this offer to consent to a separate accounting basis for such future extensions and a separate method of determining revenue and operating expenses and also to guarantee the Company against loss in the operation of those extensions. The guaranty is illegal. We have, first, a guaranty against loss in the operation of these extensions and then a preferential payment of $11,250,000 on the rest of the system. In short, a guaranty piled upon a preferential payment.

It is pertinent to point out that all the Company would have to do in order to bring an extension under these terms of its offer would be to refuse to operate that extension.

To sum up, I am opposed to the present offer:

Because it guarantees to the Company 100 per cent. of its present net earnings throughout the term of the contract, which is more than the Company's present lease is reasonably worth today, in view of the competition which the Company would have to face provided that it did not obtain a franchise for any of the new subways;

Because it guarantees to the Company a compound interest—that is to say, interest on a fund created to make good interest and profit under the plan for preferential payment;

Because even that excessive net profit of the Company, assured under this plan, will be reckoned upon an inflated statement of the Company's investment in construction, due to the inclusion of $11,000,000 for the Brooklyn extension and other lesser items;

Because under the plan proposed it would require congestion greater than that in the present subway in order that the City might ever get a profit upon its share of the investment, and even then would not receive such profit until a remote period of time, 1934, if we assume a con-

gestion only slightly greater than that in the present subway, and 1929, if we assume complete saturation, which would represent crowding 25 per cent. greater than exists today;

Because this offer requires a separate accounting basis and separate method of determining revenue and operating expenses, together with a separate guaranty by the City against loss in the case of all future extensions constructed by the City, but not accepted by the Company. The Company will be able to bring all future extensions within the operation of this guaranty by the simple expedient of refusing to operate them;

Because the City has the opportunity to get transit relief without making so improvident a contract, either by awarding an operating contract to the Brooklyn Rapid Transit Company or by proceeding with the construction of the modified Tri-borough system.

President McAneny: May I say, speaking to the point, that the proposition that is now submitted to the Board was framed essentially in pursuance of an agreement reached by a majority of this Board in executive conference, and although I am more than willing to allow for changes of opinion, it must be kept in mind that the committee would not have submitted an alternative plan, dealing with these points in the Interborough Company's case, had it not proceeded upon the understanding that it was acting in accord with the wishes of the majority of the Board of Estimate; nor, do I believe, would the Interborough Company have submitted a further proposition except upon such an understanding. The company was prepared to present a second proposition wholly rejecting the offer of the City up to the time that these later negotiations commenced. Now, as to its merits—

Comptroller Prendergast: Mr. McAneny has just made a statement and I think he has only done himself and his associates upon the Conference Committee full justice in

making it. It is true, and I wish to publicly asknowledge it, that, in the deliberations of the Board of Estimate, in its executive sessions, it was the feeling of a majority of the members of that Board expressed at that time that an arrangement somewhat in accordance with the lines of the proposal submitted yesterday would be satisfactory to that majority; but I do not wish (because I have never run away from an issue yet) to relinquish one iota of my responsibility for having led the committee to believe that a proposition such as this would be approved, and if any embarrassment which my action has caused the committee, if it has been placed in a position that it does not relish, I certainly am very sorry, not only because I do not want them to be placed in that position officially but because I have a very warm personal regard for the members of the committee and especially for Mr. McAneny.

President McAneny: I do not wish to intimate that the committee would not have agreed upon the merits of this plan, because they are agreed. I meant merely to say that they would not have presented such a plan, taking further time and occupying further discussion here, had it not been with the feeling, the understanding, in fact, that it was to meet the express view of the majority. I appreciate, of course, what Mr. Prendergast says, and let it stand so upon the record.

When we come to the merits of the case, let me say this, that the special committee of the Board, acting in conjunction with the Public Service Commission, has for some four or five months been at work upon this problem. I may say also that this has not been an usurpation of the functions of the Public Service Commission to any degree, but an acceptance of an invitation from the Commission that your committee should meet with it and talk these matters over with the object of avoiding the hitherto endless chain of reports, letters and public discussions, and actually get together upon a solution of this tremendous problem upon which the future development of the city might be based.

In a sense, it may be said that the plan presented here is the plan of both bodies, sitting side by side, and just as original to one as to the other. The Public Service Commission appreciated, of course, that without concurrent action, when it came to the approval of contract and the appropriation of money, it would itself be powerless. I regard Chairman Willcox's action in inviting this conference as a very great public service, and the conduct of the Public Service Commission to have been such as to merit the approval of the entire community. I believe, also, that when the joint report was submitted that for the first time a substantial agreement upon which contracts might be made had been arrived at.

The report proposes that certain lines to be so constructed that they will incidentally extend the area of the present service of the Brooklyn company, with additions in Manhattan. I won't rehearse these, of course. That other lines be reserved as logical extensions and expansions for the Interborough system. This being concluded, the members of the two bodies having placed these two systems in conjunction, partly in competition, through the short haul through the heart of the city, with existing lines, and through their various branches but with the intention of extending a five-cent fare to perhaps 98 or 99 per cent. of the traveling public; that is to say, the plan would take the passenger for a five-cent fare to districts that are now absolutely inaccessible, and incidentally open Brooklyn to the heart of Manhattan as no other method possibly could.

Let it be said, also, that we did not present merely a proposition from the Interborough Company, or from the Brooklyn Rapid Transit Company, in our report. We presented a proposition that had been worked up in a conference between the two bodies having official authority and the two applicant companies, to which the companies originally had been strenuously opposed, and in the development of which concession after concession had been

made; and we reached the point where we had finally brought both to what we considered bargain terms.

The Brooklyn Rapid Transit Company after certain modifications accepted the terms imposed by the city and it is prepared to proceed when the Public Service Commission can draw the contracts. There remains the signing of these formal contracts, the negotiations of subsidiary terms, but I have regarded and still regard the action of this Board as constituting a moral contract by which the Brooklyn plan should and must be consummated.

The Interborough Company notified us that they could not accept our terms and at the same time enlist private capital to the degree we proposed.

In laying out the Brooklyn plan, we virtually created, first, a new city subway along the lines in large part of the old Triborough route. We propose to build that with city money and to link that with existing lines of the Brooklyn system under contracts that would give access to those lines and would compel them to reserve for even distribution with the city all profits of joint operation over those they are earning today.

In the case of the Interborough Company, having provided for the strategic disposition of the moneys of the city between the two systems in the way he believe would do the greatest good, we allowed $55,000,000 to $60,000,000 of city money for construction against a like sum to be provided by the company; $21,000,000 to $25,000,000 for equipment by the Interborough alone in order that this comprehensive plan, reaching everywhere, might be carried out, and in order that the city in aiding itself would not be compelled to starve itself at every other point and be compelled to deny to every neighborhood advantages which such neighborhoods require and to every locality the benefits that should flow to such localities through school buildings, the development of territory generally and all those other expenses that must come within our Corporate Stock

Budget. In order to secure this benefit we have agreed to certain modified terms in connection with the Interborough Company. The Interborough Company informed us at the conference the other day, in considering their case that they could not get private capital on the terms originally proposed. Their officers were invited in, not by us, but by common agreement, I forget just where. We went over with them these conditions, and a great deal of data, and were satisfied that in order to allow that margin of safety that they required that some altered plan should be adopted.

In the plan on June 5 we proposed that the Interborough should keep unto itself all earnings of its present lines, whatever they might be, and they earned 17 per cent. last year, and they will be earning 23 in 1915. There will be some drop, of course, when the new lines are opened. But whatever was earned under the present system was to be theirs and a new and involved system of accounting was to be provided to take care of our share in the operation of the new lines. They argued that beyond the border lines they could not figure out to the satisfaction of their bankers a sufficient margin of profit in the first three or four years of operation to bring the bankers in. Then we reached this plan by which nothing is reserved in the income of the old lines but all the income of the old lines and all the income of the new lines is merged in the new; the old leases virtually merged in the new leases.

For the moment, brushing aside the question of relative percentages, and just what that means, it seems to me that a phrase of the report just read sums up the whole situation, that the Interborough Company undertakes to operate a system comprehending more than double the mileage of the present line for an assured income of $1,000,000 less than it is receiving today for its operation of the present contracted system, and that it cannot get one cent more than that allowance until the city has reached the point

where it earns more than $2,000,000 above its carrying charges.

But I submit, gentlemen, that in this issue it is not directly a matter of dollars and cents. I believe, and my committee believes and the Public Service Commission believes, that we have adequately cared for that, that no possible plan could be reached, acceptable to the two parties, that would better this. Beyond all that, however, the importance to the City of New York of a logical and comprehensive plan of transportation upon which not only will all the people be enabled to ride, and to ride with greater comfort and at less cost, but by reason of which the taxable values of the entire city will be developed enormously and by reason of which the city itself will develop along lines proper to the city to develop along—this I consider to be of paramount importance to The City of New York and to overweigh all other considerations and that is what will be the result of the comprehensive scheme we give you.

Why, Mr. Mitchel, every principle you have professed to favor and for which you have striven in this Board is recognized in this plan—every principle. Short term leases—the right of the city to take over anything after ten years upon satisfactory, equitable payment; the swapping of leases upon the east and west legs of the present Manhattan lines. The right of the city to transfer to a second operator—the substitution of the passenger basis for car mileage basis, in the operation of extensions, which sounds technical but means a great deal in computing operating expense. Every principle you have contended for is contained in the report of this committee. The only issue left is the question of dollars and cents, whether or not we are allowing the Interborough more than it is entitled to earn as a reward for the operation of this line. Upon that point alone, pitched against all other considerations for the natural development of this city, we are at issue here this morning; and upon that point alone it appears to be clear

that the company is to make less than it is making today upon a system twice as great.

Mr. Mitchel has gone deeply into an analysis of what the company would do with the money that it would earn under this plan. I repeat, as I have previously said, that that is not the direct concern of the city. It may spend the money it earns for dividends, and if it does spend it for dividends it is entitled to spend it for dividends. It does not matter whether this proceeds through the indirection of a holding company or directly from the company to its stockholders. If they are entitled to it, they are entitled to it. And that is the whole question before this Board.

As to the basis of the plans that we propose, it is suggested that the amount of money we reserve out of the first income for the protection of the operator would create a profit of between 13 and 14 per cent. upon money invested. Gentlemen, it is not a fair proposition to apply all of that reservation to the present money of the operator. That reservation represents not only what he is earning today, but it represents his services in getting new capital, it represents his services in handling this road for years to come, it represents, in short, a return upon actual investment, new and old, in the aggregate and a return for services rendered that in an ordinary business enterprise would be considered modest. And upon such terms the city is able to proceed with the building of the comprehensive system of subways we have proposed.

When it comes to the question of the ability of these lines to carry the citizens of this city in the future I stick confidently to the figures provided by the statisticians of the Public Service Commission. I do not understand Mr. Mitchel's 950,000,000 passengers. I am willing to take the 800,000,000 passengers which the Public Service Commission has estimated will be the carrying power of these roads and the requirement placed upon them.

You cannot say that that capacity will be the exact number reached by merely multiplying the present basis of

mileage, because as the development of the roads continues and as the city's population develops there will be developed many new short haul districts, there will be many new short haul districts in The Bronx, in Queens, in Brooklyn, in Manhattan. The new short haul traffic cannot be based on a limited system, but that it will be enormous must be conceded. It is conceded that 800,000,000 is a fair allowance for comfortable traffic, as New York understands comfortable traffic, in the years of the future, so that we would not only take care of our own carrying charges and realize our own investment but, from the added margin, we would cover over into our treasury more than $2,000,000 a year and still leave a profit to be divided between the two parties.

Now gentlemen, as I have said, the conferees, when they presented that report, proposed a programme they intended should be carried out and that they believed this Board of Estimate desired should be carried out in the way they had presented it, and they were obliged in the course of that procedure to carefully examine into the facts with relation to the questions presented by the Interborough Company. They have presented a report and subscribed to their own belief that this is not only eminently fair to the city as a business proposition but that its rejection at this time would be little short of calamitous. They are perfectly willing to stand on that report.

And I urge the adoption of the resolutions supporting it.

President Mitchel: Mr. McAneny has said that every principle that I have contended for is satisfied by this plan proposed. There is one principle, I think, that he has overlooked which I understand we were all in favor of, and that is that the city should be assured at least of a moderate return upon its own investment. I cannot perceive that this city is assured of even that moderate return by the proposed plan.

I agree with Mr. McAneny that it makes not the

slightest difference what the company does with the money, once it gets it, but in considering the reasons for the company's demand for a certain sum of money it is in point to know what are the company's necessities and what prompts the company to make a demand for more than what I consider, at least, to be a just allowance, and I wish to remind Mr. McAneny in this connection of one thing—I wish first to say that Mr. McAneny first stated that this 9 and 9 per cent. on old and new capital is necessary in order to permit the company to enlist new capital.

President McAneny: Not all of it.

President Mitchel (continuing): Now, I wish to remind him that in the course of these conferences I asked the representatives of the company, believing as I do that the City is financially able to carry this on for itself if it so elects, whether, if the City invested all of the construction money necessary to build the subway and thereby reduced the contribution of the Interborough Company from $75,000,000 to $25,000,000, whether that company would then be satisfied to take 9 per cent. on its old capital and 9 per cent. on its new capital. I was informed, no; that in that event the company would find it necessary to demand more than 9 per cent. upon its old capital in order to bring the total amount up to $11,250,000, because that sum it must have, and must have it simply because it has got to meet the overhead obligations of the Interborough-Metropolitan Company.

Now, when we come to that point where one of the parties to the negotiations insists he must have a certain sum of money, whether adequate and fair or not, then I think we have come to a point where negotiation must end, because there is nothing more to negotiate when it is a demand which cannot be waived, and for that reason I think the statement that this so-called compromise was necessary to enlist private capital is not quite accurate, since even if we relieved the company of the necessity of subscribing private capital for construction it still must stand upon its demand for $11,250,000.

President McAneny: One further word, Mr. Mayor. The point I made was not that this advance was necessary in its entirety to enlist private capital, but partly to enlist private capital. The sum that would be reserved to the company would represent the value of its existing leases, or at least about three-quarters of the value of its existing leases, and incidentally would take care of that margin of safety upon new investment that private capital demands, and that the company demands as a reward for services. I repeat, that so long as conditions are as they are, many other considerations enter, than those mentioned by Mr. Mitchel.

President Miller: Mr. Mayor, perhaps I look at this matter from a different point of view. The direct profit which the City gets from the subways out of the rentals is its smallest profit. To me it is of very little importance whether the City gets one-half of one per cent. more or whether the City gets less or whether the company does likewise. It is, in my mind, the duty of the City to build the best subways, to give the people the best transit. No plan for the whole City, in my judgment, will be adequate unless it includes the present Interborough system. Whether the City has to meet a deficit or whether it has not to meet a deficit, the subways are essential. If the proposition as submitted by the Interborough Railroad is one that should be accepted, the best course for the City would be to take it. The only question is one of price, so that from my point of view throughout this whole transaction the only question has been whether the City could afford to pay the price. I think that the proposition we advocate in the report is a fair one. I think the City will gain in increased benefits a thousand times more than it ever could hope to gain by any other plan or direct income from the leases. Therefore, I think that we should adopt the report as suggested.

The resolution was then lost by the following vote:

Affirmative—The Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx and Richmond—6.

Negative—The Mayor, the Comptroller, President of the Board of Aldermen and the President of the Borough of Queens—10.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment appointed to consider pending transit proposals and the Public Service Commission for the First District, made a joint report to this Board bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railway within the City of New York; and

Whereas, This Board at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The recommendations of the Special Committee of the Board and the Public Service Commission, which were approved by the Board, provided that if the Interborough Company failed to accept the terms and conditions prescribed for the operation of the new lines of rapid transit railway allotted to it, certain said lines to be added to the system to be operated by the Brooklyn Company upon the general terms prescribed for the operation of the lines originally allotted to the said Company; and

Whereas, The Brooklyn Company, in a communication to the Conferees dated July 5, 1911, expressed its willingness to operate the additional lines upon the terms proposed, if so requested by the City; and

Whereas, The Interborough Company has failed to

accept the terms originally proposed to it, and the Board has rejected the proposition of the Conferees to amend the said terms upon a basis that the Interborough Company has stated would be acceptable to it; therefore, be it

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District as subsequently amended, the Board will approve contracts to be prepared by Public Service Commission under the general provisions of the Rapid Transit Act for the construction, equipment and operation of rapid transit railways along the lines now proposed for operation by the Brooklyn Rapid Transit Company—either through instrumentality of such new railroad company as may be organized for the purpose, or through its present agencies—and for the extension and third tracking of the existing elevated lines of the Brooklyn Rapid Transit Company; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit to this Board at the earliest date practicable the forms of the contracts to be entered into for the equipment, operation and maintenance of the lines of rapid transit railway proposed for operation as aforesaid; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit at the earliest date or dates practicable, for the further approval of the Board, the contract or contracts to be entered into for such portions of the said lines as are to be constructed at the expense of the City, and to acquaint the Board so far as practicable in advance of such submission with the incidental plants, specifications and estimates for such construction, in order that the Board may properly allow the appropriation of City funds to be expended in accordance therewith; and be it further

Resolved, That the Special Committee of the Board, con-

sisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond, be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in the carrying out of these recommendations, and in the determination of such questions of detail as were left undetermined in the joint report of the conferees, including the resolutions of this date.

The following discussion ensued:

President McAneny: As I have said, the adoption of the Committee's plan involved automatically the adoption of a definite line of procedure. It was laid down that if the Interborough Company failed to accept the offer of the City on the lines laid down in the Committee's report, that the Public Service Commission should then be placed in such a position that the proposition might go to the Brooklyn Rapid Transit or to its successor in operation. We have proposed what in our judgment is a proper plan for bringing in the Interborough Company upon terms fair to the City and to the Company alike, and that plan is rejected. I do not believe that this matter should be left in the air for one day longer. The conferees have worked long and hard to bring about the result that is now before you for your determination. I believe that inasmuch as a majority of the Board has rejected the pending plan, that the only course for the conferees is now to proceed to take up the alternative, whether or not it incidentally does injury to the City, to The Bronx, Queens, or the west side of Manhattan.

I move the adoption of that part of the resolution now before the Board that relates to the contracts to be granted to the Brooklyn Rapid Transit Company or, as I have said, its successor in the public bidding. It is the purpose of that Company to organize a new company to take over the lines that are under discussion. In so doing, I also move that we approve the offer of the Brooklyn Rapid Transit Company to operate these lines upon the basis the conferees have proposed. I so move.

Comptroller Prendergast: I second the motion.

President Mitchel: This is what we voted that we would do in case the Interborough Rapid Transit Company did not meet the City's demands. We are now called upon to do it. I believe that we should do it for practically the same reasons that I believe we should not have done the other thing.

The routes which will be operated by this Company, under the contract proposed, will be to all intents and purposes the same trunk lines, and extensions as the Triborough route which I for one have always believed in, modified by the Broadway loop.

The outlined system will be practically the same. It means digging subways; it means action; it means the settlement of this difficulty. It differs in every essential from the proposition that we have just rejected. In distinction from the preferential of $11,250,000, a preferential is allowed here of only $3,500,000, and that upon an investment in the Company's own plant, built with its own money upon its own initiative, and not upon a plant built with City money and upon the City's initiative. That preferential represents about 8¾ per cent. upon the old capital stock of the old Brooklyn Company and 6 per cent. on the new, as against 9 per cent. on the old capital stock and 9 per cent. on the new capital stock of the Interborough. For these reasons I think that these resolutions offered by the Committee should be adopted.

President Miller: I voted for the plan to give the Brooklyn Rapid Transit the entire contract on the theory that we would do it if we could not get a reasonable contract from the Interborough Rapid Transit Company. I think we have a reasonable proposal from the Interborough Rapid Transit Company and, therefore, I am opposed to this proposition.

The Mayor: May I inquire with what corporation this contract is to be made?

President McAneny: The lines now under operation by the Brooklyn Rapid Transit Railway Company are owned by the Brooklyn Union Elevated Railroad Company. Some

of them are leased from the Canarsie Company, which would be merged with the other under that corporate control. The new lines should be advertised at public letting under terms which would permit the City, if the authorities so decide, to link them with the old lines.

There would be three separate contracts at least, possibly four. One for operation of the Broadway, Manhattan, and Fourth Avenue, Brooklyn, system with their extensions; one for the proposed line from Union square to the Eastern District of Brooklyn, each of these two to be wholly separable and recapturable; and one for the operation of the existing Brooklyn elevated lines with the Centre street loop as their connecting link.

The contracts will be so drawn, if this plan is to be carried out——

The Mayor: Contracts with whom?

President McAneny: Contracts with the successful bidder; contracts as advertised. They will be so drawn that they will link these systems.

There are, of course, items of legal procedure, items that belong to the requirements of the Rapid Transit Act, that remain to be worked out.

The conferees who proposed this plan have no doubt of the legal ability of the City to enter into it and no doubt whatever of its economic desirability; nor have they any doubt of the fitness of the present plan of the Brooklyn Rapid Transit Company, nor any doubt of the financial ability of the Brooklyn Company to carry out what it undertakes. I trust this resolution will be adopted and that the City will proceed with actual construction as fast as it can.

The Mayor: The so-called offer of the Brooklyn Rapid Transit Company says that the contract is to be made with some corporation hereafter to be formed. I cannot vote to make a contract with any corporation that does not exist and may never exist, and when it does exist, may be some stock jobbing corporation that we would not have anything to do with whatever. This is a very grave matter. In my judg-

ment, we will get into a law-suit that may tie up this matter for a year or two or three years, and I suggest that this matter lie over until we can think it over. Until we can think it over for twenty-four hours or even for a few days. I did not know that any such resolution as this was going to be offered.

President McAneny: It was proposed in a report some weeks ago.

The Mayor: I have very often expressed my views to the Board, and while I always am willing to submit my judgment to better judgments, I give it to you as my opinion that such a resolution, if now passed, would lead to nothing but a lawsuit. The form also of the substance that you want to put into that contract would lead to another lawsuit under the Constitution of this State. I do most sincerely hope that we avoid a lawsuit that will tie us up for two or three years. I think we may well take two or three days to consider this matter. I hope we will do so today—at least without taking action one way or another at this time.

President McAneny: May I say one word in regard to your suggestion? In the first place, as to your query as to how we can make a contract with a company not named. We are not proposing to make a contract but to co-operate with the Public Service Commission in enabling that Commission to prepare the forms of contracts for public advertisement, along such lines as we permit. A company, to do this work, must bid for it successfully, and it must be assumed that that company, whether now in existence or hereafter organized, will be organized under circumstances that will vouch for its reliability. If it is not a proper company, it will not make a contract with The City of New York.

Also, that if there be danger of a lawsuit based on any terms now proposed, that the lawsuit could not possibly restrain the City from building its own lines so to be built by City money.

President Mitchel: By separate contracts for construction.

President McAneny: There are to be three separate operating contracts. The lines that are to be built by the City may proceed at any moment and might have been commenced a year ago if we had seen our way clear at that time. By the time that those lines are completed and ready for operation in conjunction with the Brooklyn system, any questions of laws, in my judgment, may readily be threshed out in the courts, upon agreed cases, and I have no doubt that the courts will gladly co-operate with the City in hurrying those cases, as they will readily recognize that they are matters of great public emergency.

I wish we could meet your Honor's suggestion for further delay, even if for a few days, but it seems to me this is the moment to act. In view of the long delay that has already been occasioned, by reason of the numerous conferences necessary to bring about this plan, I feel that, even if I violate courtesy to you, that it is my duty to move the adoption of this resolution.

President Miller: I voted for the Brooklyn Rapid Transit proposition to come up to 59th street because I thought it proper. I still stand by that. The main reason I advocated the Interborough plan was because I thought it had the best present physical layout and it cannot be exceeded in efficiency by any other plan. It should be taken not for the benefit of the Company but for the benefit of the City.

The Mayor: We will regret it very much, and I predict now that it is a very easy prediction to make, that it will come absolutely to naught. I wanted to say that my understanding is—of course, I have not given as much attention to this, for many reasons, as the Committee has given it—but my understanding is that no investor will invest one dollar in any bonds issued by this company or any company until the question of this guaranty is passed upon

by the highest court in this State, and at the same time, I am advised further, that bankers would hesitate to buy City bonds issued for that purpose until the question has been passed upon by the highest courts in this State.

I therefore say, let us get our bearings, now that the matter has assumed a new aspect, before we do anything else. That has been my attitude from the beginning, and though I well know that my judgment may be inferior to that of other members of the Board who know more about it than I do, I still adhere to my opinion that the matter should not be passed upon at the present moment.

President McAneny: I feel bound, Mr. Mayor, to press my motion for the adoption of this resolution.

The Mayor: Of course, I have delicacy about voting on that question at all. It seems to be overlooked that these routes which are made up for the Brooklyn Rapid Transit Railway Company can never be established until approved by the Mayor, acting independently. The City has seen fit to place that safeguard over such matters as that. It is a power which I do not seek to exercise, and I would be very glad if I did not have it to exercise. Nevertheless, if that be put up to me I will exercise it as Mayor according to my best judgment for the whole City. I therefore ask that this thing stand until we confer together and with wise men of the City and with our neighbors; until we see just what we are about to do. That is all now that I wish to say on the subject.

Comptroller Prendergast: I think the members of the Board are prepared to assume their responsibility for whatever action they may take this morning. I wish to say that I am. I assume, Mr. Mayor, that when the time for your responsibility to be exercised comes that you will be prepared to exercise it. It is simply a question of each man standing up to his own responsibility when the time comes and assuming it. I hope the resolution will now be put to the Board so that we will have a chance to vote on it.

Mr. Charles L. Craig, representing the West End Association, addressed the Board in opposition to the proposed resolution. The resolution was then lost by the following vote:

Affirmative—The Comptroller, President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn and Richmond—11.

Negative—The Mayor and the Presidents of the Boroughs of The Bronx and Queens—5.

(Note—Under section 226 of the Greater New York Charter no resolution or amendment of any resolution shall be passed at the same meeting at which it is originally presented unless twelve votes shall be cast for its adoption.)

The President of the Borough of Manhattan moved that when the Board adjourns it adjourn to meet Friday, July 21, 1911, at 10.30 o'clock, a. m., and the resolution which had just failed of adoption be ordered on the calendar for said date.

Which motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

U. At a meeting of the Board of Estimate and Apportionment held on July 21, 1911, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present—Hon. John Purroy Mitchel, Acting Mayor; William A. Prendergast, Comptroller; Francis P. Bent, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Acting Mayor, Hon. John Purroy Mitchel, presided.

Rapid Transit Railways—Extensions to the Existing System, also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of July 20, 1911, by motion duly adopted, this day was fixed for consideration of a resolution offered by the President of the Borough of Manhattan relative to additional rapid transit railways which failed of adoption on that date, not having received twelve votes on its original presentation, as required by section 226 of the Greater New York Charter.

The President of the Borough of Manhattan again offered the resolution, which is as follows:

Whereas, The Special Committee of the Board of Estimate and Apportionment, appointed to consider pending transit proposals, and the Public Service Commission for the First District, made a joint report to this Board, bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railway within The City of New York; and

Whereas, This Board, at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The recommendations of the Special Committee of the Board and the Public Service Commission, which were approved by the Board, provided that if the Interborough Company failed to accept the terms and conditions prescribed for the operation of the new lines of rapid transit railway allotted to it, certain said lines be added to the system to be operated by the Brooklyn Company upon the general terms prescribed for the operation of the lines originally allotted to the said Company; and

Whereas, The Brooklyn Company, in a communication to the conferees dated July, 1911, expressed its willingness to operate the additional lines upon the terms proposed, if so requested by the City; and

Whereas, The Interborough Company has failed to accept the terms originally proposed to it, and the Board has rejected the proposition of the conferees to amend the said terms upon a basis that the Interborough Company has stated would be acceptable to it; therefore be it

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District, as subsequently amended, the Board will approve contracts to be prepared by the Public Service Commission under the general provisions of the Rapid Transit Act for the construction, equipment and operation of rapid transit railways along the lines now proposed for operation by the Brooklyn Rapid Transit Company, either through the instrumentality of such new railroad company as may be organized for the purpose, or through its present agencies, and for the extension and third tracking of the existing elevated lines of the Brooklyn Rapid Transit Company; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit to this Board at the earliest date practicable the forms of the contracts to be entered into for the equipment, operation and main-

tenance of the lines of rapid transit railway proposed for operation as aforesaid; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit at the earliest date or dates practicable, for the further approval of the Board, the contract or contracts to be entered into for such portions of the said lines as are to be constructed at the expense of the City, and to acquaint the Board, so far as practicable, in advance of such submission with the incidental plans, specifications and estimates for such construction, in order that the Board may properly allow the appropriation of City funds to be expended in accordance therewith; and be it further

Resolved, That the Special Committee of the Board consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in the carrying out of these recommendations, and in the determination of such questions of detail as were left undetermined in the joint report of the conferees, including the resolutions of this date.

Which was adopted by the following vote:

Affirmative—The Acting Mayor, the Comptroller, the Acting President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn and Richmond—14.

Negative—The Presidents of the Boroughs of The Bronx and Queens—2.

V. At a meeting of the Board of Estimate and Apportionment held on February 15, 1912, the following proceedings were had and taken:

Rapid Transit Railways.

At the meeting of June 13, 1911, a report was received from the Conference Committee consisting of the Presidents of the Boroughs of Manhattan, The Bronx and Richmond, and the Public Service Commission for the First District, relative to the construction, maintenance and operation of additions, and extensions to the existing rapid transit railway and the construction and operation of additional rapid transit railways.

By resolution adopted June 21, 1911, the Committee of this Board in conjunction with the Public Service Commission, was requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of the same.

The President of the Borough of Manhattan, as Chairman of the Committee, presented the following:

February 13, 1912.

To the Honorable Board of Estimate and Apportionment:

Sirs—In the report submitted to your Board by the members of the Public Service Commission for the First District, and by your Special Committee on transit proposals, dated June 5, 1911, it was suggested that the determination of projected lines in South Brooklyn be deferred in order to enable the conferees to consider with more care the various alternatives presented for the disposition of these lines. In accepting generally the recommendations of the report, your Board accordingly adopted the following resolutions:

> "Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a

supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn, to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of same."

The conferees have carefully considered the plans of the original Tri-Borough System which involve the extension of the 4th avenue subway from its present terminus to Fort Hamilton, with another extension branching out at about 39th street, and extending as a subway under 39th street, New Utrecht avenue and West End Avenue, and as an elevated along Stillwell and other avenues to Coney Island. It has been suggested, as an alternative to this plan, that elevated lines be generally substituted for the lines included in the Tri-Borough System for South Brooklyn. After a more complete study of the situation than was possible in connection with the other matters embraced in the report of June 5, the conferees have come to the conclusion that the lines in South Brooklyn that should be adopted as a basis for inviting proposals should be:

(1) An extension of the present 4th avenue line from 43d street as a four-track subway to a point to be later determined, where connection can be made with an extension to Staten Island and thence as a two-track subway (so located in the street that at a later time and when necessary two additional tracks may be added) to 86th street.

(2) An extension of the 4th avenue subway through 39th street as a three-track subway to New Utrecht avenue, and thence as a three-track elevated line to Coney Island.

The modified layout as now recommended would not involve any reduction in capacity from that which would be provided by the Tri-Borough layout.

It is estimated that the construction of the line toward Fort Hamilton as a subway would increase the cost of the proposed line by about $4,000,000 over what it would cost

if the present 3d avenue elevated line were extended to Fort Hamilton. In the report of June 5, 1911, the conferees recommended that at least $5,000,000 be reserved above the $12,000,000 estimated for the South Brooklyn lines. It will be noted that the increase by reason of building the 4th avenue extension as a subway is well within the figure named.

The Brooklyn Rapid Transit Company has already proposed to operate the above lines, and in addition, if the plan of elevated structures for the Beach lines be adopted:

(1) A three-track elevated line on the Sea Beach right of way from 62d street to Coney Island; and

(2) A three-track elevated line on the old Culver route from 10th avenue to Coney Island,

—in connection with its existing system and a proposed new system to consist of the Broadway-Lexington route, the 4th avenue route, the Brooklyn loop lines, Broadway and 59th street lines, and the lines to Astoria and Corona in Queens.

In this way South Brooklyn would obtain all rail connection with other parts of Brooklyn and Manhattan through lines of large capacity. The Company has, moreover, proposed to contribute $12,000,000 toward the new city lines in South Brooklyn which should cover all of the cost except the additional amount necessary by reason of continuing the 4th avenue line as a subway toward Fort Hamilton. In connection with this branch, the Company has also proposed to exchange free transfers to the surface lines to Fort Hamilton, so that transfers to and from such surface lines could be made at 86th street without additional cost. If the Brooklyn company be the successful bidder, it also proposed that if the elevated lines are constructed along the routes on which it is now operating rapid transit trains upon the surface, the Company would substitute car for train service upon the surface of the street and confine the train service to the elevated roads. Aside from the benefit to the district by reason of the connections with the existing system and the proposed new city system above referred to, the con-

struction, as suggested, would mean very substantial relief to the South Brooklyn section since the existing facilities would be continued with the elimination of rapid transit operation upon the surface of the streets while there would be added improved rapid transit elevated railroad service.

If the operation of the proposed new lines fall to the Brooklyn Rapid Transit Company, it is part of that Company's plan that the elevated extensions, with the exception of that on the Sea Beach right of way, shall be treated as extensions of the 4th avenue system, title to each to be vested in the City and each to be recapturable, as the main system would be, at any time after ten years upon payment of the Company's investment, such payment to decrease from year to year and finally disappear.

The conferees are of the opinion that the City should determine at the earliest time practicable whether the trunk line railways now discharging freight along the Staten Island water-front would be prepared to join with the City in the construction of a tunnel to Brooklyn that could be used jointly by the private roads for the carriage of freight and by the City for the desired transit connection with the 4th avenue route. The cost of such a tunnel might be divided between the Companies and the City, if such a plan prove feasible, the City's share in that event not to exceed six million dollars. It has also been pointed out that the bed of such a tunnel might be used for the carriage to Staten Island of the water mains of the Catskill system, which it is now proposed to lay across the Narrows, and that the saving that would thus be effected in the cost of the aqueduct system would, according to estimates of the Engineers, be $1,000,000 thus adding additional argument for an early undertaking of the work.

The President of the Borough of The Bronx, while concurring generally in the recommendations of this report, is of the opinion that the 4th avenue subway should not be extended beyond the proposed point of conjunction with the Staten Island line, for the reason that, in his judgment,

the additional outlay of money for a subway, rather than an elevated structure, would not be justified by the traffic returns from the area to be served. If the subway is not extended beyond 65th street, one of the suggested points of conjunction with the Staten Island line, the saving effected would amount to $1,300,000.

Commissioner Maltbie of the Public Service Commission concurs in the recommendations as to the several beach lines, but does not believe that the 4th avenue line should be extended at present beyond its present terminus. He has urged, as a substitute, that the 3d avenue elevated line, which now runs to 65th street, be third-tracked and extended as a subway to Fort Hamilton; the 4th avenue line below 39th street to be built when needed for a Staten Island line or when traffic demands the operation of two lines one block apart. The reduction in expense through the adoption of the line proposed by Mr. Maltbie is estimated at $2,400,000.

The majority of the conferees are of the opinion, however, that it would be better policy to extend the subway at once along the lines originally proposed, at least as far as 86th street, and that, although some additional cost is involved, the neighborhood to be served is entitled to this concession.

All of which is respectfully submitted.

George McAneny, Chairman; Cyrus C. Miller, George Cromwell, Committee of the Board of Estimate and Apportionment.

William R. Willcox, Chairman; William McCarroll, Milo R. Maltbie, John E. Eustis, Public Service Commission for the First District.

Consideration of the report was deferred until the next meeting of the Board, February 21, 1912.

W. At a meeting of the Board of Estimate and Apportionment held on February 29, 1912, the following proceedings were had and taken:

RAPID TRANSIT RAILWAYS.

The President of the Borough of Manhattan, as Chairman of the Committee on Pending Transit Proposals, informed the Board that a general proposal for the operation of subway and elevated railways had been received by the Public Service Commission from the Interborough Rapid Transit Company under date of February 27, 1912, and would in due course be transmitted by the said Commission for the consideration of this Board. He asked that the Board authorize the Committee on Transit Proposals, in the event of the receipt of the proposal in question between meeting dates, to prepare its report and recommendations with relation thereto without waiting for a formal reference from the Board itself, and moved that such authority be granted.

The motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

X. At a meeting of the Board of Estimate and Apportionment held on March 14, 1912, the following proceedings were had and taken:

RAPID TRANSIT RAILWAYS.

In the matter of the offer of the Interborough Rapid Transit Company to construct and operate certain additions to the existing rapid transit railway and additional rapid transit railways.

The President of the Borough of Manhattan as Chairman of the Committee on Transit Proposals of this Board presented the following:

To the Board of Estimate and Apportionment of the City of New York:

In the development of comprehensive additions to rapid transit, this Commission deemed it advisable to transmit to you, under date of December 20, 1910, copies of the propositions of the Interborough Rapid Transit Company, dated December 5, 1910, and June 10, 1910, for extending the City's subway system and for third-tracking and extending the elevated system operated by that company.

In its communication the Commission stated that, provided certain features not then satisfactory could be properly adjusted, it was prepared to accept such propositions and asked your Honorable Board to consider their general provisions.

On January 19, 1911, and January 31, 1911, you authorized the appointment of a committee and empowered it to confer with the Commission and with representatives of the companies interested, and to report.

During the conferences that followed, proposals were submitted by the Brooklyn Rapid Transit Company for the equipment and operation of rapid transit railroads and a further proposition was made by the Interborough Rapid Transit Company, extending and amplifying the proposition of December 5, 1910. After a thorough and prolonged consideration of these propositions, and of the City's needs in connection with the general rapid transit situation, a report, dated June 5, 1911, was made to your Honorable Board.

The conclusion of the conferees, as expressed in such report, was that a dual system, to be operated in part by the Interborough Rapid Transit Company and in part by the Brooklyn Rapid Transit Company, upon the terms specified in the report, would best serve the present and

future needs of the City. A recommendation was made, however, of an alternative in case either or both companies declined to accept the terms and conditions set forth in the report, that is, if the Interborough Rapid Transit Company accepted and the Brooklyn Rapid Transit Company refused to accept, provision was made whereby a complete system might be operated by the Interborough Rapid Transit Company, while, if the Brooklyn Rapid Transit Company accepted and the Interborough Rapid Transit Company refused to accept, provision was made whereby a complete system might be operated by the Brooklyn Rapid Transit Company. In the event of both companies declining, the Commission was to proceed with the construction of the Tri-Borough system, as planned by it.

Your Honorable Board, on June 21, 1911, unanimously approved of such report, with certain minor changes mentioned in the resolutions of that date, and, following such approval, the plan was submitted to the operating companies. The Brooklyn Rapid Transit Company, under date of June 27, 1911, accepted the report with certain modifications expressed in such letter, and on June 30, 1911, your Honorable Board adopted further resolutions, modifying the resolutions of June 21, 1911, in the particulars therein mentioned. Under date of July 5, 1911, the Brooklyn Rapid Transit Company accepted the terms outlined in such report and such resolutions, but the Interborough Rapid Transit Company declined to accept, withdrawing its offer of December 5, 1910, as extended and amplified by its offer of March 2, 1911.

Following the refusal of the Interborough Rapid Transit Company, conferences were resumed with that company which led to the submission of the offer of July 19, 1911. In this proposition the Interborough R. T. Co. offered to

accept the lines proposed for operation by it in the report of June 5, 1911, but insisted upon different financial terms.

Under date of July 20, 1911, the committee of your Honorable Board and a majority of the Commission presented a report commending this offer of the Interborough Rapid Transit Company as a part of the dual plan for rapid transit, but your Honorable Board refused to accept such recommendation and adopted resolutions disapproving the report.

On July 21, 1911, your Honorable Board adopted further resolutions in which were embodied your conclusions that contracts should be so drawn as to make possible a formal proposal by the Brooklyn Rapid Transit Company, or a company formed in its interest, for the equipment and operation of the entire system of new subways to be constructed by the City, and further, that contracts for construction should be proceeded with under any circumstances.

In accordance with this program, the Commission has proceeded in the awarding of contracts for construction, in the laying out of additional routes and in the preparation of a form of contract for equipment and operation.

The Commission immediately awarded contracts for certain sections on the Broadway-Lexington Avenue route and readvertised and awarded contracts for other sections. As soon as these contracts were consented to by your Honorable Board, they were executed and delivered to the contractors. In this connection, it is to be noted that all sections for which contracts have been executed are capable of inclusion either in the larger Brooklyn Rapid Transit plan or in an independent system. The aggregate of contracts executed since July 21, 1911, is now $30,719,164.54, and active work is progressing under them. Such contracts are shown in the following table:

Section.	Name of Contractor.	Awarded by Commission.	Consented to by Board of Est. and Appt.	Amount of Contract.
6	Bradley Contracting Co.	July 5, 1911	July 21, 1911	$3,634,213 50
8	Bradley Contracting Co.	July 5, 1911	July 21, 1911	3,369,484 20
10	Bradley Contracting Co.	July 5, 1911	July 21, 1911	3,253,072 80
11	Bradley Contracting Co.	July 5, 1911	July 21, 1911	3,132,195 05
13	Bradley Contracting Co.	Oct. 31, 1911	Nov. 16, 1911	4,071,416 50
12	Oscar Daniels Co.	Aug. 1, 1911	Aug. 3, 1911	2,825,740 74
15	Hagerty-Drummond Co.	Oct. 10, 1911	Oct. 26, 1911	3,820,129 75
9	Patrick McGovern	Dec. 8, 1911	Feb. 1, 1912	1,961,997 00
3	Underpinning & Foundation Co.	Jan. 12, 1912	Jan. 18, 1912	2,295,086 50
2	Degnon Contracting Co.	Jan. 24, 1912	Feb. 1, 1912	2,355,828 50
	Total			$30,719,164 54
	In addition to the above, the Commission has awarded the following contract which has not yet been acted upon by your Honorable Board:			
5	Metropolitan Contracting Co.	July 26, 1911		2,419,127 20

Active construction work is under way on these contracts on the Broadway-Lexington Avenue route, as well as on the Fourth Avenue and Centre Street contracts, which, together, aggregate $60,000,000. In other words, while time is being taken for careful consideration of the contracts for operation, construction is proceeding as rapidly as the work itself will allow, in harmony with the action of your Honorable Board in July last.

In the matter of routes, several lines, included for operation by the Brooklyn Rapid Transit Company under the resolution of July 21, 1911, had not been legalized. The Commission prepared the necessary plans for these routes and the appropriate resolutions were adopted by the Commission and approved by the Board of Estimate and Apportionment on the dates mentioned below. The Mayor has not, however, as yet, given his separate consent, as provided for by the Rapid Transit Act. In consequence, it has not been possible to apply to the property owners for their consents, or in the event of their refusal, to the Appellate Division of the Supreme Court in lieu thereof. This consent of the Mayor and of the property owners is a necessary prerequisite to the preparation by the Commission of the contracts and plans under which construction might be begun. The routes are:

Route	Date of Adoption by Public Service Commission.	Consented to by Board of Estimate and Apportionment.
Eastern Parkway, modified, including Flatbush Ave. with the Brighton Beach connection, the Nostrand Ave. connection, the Utica Ave. connection, and the Livonia Avenue connection	Mar. 3, 1911	May 25, 1911
Nostrand Avenue	Mar. 3, 1911	May 25, 1911
Livonia Avenue	Mar. 3, 1911	May 25, 1911
Battery-East River-Atlantic Avenue	June 30, 1911	July 27, 1911
59th St., Woodside and Astoria	Oct. 10, 1911	Oct. 26, 1911
Roosevelt Avenue	Oct. 10, 1911	Oct. 26, 1911

With reference to the proposed contract for equipment and operation, it should be thoroughly understood that, as was stated by the Appellate Division of the Supreme Court in the Admiral Realty Company suit, the negotiation and conferences of the past year have been informal and non-statutory. Legal agreements can be entered into only by following the procedure laid down in the Rapid Transit Act.

A form of contract for equipment and operation of a general city system must contain provisions dealing with every phase of equipment and operation in such a way as will assure fair relations between the City, the public and the operating company at any and all times during the period of the contract. Such a contract, because of its magnitude and importance, must of necessity require careful and deliberate preparation. The Counsel to the Commission has been engaged upon this matter and has prepared a draft which, in its final form, will be submitted to a public hearing, as required by law.

This briefly stated, represents the progress so far made under the program of July 21, 1911. The resolutions of that date constitute the last official expression of opinion on the part of your Honorable Board. So far as the record is concerned, these resolutions indicate that you would consent to contracts whereby the entire new city system would be operated by the Brooklyn Rapid Transit Company, or a company formed to carry out its proposal, although it is to be noted that the contract for section 5 of the Lexington

Avenue Route, sent to your Honorable Board on July 26, 1911, has not as yet been acted upon.

The Commission is now in receipt of a communication, under date of February 27, 1912, from the Interborough Rapid Transit Company, submitting another proposition as to the lines suggested for operation by that company in the Joint Report, with modified terms. From this, it is apparent that that company is again desirous of participating in rapid transit development. A copy of the communication from the company is transmitted herewith. The essential points of this new proposition are:

1. The Interborough Rapid Transit Company to equip the lines proposed for operation by it in the report of June 5, 1911, to contribute $56,000,000 toward the construction thereof, and, when constructed and equipped, to maintain and operate them for a term of forty-nine years, in conjunction with the existing subway system, for a single five-cent fare.

2. The leases of the existing subways (Contracts Nos. 1 and 2) to be leveled, so that the subways constructed under these contracts and the new subways shall fall into the City's possession at one and the same time, provision to be made for exchanging part of the new subway lines for part of the old, so that in the event of recapture the City may take over an east side or west side line.

3. The new lines to be subject to recapture at the end of ten years, in accordance with the provisions of the Rapid Transit Act. This recapture may be exercised directly by the City or through a new contractor.

4. The Belmont Tunnel to be turned in as part of the general system, at a valuation of $3,000,000.

5. The receipts from the existing and new subway lines to be pooled, and from the gross receipts of both lines there is to be deducted and paid, in the order named:

(a) Operating expenses, including damages for accidents, provisions for depreciation, renewals and obsolescence, taxes, insurance and rentals payable to the City

under existing subway contracts and amortization and brokerage charges.

(b) A sum to be retained by the company amounting to $6,335,000 per annum, stated by the company as the average annual income received by it from the operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911.

(c) A sum equal to six per cent. per annum upon the new investment of the Interborough Company in the new lines, estimated at $77,000,000, or $56,000,000 for new construction, and $21,000,000 for new equipment. This, with the present investment of the company in existing subways, estimated at $48,000,000, would bring its total investment in the new and old lines to $125,000,000.

(d) To be paid to the City, interest and sinking fund upon the bonds issued by the City for the construction of new lines and such further sum as would bring the payments to be made to the City up to an amount equal to 8.76 per cent. upon its capital investment in the original construction of the new subways.

(e) Any amount remaining to be divided equally between the City and the company, share and share alike.

6. Future subway extensions required by the City may be added to the new system and will be equipped by the company as part of the entire system upon a separate accounting system, based upon the per passenger method of apportionment.

7. The Interborough Company to expend approximately $30,000,000 in the third-tracking and extensions of the Manhattan Elevated Railroad system and to pay therefor to the City a percentage of the increased receipts of that system.

The details of the terms for operation, as expressed in this later communication from the Interborough Rapid Transit Company, are, in general, similar to the terms as set forth by the conferees in the report of July 20, 1911. There are, however, certain modifications in the terms now suggested by the Interborough that are to the advantage of the City. Proceedings are now pending in the courts, in

which questions are raised as to certain important features of the proposition, particularly as to preferential payments to the operating companies. It may be added that this provision for preferential payments is a part of the present proposition of the Interborough Rapid Transit Company, as well as of previous ones, and it is also a part of the proposition of the Brooklyn Rapid Transit Company. Until a final decision has been obtained from the Courts, the Commission does not deem it advisable to discuss such terms at length. The Commission must give consideration to propositions from companies after they have been presented, as provided by law. Consequently, the Commission cannot be, and is not, foreclosed from accepting a better proposition if it is presented in a legal way. The Commission believes, however, that the present Interborough proposition is so advantageous to the City and to the traveling public that every proper means should be used to secure it as a part of the dual system.

By the dual system is meant, in general, the proposed adjustment of routes as requested in the conferees' joint report, whereby, under proper forms of contract, as required by the Rapid Transit Act, additional lines would be added to the Interborough and Brooklyn Rapid Transit systems, as follows:

Interborough Rapid Transit Company.	Brooklyn Rapid Transit Company.
Lexington Avenue.	Extensions of present Brooklyn Rapid Transit lines, including South Brooklyn lines, reconstructed.
Southern Boulevard and Westchester Avenue.	Broadway Seventh Avenue.
River and Jerome Avenue to Woodlawn Cemetery.	Battery to 59th Street.
White Plains Road and Gun Hill Road.	59th Street to Queens Plaza.
42nd Street, Times Square and Steinway Tunnel.	Battery tunnel.
Steinway Tunnel.	Spring Street.
Steinway Tunnel extension to Queens Plaza.	Nassau Street.
Astoria line.	Union Square to Eastern District.
Woodside and Corona.	Fourth Avenue Subway.
7th Avenue, Times Square to Battery.	Centre Street Loop.
Whitehall Tunnel to Borough Hall, Brooklyn.	Flatbush Avenue connection.
Flatbush Avenue and Eastern Parkway to Buffalo Avenue.	
Nostrand Avenue—Flatbush Avenue.	
Livonia Avenue to New Lots Road.	

Under this proposal of the Interborough Rapid Transit Company the City would gain (1) the Seventh avenue line to Brooklyn; (2), the Steinway Tunnel, with its extensions to Times Square and to the Queensboro Bridge Plaza; (3) the extensions and additions to the elevated lines of the Interborough Company; (4), the White Plains Road extension, and (5), increased utilization of the present City-owned subway, upon which the City has already expended about $60,000,000. Under the dual system, with a total construction cost of $216,000,000, the City would spend for construction on lines other than the Fourth avenue and Centre street subways about $125,000,000. Under the larger Brooklyn Rapid Transit plan the City would spend, on lines other than the Fourth avenue and Centre street subways, about $145,000,000. Under the dual system, the Brooklyn Rapid Transit Company would spend $30,000,000 in reconstructing, elevating and third-tracking its own lines, and the Interborough Company would spend some $30,000,000 on its elevated lines. Under the Brooklyn Rapid Transit plan, that company would spend the same amount, namely, $30,000,000.

In their Joint Report, the conferees said, page 44:

> "We are advised, also, that, in addition to the $60,000,000 reserved especially for subway purposes, the City can readily spare $80,000,000 from this sum (i. e., total City credit) for use during the next five years, or $140,000,000 in all."

It will thus be seen that the expenditure necessary for the dual system, $125,000,000, is well within the amount then deemed available for rapid transit.

The Commission has in preparation the necessary plans and resolutions for the legalization of routes incident to the dual system. They will be submitted to your Honorable Board and to the Mayor at the earliest moment. This preliminary step is important for, in the opinion of the Com-

mission, the form of contract for equipment and operation to be legally submitted to prospective operators, as required by the Rapid Transit Act, should include all routes and connections that would go to make up either the Brooklyn Rapid Transit system or the Interborough Rapid Transit system, under the dual plan, or the larger Brooklyn Rapid Transit system, or an independent system.

If the various routes, heretofore approved by the Commission and those upon which the Commission will shortly transmit resolutions, are promptly legalized, the Commission will proceed with the preparation of contracts for operation and with construction contracts which will be from time to time transmitted to your Honorable Board for consent and appropriation of the required moneys to carry them into effect. Respectfully yours,

WILLIAM R. WILLCOX, Chairman.

Interborough Rapid Transit Company, 165 Broadway, New York, February 27, 1912.

Theodore P. Shonts, President and Chairman of Executive Committee.

Hon. WM. R. WILLCOX, *Chairman, Public Service Commission for First District*, 154 Nassau Street, New York City:

Dear Sir:—In connection with the proposal of this Company regarding the subway and elevated lines and improvements described therein, I beg to state that the statement marked "Schedule A," hereto attached shows how the average annual income referred to in paragraph (*b*), section 12, of the proposal, under the heading "Pooling of Receipts and Payments Therefrom," is ascertained.

Further, while it is not necessary to embody it in our proposal, I beg to advise you that we have informed our bankers that the city and the company reserve the right to submit, either severally or jointly, to the proper court the determination of any and all questions regarding the legal

validity and sufficiency of the formal contract to be made. Therefore, the city and the company should within at least sixty days after due execution and delivery of the said formal contract, begin such proceedings as either or both may deem desirable or necessary for the foregoing purposes.

Very respectfully,

Incl. T. P. Shonts, President.

Schedule "A"

Showing average annual income of the Interborough Rapid Transit Company from operation of existing subway lines and equipment for the two years ending June 30th, 1910 and 1911.

Year ending June 30th	1910.	1911.
Gross Operating Revenue	$13,932,505	$14,353,206
Operating Expenses	4,756,449	5,929,653
Net Operating Revenue	$ 9,176,056	$ 8,423,553
Taxes	225,280	268,438
Income from Operation	$ 8,950,776	$ 8,155,115
Interest and Sinking Fund on City Bonds	2,181,204	2,254,692
Resulting Net Income	$ 6,769,572	$ 5,900,423
The Average Sum—as set forth in Paragraph (*b*) of Section 12 of the Company's proposal of February, 1912, under the heading "Pooling of Receipts and Payments Therefrom"—to be paid to the Company during each of the 49 years of the proposed lease, is		6,335,000

Interborough Rapid Transit Company,
By T. P. Shonts, President.

Interborough Rapid Transit Company, 165 Broadway, New York, February 27, 1912.

Theodore P. Shonts, President and Chairman of Executive Committee.

Hon. Wm. R. Wilcox, *Chairman, Public Service Commission for First District*, 154 Nassau Street, New York City:

Dear Sir:—In order that there should be before the public authorities a complete statement of the subway and

elevated extensions and improvements concerning which the Interborough Rapid Transit Company is prepared to enter into a contract with the city, the following offer is submitted on the company's behalf:

The Company will accept the lines assigned to it by the city in the Joint Transit Conferees' report in the Summer of 1911, and will, under the terms hereinafter stated, construct, contribute to the construction of, equip and operate such new subway lines, and construct, equip and operate the third-tracking, improvements and extensions of the elevated railroads as follows:

I. Subway Lines.

(*a*) A four-track subway line proceeding from Park Avenue at a point between 32nd Street and 42nd Street to a point on Lexington Avenue between 43rd and 44th Streets; thence under Lexington Avenue and the Harlem River to about 135th Street; thence via Park Avenue, private property and Mott Avenue with four tracks to a point of connection with the West Farms Division of the existing subway at 149th Street; thence three tracks, part subway and part elevated, to 162d Street; thence as an elevated three-track line to the intersection of Jerome Avenue with Woodlawn Road, adjoining Woodlawn Cemetery. The company, from an operating standpoint, would prefer that this line begin as near to 42nd Street as possible.

(*b*) A two-track subway line diversing from the proposed Lexington Avenue line at or about 135th Street, under private property, through 138th Street to Southern Boulevard; thence to Whitlock Avenue and to Westchester Avenue; and thence as a two and three-track elevated line through Westchester Avenue to Pelham Bay Park.

(*c*) A subway line proceeding southerly from Times Square under Seventh Avenue as extended, Varick Street, West Broadway, and Greenwich Street to the Battery, as far as possible as a four-track road.

(*d*) A two-track tunnel from Whitehall street, via Montague street, to Borough Hall in Brooklyn; or a two-track tunnel via Liberty street, Maiden Lane and Pineapple street, to Borough Hall in Brooklyn.

(*e*) A two-track subway line running easterly under 42d street from Times Square to point of conjunction with the Belmont Tunnel.

(*f*) The Belmont Tunnel continued as a two-track subway via Van Alst avenue and Fourth street, northward under Hunter's Point avenue; thence as a two and three-track elevated road over the yards of the Long Island Railroad northward, curving into Davis street; thence via Davis street, Ely avenue, Williams street, and such private property as may be necessary to the Queensborough Bridge Plaza, and thence along the Queensborough Bridge Plaza to Jackson avenue, and via Diagonal street, Thompson avenue and Greenpoint avenue to Woodside, and to Sycamore avenue in Corona.

(*g*) A two and three-track elevated railroad from Queensborough Plaza via Jackson avenue, Debevoise avenue to Ditmars avenue, Astoria.

(*h*) A two and three-track elevated line proceeding from a connection with the West Farms Division of the present subway in Boston Road near 179th street, thence over private property and intersecting streets and along the west side of the New York, Westchester and Boston Railway to White Plains avenue, and thence via White Plains avenue to its projected terminus at Becker avenue near the City Line.

(*i*) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush Avenue and Eastern Parkway to Buffalo avenue (subject to the right of the Public Service Commission to construct, or permit the construction and operation of, additional tracks on Flatbush avenue between the said terminus of the existing subway at Atlantic avenue, Brooklyn, and

Prospect Park Circle); also a two-track subway extension from Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from Eastern Parkway via East 98th street and Livonia avenue through the Brownsville District to New Lots Road.

TRACKAGE RESERVATIONS.

The right is reserved by the city, and concurred in by the company, to grant trackage rights over the following sections of the enlarged subway system on a basis which shall be equitable to each company exercising such rights;

(*a*) Between the operators of the subway and elevated systems, respectively, or their successors, over the Jerome Avenue Line; and the White Plains Road Extension in The Bronx;

(*b*) Between the Interborough and any other operator, or the successors of either, of the lines to Astoria and Corona, converging at the Queensborough Bridge Plaza.

II. ELEVATED LINES, THIRD-TRACKING, IMPROVEMENTS AND EXTENSIONS.

(*a*) On the Second Avenue Line, the completion of the third track from City Hall station to 129th street; on the Third Avenue Line, the completion of the third track from City Hall station to 129th street and Harlem River, with the necessary track changes to abolish grade crossings at Chatham Square; because of the junction of the third tracks of the Second and Third Avenue lines at the Harlem River the construction of a four-track bridge and a four-track line between the Harlem River and 144th street, and the extension of a third track thence to 147th street, with the privilege of thereafter extending the third track to the present terminus of the Third Avenue Line at Bronx Park; and on the Ninth Avenue Line, the completion of the third track from Rector street to 155th street.

(*b*) The construction of a two-track elevated road from about 157th street and Eighth avenue across Putnam

Bridge over the Harlem River; thence over the right of way of the New York Central Railroad and private property; thence as a tunnel under private property and 162d street, emerging as an elevated structure in 162nd street near Jerome avenue; thence through 162nd street to River avenue, connecting with the elevated structure of the Jerome Avenue extension of the subway.

(*c*) From the Third Avenue Line at about 143rd street, a two-track extension through private property and Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Brook avenue.

(*d*) A two-track extension from the Third Avenue Line at Fordham avenue through Webster avenue and Gun Hill Road to White Plains avenue, connecting at that point with the Becker avenue extension of the subway in White Plains Road.

(*e*) The construction of a two-track extension from the Second Avenue Line, across the Queensborough Bridge to the Queensborough Bridge Plaza.

TERMS APPLYING TO SUBWAY EXTENSIONS.

Construction.

1. The subway lines herein proposed shall be constructed according to plans of the Public Service Commission for this District, and under contracts to be awarded by the Commission, on behalf of the city, after public bidding, to responsible contractors, and the construction thereof shall proceed in such order as the Commission shall direct, due regard, however, being given to the necessity of providing relief from the present traffic congestion and to proper facility and economy in construction. It is understood, however, that in the preparation and execution of the plans and contracts, there shall be active and cordial co-operation between the company and the Commission, so that the interests of the Company on account of its furnishing at least $56,000,000 of the capital for construction shall

be treated fairly and equitably. The formal contract between the city and the company shall provide, first, that the obligation of the city for contracts already let for sections of subway in Lexington avenue shall be accepted as part of the city's share of the total cost of construction; second, for the provision from time to time of the additional capital required for construction or equipment purposes; and such other features as the subway construction situation may require.

The cost of construction, to the extent hereinafter provided, as the work proceeds will be paid monthly, one-half by the city and one-half by the Interborough Company, and the cost of equipment to the extent hereinafter provided, will be defrayed wholly by the Interborough Company.

2. The costs of construction or equipment, whether borne by the city or by the Interborough Company, or upon a basis of division between the City and the Interborough Company, shall be the actual cost, and shall include:

(*a*) All contracts for original construction work; or

(*b*) For roadbed, tracks and station finish;

(*c*) All carrying charges during construction;

(*d*) Engineering expenses, including those of the Public Service Commission to these lines;

(*e*) Extras and damages;

(*f*) Real estate and easements; and

(*g*) Such other incidental charges as may be agreed upon; the cost of third-rail and signal system to be charged to equipment.

Any incidental fee damage for rights of way in acquiring of streets allowed by the courts shall be paid from the city's general funds and not from the subway construction fund. Subject to the use thereof for transit purposes, the city may sell, lease or otherwise dispose of the surface of all real estate not required for subway uses.

3. Brokerage charges not to exceed three per cent of the $7,000,000 furnished by the company towards the cost of construction and equipment, shall be allowed to be amor-

tized from the earnings of the property during the life of the lease; but if by virtue of the ten-year recapture provision any part of the lines constructed, or equipment, shall be taken over by the city, the city shall pay the actual cost to the company of its investment in such construction and equipment, less such portion of the financing cost to the company as may have been amortized.

FORTY-NINE YEAR LEASE.

4. The new lines will be operated by the Interborough Company under a contract with the city which will extend over a period of forty-nine years from the time when the new subways are put into complete operation; provided, however, that the date from which the new leases shall run shall not be later than four years from the time that formal contract is entered into between the city and the company, unless strikes, injunctions or other causes beyond the control of the company shall prevent the opening of the new lines within said period, in which event the necessary delay caused by strikes, injunction or other causes shall be added to the period of four years as aforesaid.

LEVELING OF EXISTING LEASES TO A FORTY-NINE YEAR PERIOD.

5. The Interborough Company thereupon proposes that its existing leases from the city under which the original subway, from Ann street northward, and the Brooklyn Extension, from Ann street to Atlantic avenue, Brooklyn, are operated, together with the right to renewal terms thereunder, shall be leveled so that the leases of the existing subway shall be co-terminous with the lease or franchise to the Interborough Company to operate the new subway lines herein proposed.

EXCHANGE OF LEGS OF PRESENT SUBWAY.

6. So that the city, if it so elects, may obtain possession of either a complete East Side or a complete West Side subway line, the Interborough Company will consent, in event

of the necessary legislation having been secured, in the securing of which it will co-operate, and provided in lieu of any duly authorized mortgage be not disturbed, to a modification of contracts Nos. 1 and 2 under which the existing subways are operated, so that either that portion of the existing subway system extending southward from 42nd street in Manhattan to Atlantic Avenue, Brooklyn, or north of 42nd Street to The Bronx, shall be held under a lease terminable at any time after ten years from the beginning of operation of the proposed Seventh Avenue, or Lexington Avenue line, upon receiving compensation therefor the right to hold either the proposed Seventh Avenue Line from Times Square southward to Borough Hall, Brooklyn, or the proposed Lexington Avenue Line and its said extensions from 42nd Street northward into The Bronx, under a non-terminable lease for forty-nine years from the time when the new subways are put into complete operation; the difference in values upon the exchange to be adjusted by agreement between the city and the company, or, if they cannot agree, to be fixed by arbitration upon terms and conditions to be agreed upon.

RECAPTURE.

7. The new lines constructed under this agreement (except either the proposed Seventh Avenue line from Times Square to Borough Hall in Brooklyn, or the proposed Lexington Avenue line and its said extension from 42nd Street northward into the Bronx, in event of the exchange of legs hereinbefore proposed), as hereinafter provided, shall be subject to the right of the city to take over such new lines at any time after ten years of operation, upon the terms of paying to the Interborough Company the amount of its investment in construction, plus 15 per centum, which aggregate sum shall gradually decrease (under the provisions of the contract) as the term continues, so that at the end of the full term of the contract no such amount shall be paid; and the actual cost of the equipment attaching to such lines—

not including as a part of the cost any sums spent for depreciation or renewal thereof — plus fifteen per centum thereof, less the amount accrued in any sinking fund created for the amortization of the company's investment in equipment and any deferred maintenance charges with respect thereto. The right of recapture provided for in this paragraph shall nevertheless be exercised by the city with respect to the whole of any one or more of the following group of lines:

(*a*) The Seventh Avenue line, including the extensions under the East River to Borough Hall, Brooklyn; the Lexington Avenue line, together with the extension to Pelham Bay Park and on Jerome Avenue to the intersection of the latter Avenue with Woodlawn Road, adjoining Woodlawn Cemetery.

(*b*) The 42nd Street line from Times Square easterly, including the Belmont Tunnel and the extensions to Corona and Astoria.

(*c*) The Brooklyn extensions previously described, *i. e.*, a four-track subway line from the terminus of the existing system at Atlantic Avenue, Brooklyn, under Flatbush Avenue and the Eastern Parkway to Buffalo Avenue; also a two-track subway extension from Eastern Parkway under Nostrand Avenue to Flatbush Avenue and a three-track extension from Eastern Parkway via East 98th Street and Livonia Avenue through the Brownsville District to New Lots Road.

(*d*) The White Plains Road extension.

8. If the city shall take over the new lines after a period of ten years from the beginning of operation thereof, under any provision of law, the city shall have the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of such new lines, upon payment to the company of a sum equal to the then present worth of the unexpired portion of the company's lease under Contracts Nos. 1 and 2,

estimated upon the basis of the annual net profits for the five-year period immediately preceding such recapture, or, if the period of final amortization has been passed, then for the five years immediately preceding the completion of amortization.

CITY MAY ASSIGN ITS RIGHTS.

9. Whatever rights the city shall posess under this offer with respect to retaking any of the lines covered by such termination shall be subject to assignment, at the City's option, such third party as the city may designate.

BELMONT TUNNEL.

10. All right, title and interest of the Interborough Company in and to the Belmont Tunnel will be contributed by the company, as part of its half of the construction cost of the foregoing subway lines, at valuation of $3,000,000.

FIVE-CENT FARES.

11. All the foregoing subway lines will be operated by the company in connection with the present subway lines for a single fare of five cents.

POOLING OF RECEIPTS AND PAYMENTS THEREFROM.

12. When the new subway lines shall have been equipped and put in operation the gross receipts from the operation of the existing subway lines and equipment and from the proposed new subway lines and equipment will be pooled for and during the full term of forty-nine years and from the total of such gross receipts deductions will be made as follows:

(a) Operating expenses, including damage for accidents, provision for depreciation, renewals and obsolescence, taxes, insurance and rentals payable to the city under existing subway contracts, and amortization of brokerage charges. Rentals under existing contracts in the amount payable when the new lease becomes effective shall continue

to be paid to the city during the full term of the said forty-nine years.

(*b*) A sum, to be paid to the company out of such gross receipts for each of the said forty-nine years, to represent the average annual income from operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911, which is $6,335,000, as compensation for the pooling of the receipts of the existing subway and equipment with those of the new subway lines and equipment; for the leveling of the leases of the existing subway and the exchange of the legs; for services in connection with the operation of the property; and for the company's agreement to furnish to the extent hereinafter provided, one-half of the cost of the construction of the proposed new subways, and the entire cost of the equipment thereof. It is scarcely necessary to explain that this sum is not clear profit, because out of it must be paid the company's fixed charges, such as interest and sinking fund payments on its capital investment in the subway lines and equipment.

(*c*) A sum equal to six per centum per annum for each of the forty-nine years upon the investment of the Interborough Company in the subway lines and equipment hereinbefore set forth. The investment of the Interborough Company under this clause shall not be less than, and shall not exceed, $77,000,000, or $56,000,000 for new construction and $21,000,000 for equipment (which equipment shall include cars; equipment for the supply and transmission of power; yards and yards terminals; third rail; signals and interlocking); so that with the company's capital investment in the present subway, aggregating on June 30, 1911, approximately $48,000,000, its total investment shall be $125,000,000. If less than said $21,000,000 be required from the company for said equipment, such amount shall be expended for construction, so that its total investment shall not be less than $125,000,000. If additional capital be required to construct the new subway lines as hereinbefore defined, the city shall furnish the excess.

If the said $21,000,000 shall not be sufficient to properly equip the said new subway to meet the requirements of the first year of operation in accordance with plans, specifications and contracts for such equipment as approved by the Public Service Commission and accepted by the company, the company shall furnish the excess, and shall receive, during the period of forty-nine years, in the order defined in paragraphs numbered 12 and 13 hereof, the payment of sums equal to the actual cost of such additional capital for equipment, plus a sinking fund therefor of not exceeding one per centum per annum.

If at any time during the term of said lease expenditures for betterments or improvements of the old or new subways, chargeable to capital account, shall be required to be made, the capital for making such construction betterments or improvements shall be furnished share and share alike by the city and the Interborough Company, and if expenditures by the way of betterments or improvements chargeable to capital account shall be required to be made upon the equipment of the old or new subways, or if, after the new subways are put in operation under said lease, additional equipment shall be required, the capital for making such equipment betterments, improvements or additions shall be furnished by the Interborough Company, and in either event a sum equal to the actual cost of such additional capital, plus a sinking fund thereon of not exceeding one per centum per annum, shall be allowed to the company and to the city, respectively, and shall be deducted from the gross receipts in the respective order of the other payments herein provided for in sections Nos. 12 and 13 hereof. Out of the sums which the company shall receive as aforesaid, it will pay all charges for interest as the same become due, and provide a sinking fund sufficient to retire and pay off at maturity the principal of its original investment in said subway construction and equipment. If, however, such sinking fund of one per centum shall not be sufficient to amortize any part of the capital furnished by the

Interborough Company, for the construction, betterments or improvements of said subways, or for betterments or improvements of, or additions to, the equipment, before the expiration of the lease, the cost of such construction, betterments, improvements or additions, less the amount then accumulated in the sinking fund, shall, upon the taking over or termination of any lease, be assumed and paid by the city.

If any deficiency shall arise in any year in meeting the aforesaid payments to the company, such deficiency shall be cumulative and shall be paid off and discharged annually out of the said subway earnings before the payments herein defined shall be made to the city.

13. After the payment of the foregoing obligations to the company there shall be deducted, out of the profits, interest and sinking fund upon the capital provided by the city for the construction of the new lines, and such further sum as will bring the payments to be made to the city during the entire period of the forty-nine year lease up to an amount equal to 8.76 per centum upon its capital investment in the original construction of the new subways. Upon its capital investment in the betterments or improvements of the old or new subways, chargeable to capital account, it shall then receive the same rate of compensation as is provided for in section 12 hereof with respect to investments by the company in betterment or improvements upon new equipment. If any deficiency shall arise in any year in meeting the aforesaid payments to the city, such deficiency shall be cumulative and shall be paid off and discharged annually out of the said subway earnings before the equal division of profits provided for in the following paragraph becomes effective.

14. The remainder of said profits shall annually be divided between the city and the company share and share alike.

Receipts to Be Pooled on Completion of Any Substantial Part.

15. Upon the completion of a substantial portion of the new system, the gross receipts from operation of the existing subways and equipment shall be pooled with the gross receipts from operation of such newly completed portion, and such pooled receipts shall be distributed as hereinbefore provided, but in the proportion which said new lines shall bear to the whole system as the same may from time to time be placed in operation. In fixing this proportion, the gross receipts shall be ascertained from the tickets deposited at the stations on the new subway lines covered in the proposal, and from any other miscellaneous revenues derived from such stations, and the operating expenses shall be ascertained, as hereinafter defined, for new subway extensions, upon a per-passenger basis.

New Equipment When Amortized to Belong to City.

16. New equipment for the operation of the enlarged subway system, as hereinbefore provided, shall, to the extent amortized through the sinking fund, and its accretions, become the property of the city at the end of the lease.

Equipment of Present Subway to be Taken Over by City at End of Lease.

17. The equipment of the existing subways owned by the company shall, upon the termination of the new forty-nine year lease, be taken over by the city as provided for under the terms of Contracts Nos. 1 and 2 between the city and the Interborough Company, for the construction and equipment of the existing subway.

III. Subway Extensions.

18. Future subway extensions required by the city will be constructed by it, and will be equipped by the company

for the city and operated as a part of the entire system, upon the following terms:

A separate account shall be kept of the gross earnings of any such extension or extensions, to be ascertained from the tickets at the stations thereupon, and any other miscellaneous revenues derived from such stations.

From the gross earnings thus ascertained there shall be deducted:

First:

(*a*) All station expenses.

(*b*) Maintenance of way and structures.

(*c*) Damages from accidents happening on the division.

Second: Other operation costs, to be determined according to the unit costs of the Interborough system, upon a per-passenger basis:

(*a*) Conducting transportation.

(*b*) Maintenance of equipment and depreciation.

(*c*) Cost of power.

(*d*) General and administration expenses.

(*e*) Taxes, if any.

After the payment of the foregoing charges the company shall receive for its equipment a sum equal to the actual annual charges of the company for carrying the cost thereof, and a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence.

From the balance of the income then remaining shall be paid interest and sinking fund upon bonds issued by the city to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid semi-annually by the city either out of the city's portion of the earnings of the entire subway system, as described in section 13 of this proposal, or from such other sources as the city may see fit. That portion of any deficit which represents payments made by the city upon bonds issued by the

city for the construction of subway extensions shall accumulate and be a charge against future profits, before any division thereof shall be effected between the city and the Interborough Company.

The net profits remaining after providing for the foregoing charges shall be equally divided between the city and the Interborough Company, but when any of the future subway extensions shall become profitable, and all deficits both of the company and the city shall have been fully paid and discharged, it shall, beginning on July 1 of the following year, be operated as a part of the enlarged subway system under the general plan, and shall be governed by all the provisions applying to the enlarged subway system hereinbefore provided for, the company and the city to receive in each year, on their respective capital investments in these subway extensions, a sum not exceeding the actual cost of furnishing such capital, plus a sinking fund thereon of not exceeding one per centum per annum, until the said investment has been amortized.

In event of recapture of any extension or of the termination of the lease upon any extension, the city shall pay for the equipment in the manner provided for under section 7 hereof.

Examination of Subway Equipment.

19. The formal contract between the company and the city shall provide for an examination by the Public Service Commission of the physical condition of the plant and equipment of the present subway before it is taken over for operation as a part of the enlarged subway system contemplated by this proposal, so that the city may definitely assure itself that the property has been adequately maintained, and any expenditures deemed necessary by the Public Service Commission to place it in such condition shall be made by the company before the pooling of receipts proceeds.

Management and Operation.

20. The formal contract between the company and the city shall also contain provisions embodying substantially the essentials of the Public Service Law with relation to both operation and management, together with such added reasonable guarantee as the city may require with relation to the character and sufficiency of the equipment to be furnished and of the service to be given.

City to Approve of a Lease or Assignment, etc.

21. Such formal contract shall also contain provisions that the management of the enlarged subway system covered by such contract shall be conducted by one company; and without the consent of the city, no lease, transfer or assignment, in whole or in part, of any of the rights granted by the city in the proposed contract shall be made, nor shall any subsidiary company be created to operate or maintain either the whole or any part of the enlarged system, or to furnish to it power, supplies, or any other of the operating necessities.

Classification and Character of Operating Expenses.

22. The classification and character of operating expenses under this contract shall be that prescribed by the Public Service Commission for the First District. In the event of any dispute arising regarding the character or amounts of items charged into Operating Expenses, the company and the city, respectively, shall have the right to review by an appeal or certiorari to the Appellate Division of the First District.

IV. Terms Applying to Elevated Third-Tracking Improvements and Extensions.

1. The franchise for the construction of additional tracks upon the Manhattan Elevated Railroad, as hereinbefore described in paragraph (*a*) under the head of "Ele-

vated Third-Tracking, Improvements and Extensions," together with all other construction described in said paragraph, shall be embodied in a certificate issued to the Manhattan Railway Company. The term of said franchise shall be twenty-five years, with three renewal periods of twenty years each, for the purpose of readjustment of rentals; the right of recapture shall accrue to the city, either upon the termination of a ten-year or other period, or at the termination of the franchise, but not for railroad transit operation either by itself or by any other party, and without prejudice to the rights of the Manhattan Company in its elevated railway lines, and subject to adequate provisions for the protection of such rights. It is necessary that the city co-operate in obtaining such legislation as may be required to render this provision effective. The compensation for said franchise shall not exceed two per centum of the increased gross receipts of each station served by express trains upon such lines, whether such station be a new station, an enlargement of an existing local or express station, or a relocation of such station, over the gross receipts of the same station, from the transportation of passengers and property on the said line for the year ending June 30, 1911, or a corresponding portion of such year.

2. The franchise for the elevated extensions, hereinbefore described in paragraphs (*b*), (*c*), (*d*) and (*e*) under the head "Elevated Third-Tracking Improvements and Extensions," shall be embodied in a certificate issued to the Interborough Company. The terms of said franchise shall be eighty-five years from the time the said elevated extensions are put in complete operation. Said extensions and the equipment attaching thereto shall be subject to recapture by the city at any time after ten years from the date of beginning complete operation thereon, upon the same terms as are hereinbefore stated with respect to such subway extensions and equipment thereof as shall be subject to recapture. If the White Plains or Jerome Avenue extensions should be taken over by the city at any time under the

ten-year recapture provision, in order that public convenience may not be interfered with, trackage rights will be reserved over those lines for the purpose of enabling the elevated system to reach any terminals, storage yards or shops located upon such extensions and utilized by the Manhattan Company.

CITY'S COMPENSATION FOR ELEVATED FRANCHISES.

3. As soon as said elevated extensions have been constructed and placed in complete operation, the gross receipts therefrom shall be pooled with the gross receipts derived by the Interborough Company from the operation of the present Manhattan Elevated lines, including the third-track improvements hereinbefore provided for, and so long as the elevated system as thus enlarged shall remain under the control of the Interborough Company, or its successors or assigns, all receipts from the operation thereof, after deducting taxes, operating expenses, including insurance, damage claims, a proper annual allowance for depreciation and obsolescence, rentals payable to the Manhattan Company by the Interborough Company under the lease dated January 1, 1903, interest and sinking funds upon capital for said elevated improvements and extensions, amortization of brokerage charges not exceeding three per centum, and a sum equal to the average annual profits, after deducting taxes as finally adjusted, derived by the Interborough Company from the operation of the present elevated system for the two years immediately prior to June 30, 1911, shall be equally divided between the city and the Interborough Company.

4. If under this latter arrangement, the Manhattan Company or the Interborough Company shall be under an obligation to pay the two per centum of increased gross receipts hereinbefore referred to as a franchise payment, the Interborough Company before divisions of profits shall first be entitled to deduct from the surplus profits arising

from the operation of the elevated lines an amount corresponding to the amount of the franchise payment.

5. If in any year the receipts or profits of the Interborough Company from the operation of the elevated system as so enlarged shall be less than the average receipts or profits from the operation of the present elevated system for the two years immediately prior to June 30, 1911, ascertained as above, the deficit shall accumulate and shall be a charge against all future profits from the operation of the enlarged system, before the city under the terms of this arrangement shall be admitted to a division of the said profits. Respectfully submitted,

INTERBOROUGH RAPID TRANSIT COMPANY,
By T. P. SHONTS, President.

Which was referred to the Committee on Transit Proposals, the report of said Committee to be on the calendar for March 21, 1912.

Y. At a meeting of the Board of Estimate and Apportionment held on March 21, 1912, the following proceedings were had and taken:

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; Ardolph L. Kline, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

RAPID TRANSIT RAILWAYS.

In the matter of the communication from the Public Service Commission for the First District transmitting

offer of the Interborough Rapid Transit Company relative to operation of certain rapid transit railways.

This communication was presented to the Board at the meeting of March 14, 1912, when it was referred to the Committee on Pending Transit Proposals. The report of said Committee to be considered this day.

The President of the Borough of Manhattan, Chairman of the Committee, stated the Committee had not completed its report and at his request the matter was laid over until March 28, 1912.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District and the Board of Estimate and Apportionment of The City of New York have under consideration plans for the construction and operation of a system of subway and rapid transit lines that will extend rapid transit facilities to every part of the city and secure to the people an extension of service that will increase three fold the area throughout which passengers may be carried for a single five-cent fare; and

Whereas, The plans under consideration when approved must give to the city the best possible returns for its own future investment in rapid transit lines; and

Whereas, In order to render possible the adoption of such plans it is necessary that the present rapid transit statutes be amended in certain particulars; and

Whereas, There is now pending before the legislature an act amendatory of the rapid transit act, prepared by the Public Service Commission and designed to permit the public authorities to enter into contracts for the construction, equipment and operation of rapid transit lines in accordance with the plans aforesaid, and upon the bset possible basis to be secured to the city; and

Whereas, The passage of the said act would not commit the city to action of any sort, nor limit or restrict the authority of the Public Service Commission and the Board of

Estimate and Apportionment, but merely broaden their powers to the degree deemed necessary; and

Whereas, The failure of the passage of the said act would leave the rapid transit situation in confusion and put off indefinitely the relief for which the people of the city are waiting; now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of the City of New York earnestly urges upon the legislature the importance of the prompt passage of Senate Bill No. 1277, amending the rapid transit act and introduced by Senator Wagner on March 18th; and be it further

Resolved, That the Secretary be directed, on behalf of this board, to forward copies of these resolutions to the President of the Senate and the Speaker of the Assembly, and that the Corporation Counsel be requested to represent this board at such hearings as may be given upon the bill in either house.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Queens offered the following:

Whereas, In the offer made by the Interborough Railroad Company for the operation of certain lines specified in their proposal there is included the operation of the Belmont Tunnel, when completed, as far as the Grand Central Depot and thereafter to Times Square; and

Whereas, It will take, in the estimation of those informed of the situation, at least two years to construct the portion west of Lexington Avenue towards Times Square; and

Whereas, In the meantime the inconvenience to the public will continue and the injury to property will increase un-

less steps are taken for the immediate operation of the Tunnel; therefore be it

Resolved, That the Interborough Company be requested to include in their offer an agreement to operate without delay that portion of the Belmont Tunnel already constructed, between Lexington Avenue in the City of New York and Jackson Avenue in Long Island City, upon the same terms and conditions as are provided for in their offer to operate the entire tunnel when completed.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

Z. At a meeting of the Board of Estimate and Apportionment held on March 28, 1912, the following proceedings were had and taken:

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; Ardolph L. Kline, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

RAPID TRANSIT RAILWAYS.

In the matter of the communication from the Public Service Commission for the First District transmitting offer of the Interborough Rapid Transit Company relative to operation of certain rapid transit railways.

This communication was presented to the Board at the meeting of March 14, 1912, when it was referred to the Committee on Pending Transit Proposals.

At the meeting of March 21, 1912, the Committee reported that it had not as yet formulated its report and the matter was laid over until this day.

A communication was received from the North Van Nest Taxpayers' Association in favor of the offer of the Interborough Company and commending his Honor the Mayor and the members of the Board for their earnest efforts in behalf of the traveling public.

A communication was received from the Seventh Avenue Association in favor of the proposition of the Interborough relative to subway construction in Seventh Avenue, Manhattan.

A communication was received from the Brooklyn Transit Conference relative to rapid transit matters affecting the Borough of Brooklyn.

A communication was received from the Williamsbridge and Wakefield Rapid Transit Committee expressing its fullest confidence in the Board and stating the resolution introduced in the Board of Aldermen by the Alderman from said District does not represent the views of the people of that section.

A communication was received from the Business Men's Association of Fordham Heights endorsing the offer of the Interborough Rapid Transit Company.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, stated the Committee was not prepared to report today.

AA. At a meeting of the Board of Estimate and Apportionment held on May 10, 1912, the following proceedings were had and taken:

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The

Bronx; Denis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

RAPID TRANSIT RAILWAYS.

The following resolution was offered:

Resolved, That this Board authorizes and directs its conference committee on transit proposals to ascertain from the Public Service Commission the status of each of the several routes comprised within the proposed dual system of rapid transit lines that have not as yet been presented to this board, and that said committee is requested to urge upon the Public Service Commission the importance of action upon each of the said routes at the earliest moment practicable; and

Resolved, That the said committee inform the Public Service Commission that this board favors the adoption of the so-called Liberty street and Pineapple street tunnel route as part of the system of the Interborough Rapid Transit Company, and the Whitehall street, Montague street tunnel route as part of the system to be operated by the Brooklyn Rapid Transit Company.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

On motion the board adjourned to meet Tuesday, May 14, 1912, at 2.30 o'clock p. m.

BB. At a meeting of the Board of Estimate and Apportionment held on May 22, 1912, the following proceedings were had and taken:

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Denis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

RAPID TRANSIT RAILWAYS.

One Hundred and Forty-ninth Street and Mott Avenue Subway Connection in the Borough of The Bronx—New Utrecht Avenue Elevated Line in the Borough of Brooklyn—Eastern District Route in the Boroughs of Brooklyn and Queens—Boston Road and White Plains Road Connection in the Borough of The Bronx—Broad Street and Whitehall Street Tunnel Connection in the Borough of Manhattan—Flatbush Avenue, St. Felix Street, Fulton Street Route in the Borough of Brooklyn—Gravesend Avenue Route in the Borough of Brooklyn—Steinway Tunnel and Queensboro Plaza Route in the Borough of Queens.

The Secretary presented the following:

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District herewith transmits to your Honorable Board for your approval and the approval of the Mayor of the City as required by law certified copies of resolutions adopted by it on May 17 and May 20, 1912, determining and establishing routes and general plans of construction for eight new rapid transit railroads in the Boroughs of Manhattan, Brooklyn, Bronx and Queens. These lines are all included in the proposed dual system of subways and were adopted after a joint meeting of the Special Committee on Transit

of your Board and the Commission. All these routes, with the exception of the Broad Street and Whitehall Street Tunnel Connection, have been laid out for a portion of their length through private property. In certain cases this was practically unavoidable; but in others it was done in order to secure the most advantageous layout. If, however, the property through which or over which these routes have been laid out cannot be acquired at reasonable terms, modifications may need to be adopted, but the Commission feels that the possibility of such changes should not prevent the adoption of these routes. The Commission may then proceed at once to have them legalized, and to negotiate the terms upon which the private rights may be secured.

The routes herewith transmitted are as follows:

149th Street and Mott Avenue Subway Connection in the Borough of The Bronx (Route No. 27): This route provides a connection between the Lexington Avenue Subway now under construction along Mott Avenue and the present Manhattan-Bronx Subway in 149th Street.

New Utrecht Avenue Elevated Line in the Borough of Brooklyn (Route No. 39): This route runs from Fourth Avenue and 38th Street, where a connection can be made with the Fourth Avenue Subway, through the property of the South Brooklyn Railway Company to Tenth Avenue as a subway, and thence continues as an elevated road over Tenth Avenue and New Utrecht Avenue to 81st Street, thence over private property and cross streets to 86th Street, and thence over 86th Street to Bay 37th Street, where a connection can be made with the Bensonhurt Bath Beach and Coney Island Route as already legalized.

Eastern District Route in the Boroughs of Brooklyn and Queens (Route No. 41): This route runs as an elevated road from Bushwick and Johnson Avenues in the Borough of Brooklyn, where a connection can be made with the Brooklyn, Manhattan and Long Island City Route running under the East River from 14th Street in the Borough of

Manhattan as already legalized over Johnson Avenue to Wyckoff Avenue and over Wyckoff Avenue, private property and intersecting streets to a connection with the existing elevated railroad on Broadway, East New York.

Boston Road and White Plains Road Connection in the Borough of The Bronx (Route No. 44): This route runs as an elevated road from Boston Road and East 179th Street, where a connection can be made with the present Manhattan-Bronx Rapid Transit Railroad in Boston Road, through private property and intersecting streets and between the tracks of the New York, Westchester and Boston Railroad and Bronx Park, to White Plains Road and over White Plains Road to Astor Avenue, where a connection can be made with the West Farms Road and White Plains Road Route as already legalized.

Broad Street and Whitehall Street Tunnel Connection in the Borough of Manhattan (Route No. 49): This route provides a connection through Broad Street between the present route along Nassau and Broad Streets already legalized as part of the Third Avenue Route and the Whitehall Street-East River-Montague Street Route heretofore adopted by the Commission and now awaiting the action of your Board.

Flatbush Avenue, St. Felix Street, Fulton Street Route in the Borough of Brooklyn (Route No. 46): This route, running from Flatbush Avenue under private property, the Long Island Railroad Station at Atlantic Avenue, and St. Felix Street to Fulton Street, provides a connection between the Eastern Parkway Route to Flatbush Avenue and the Fourth Avenue Subway in Fulton Street.

Gravesend Avenue Route in the Borough of Brooklyn (Route No. 49): This route runs from 38th Street and Ninth Avenue, where a connection can be made with the New Utrecht Avenue Elevated Line, along private property south of 37th Street to Gravesend Avenue as an elevated railroad, and thence continues as an elevated rail-

road over Gravesend Avenue, Shell Road, West 6th Street and private property to Surf Avenue at Coney Island.

Steinway Tunnel and Queensboro Plaza Route in the Borough of Queens (Route No. 50): This route runs from the present terminus of the Steinway Tunnel at Fourth Street and Van Alst Avenue through private property and intersecting streets, as a subway, to the Sunnyside Yard, where it becomes an elevated railroad, then continuing as an elevated railroad over Davis Street and Ely Avenue to the Queensboro Bridge Plaza.

Dated, May 20, 1912.

PUBLIC SERVICE COMMISSION
FOR THE FIRST DISTRICT.
By W. R. WILLCOX, Chairman.

[SEAL OF THE COMMISSION]

Attest: Travis H. Whitney, Secretary.

The following was offered:

Resolved, That the communication be received and in pursuance of law, this Board fixes Friday, the 31st day of May, 1912, at 10.30 o'clock a. m., and Room 16, City Hall, Borough of Manhattan, as the time and place when and where such plans and conclusions will be considered; and be it further

Resolved, That the Secretary of this Board be and he is hereby directed to publish notice of such consideration in the CITY RECORD.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

The matter was then referred to the Transit Committee.

Rapid Transit Railways.

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

The President of the Borough of Manhattan, Chairman of the Committee on pending transit proposals, presented the following:

May 22, 1912.

To the Honorable Board of Estimate and Apportionment:

Dear Sirs—Your Committee was appointed under a resolution adopted January 19, 1911, to confer with the members of the Public Service Commission for the First District upon the then pending proposition of the Interborough Rapid Transit Company for the construction and operation of additional rapid transit lines "or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

In resolutions subsequently adopted, your Committee was also empowered to confer, in conjunction with the Public Service Commission, with the officers of the Interborough Company or with the representatives of other companies presenting plans for the construction, equipment and operation of rapid transit railways, in order that it might advise the Board with relation to the details of pending propositions, and to submit its recommendations with relation to such action as the Board, under the provisions of the Rapid Transit Act and of the Charter, might be required to take.

While your Committee was in conference with the Public Service Commission upon the proposals of the Interborough Company, a proposition was received from the Brooklyn Rapid Transit Company to construct, in part,

and to equip and operate certain rapid transit lines in connection with its existing elevated railway system.

Under date of June 13, 1911, your Committee and the Public Service Commission submitted a joint report, proposing that the City enter into contracts with both the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company for the construction, in part, and for the equipment and operation of various rapid transit railways to be operated under a dual plan by the respective companies and upon terms which, in the judgment of the conferees, would furnish a basis for such operation just both to the companies in question and the City.

Certain alternatives were also submitted, so that in case either or both the companies declined to accept the terms and conditions set forth in the report, provision would automatically be made for the operation of a complete system by the company agreeing to accept the lines assigned it, or if both declined to accept, by the City itself upon an independent basis.

Your Honorable Board, on June 21, 1911, unanimously accepted the joint report and, with certain minor changes, approved of its recommendations. The Brooklyn Rapid Transit Company, under date of June 27, 1911, accepted the lines assigned it, provided certain modifications were made in the financial and operating terms. The Interborough Rapid Transit Company, in a letter of the same date, declined to accept the terms outlined as a basis for the operation of the routes assigned to it, and by the same letter withdrew its then pending offers—dated June 10th and December 5th, 1910, and May 9th, 1911—for the operation of either subway and elevated lines, upon any basis theretofore considered.

Shortly afterward, upon the statement of the Interborough Company that with certain modifications of terms it would still be inclined to take the lines originally assigned to it, conferences, with that company were assumed, leading to the submission of its supplementary offer under date

of July 19, 1911. In this communication the Interborough Company offered to accept a part in the operation of a dual system if it might be given terms that would furnish certain margins of financial protection upon which its bankers had insisted.

Under date of July 20, 1911, your Committee and a majority of the Public Service Commission presented a report recommending the adoption of this amended offer of the Interborough Company as a part of the dual plan; but your Board, at the meeting held July 21, 1911, declined to accept this recommendation.

Upon the same day your Board accepted the plan presented by the conferees as an alternative, in the event of the failure of the dual plan, and agreed to approve contracts with the Brooklyn Rapid Transit Company for the operation not only of the system it had originally proposed to operate, but of those additional lines, originally assigned for operation by the Interborough Company, that would be in any way contiguous to its system and that could be operated as part of a generally coherent plan.

Accepting this as the approved program of the Board, the Public Service Commission proceeded to award contracts for the construction of various routes that would enter into the plan approved, and also to prepare the forms of the contract for equipment and operation. Before the preparation of such forms had been completed, informal conferences between representatives of the Board and of the Commission, and of the Interborough Company and its bankers, were resumed, with the result that under date of February 27, 1912, the Interborough Company submitted a new proposition for the operation of the routes originally assigned to it in the dual plan, agreeing to accept terms far more favorable to the City than those that had been rejected in July. During the course of these informal conferences, the officers of the Brooklyn Company advised the Chairman of your Committee and the Chairman of the Public Service Commission that while that company would

prefer to take over and to operate the expanded plan approved in July, it would on the other hand be willing to take its part in a readjusted dual plan and to co-operate with the City in working out such a plan if the representatives of the City so desired, and if the Brooklyn Company might be assured of an adequate operating basis covering the territory it will serve.

The Interborough Company's offer of February 27, 1912, has been formally approved by the Public Service Commission. On March 15 it was transmitted by the Commission to your Board for consideration, and referred in turn to your Committee for report.

Since the latter date, certain amendments to the Rapid Transit Act, prepared by the Public Service Commission and extending the powers of the Commission and the Board of Estimate and Apportionment, so as to permit the approval of contracts upon the principles proposed, have been passed by the legislature and approved by the Governor. Within the same period, the decision of Mr. Justice Blackmar in the Supreme Court, upholding the constitutionality of certain of the proposed financial and operating terms, has been upheld by the unanimous judgment of the Appellate Division for the Second Department. Although the questions involved in the cases upon which these decisions have been given will now be taken to the Court of Appeals, it is expected that an early decision will be given there. The actual work of construction upon the Broadway and Lexington Avenue lines, as well as upon the completion of the Fourth Avenue and Bridge Loop Lines, in anticipation of the letting of operating contracts, has been under way for some months. As the question at issue in the courts has no relation to the merit of the plans proposed, and has to do solely with construction of the law, your Committee is of the opinion that if the proposed operating plans are to receive the approval of your Honorable Board, it will prove ultimately an economy of time if action is taken

at once, and if the Public Service Commission may thus be enabled to proceed with the completion of the proposed operating contracts with the assurance that its action will be ratified by the Board of Estimate and Apportionment when presented for the Board's final consideration.

Character of the Dual System Proposed.

Throughout the negotiations that have led to the presentation of the pending plans, the Public Service Commission and the members of your Committee have kept in mind the need of providing not merely a series of roads for the convenience of the traveling public, but a basis for the future development of the city, along logical and well-ordered lines. The need of a system that will serve this purpose need not be argued. The present congestion of traffic upon all rapid transit lines is great, and the lack of facilities for distributing population through sections that offer an abundance of opportunity for home building and other development, within comparatively short distances of the center of the city, is also clearly apparent. Stagnation of the real estate market in various parts of the city is a reflection of this condition. The assessment of real estate for taxing purposes in the year 1912 shows, for the first time in many years, practically no increase. Although this result is attributable in some degree to other causes, there can be no doubt that it is due, in the main, to the causes to which we refer. The city's prime interest in the building of new transit lines is not, in short, to make money through successful railroading, in the commercial sense, but to lay a basis for city expansion and city growth.

The conferees have also been convinced that the best interest of the city will not be served if new rapid transit lines are built only where they will yield an immediate profit from operation. The single offer for construction and operation pending at the time your Committee was appointed, that of the Interborough Company dated December 5, 1910, was framed upon this principle. It has been the conviction of

the conferees that it is far better to establish a system that will penetrate to all parts of the city at approximately the same time, in this way compelling the richer short haul lines to support the less profitable extensions, and, incidentally, keeping the development of outlying localities in all of the boroughs in a proper state of balance. It is their belief that the creation of such a system, having in it as well in an important degree the element of competition, will amply justify the cost to the city of carrying such incidental deficiencies as may occur in the earlier years of operation. It is, however, also their opinion that the period of deficiencies will be brief, and that if the plans now pending be adopted the city will within a few years realize a sufficient margin of profit to exempt its entire new investment from the constitutional debt limit. Through this and other means, the city will, after the statutory period of ten years has passed, assume an absolute control of the new lines now to be built, and of all future extensions; reserving the right to recapture any or all of them for combination in an independently operated or municipally operated system, whenever the taking of either course might seem wise.

Your Committee has never doubted that in order to secure the greatest future benefit the existing subway and elevated lines should be used as a nucleus for future growth. The city and the Interborough Company combined have an investment of $100,000,000 in the present subway, and the Brooklyn Company has a private investment, in plant and equipment, estimated at $60,000,000. The two systems embrace 66.9 miles of road and 178 miles of track. A failure to utilize these lines, or to properly articulate them with others in a manner that will offer the best basis for the development of the city plan, and avoid economic waste, would in the judgment of your Committee be indefensible; certainly, so long as the right to the city to recapture and readapt any of the additional lines now to be built, if it so desires, stand undisturbed.

Instead of three or four separate systems, it has seemed better to so group the lines, new and old, that all would come within two great systems, each offering within its bounds universal carriage or transfer for a five-cent fare, and so adjusted that together, they will bring the benefits of the five-cent fare zone to all but a slight percentage of the people who ride. This was the theory underlying the joint report of the conferees, submitted in June last. We believe it fortunate that through the negotiations that have since proceeded, it is again possible to secure the dual plan, and upon terms distinctly more advantageous to the city than those at first considered.

It is understood that a new company, under a title sufficiently broad to cover its city-wide activities, will be organized by the Brooklyn Rapid Transit Company to take its part in the plan proposed. The Interborough Company is prepared to proceed under its present organization.

Routing Terms.

Your Committee and the Public Service Commission, as well as the representatives of the Interborough Rapid Transit Company and of the Brooklyn Rapid Transit Company, have agreed upon the determination of the new lines to be allotted to the respective operators, and upon the extension and improvement of certain existing lines, as follows:

Lines to be Operated by the Interborough Rapid Transit Company and to be Constructed from Funds Furnished Jointly by the City and the Operator in the Proportions Hereinafter Indicated:

(1) A four-track subway proceeding southerly from Times Square under Seventh avenue to Varick street, West Broadway and Greenwich street to Park place, thence as a two-track subway under Greenwich street to the Battery.

(2) A two-track subway proceeding from Greenwich street through Park place, Mail street or the City Hall Park and either Spruce or Beekman street to William street, thence through William street to Hanover Square

and Old Slip and under the East River to Clark street in Brooklyn, thence along Clark and Fulton streets to a connection with the present Interborough line at Borough Hall.

(3) A four-track subway from the terminus of the existing Interborough system at Alantic avenue, Brooklyn, under Flatbush avenue to Prospect Park Circle, and thence under the Eastern Parkway to Buffalo avenue.

(4) A two-track subway running southerly from the Eastern Parkway under Nostrand avenue to Flatbush avenue.

(5) A two or three-track elevated line running easterly from the Eastern Parkway by way of East Ninety-eighth street and Livonia avenue, through the Brownsville District, to New Lots road.

(6) A four-track subway line proceeding from Park avenue—at some point between Thirty-second and Forty-second streets—to Lexington avenue; thence under Lexington avenue and the Harlem River to about One Hundred and Thirty-fifth street in The Bronx; thence via Park avenue, private property and Mott avenue with three or four tracks to a point of connection with the West Farms Division of the present subway at One Hundred and Forty-ninth street, thence three tracks, part subway and part elevated, to One Hundred and Sixty-second street and River avenue.

(7) A three-track subway diverging from the Lexington avenue line at or about One Hundred and Thirty-fifth street in The Bronx; running thence under private property and through One Hundred and Thirty-eighth street to Southern Boulevard, thence under Whitlock avenue to Westchester avenue and thence as a two-track and three-track elevated line through Westchester avenue to Pelham Bay Park.

(8) A three-track elevated line from the junction of One Hundred and Sixty-second street and River avenue via River and Jerome avenues to Woodlawn road adjoining Woodlawn Cemetery.

(9) A two and three-track elevated line proceeding from a connection with the West Farms division of the present subway in Boston road, near One Hundred and Seventy-ninth street, thence over private property and intersecting streets and along the west side of the New York, Westchester & Boston Railway to White Plains avenue, and thence via White Plains avenue to a projected terminus at Becker avenue, near the City line.

(10) A two-track subway line running easterly under Forty-second street, from Times Square to a point of conjunction with the Belmont tunnel at the Grand Central station.

(11) The Belmont tunnel, continued as a two-track subway and elevated line through and over the Sunnyside Yard of the Long Island Railroad Company, thence as a two and three-track elevated line curving into Davis street, Long Island City, thence via Davis street and Ely avenue, William street and such private property as may be necessary to Queensboro Bridge Plaza.

(12) A two and three-track elevated line from the Queensboro Bridge Plaza via Jackson avenue, Long Island City, and Debevoise avenue to Ditmars avenue in Astoria.

(13) A two and three-track elevated line from the Queensboro Bridge Plaza to Jackson avenue, Long Island City, and Diagonal street; thence via Diagonal street, Thompson avenue and Greenpoint avenue to Woodside, and to Sycamore avenue in Corona.

Lines to be Operated by the Brooklyn Rapid Transit Company or by a Company to be Organized in its Interest:

(A) *To be constructed from funds furnished jointly by the City and operator in the proportions hereinafter indicated:*

(1) A two-track subway line from Whitehall street at the Battery in Manhattan, through Whitehall and Morris streets, Trinity place, Church and Vesey streets to Broadway; thence as a four-track subway in Broadway to Forty-

second street, and from Forty-second street through Seventh avenue to Fifty-ninth street; thence as a two-track subway through Fifty-ninth and Sixtieth streets to the Queensboro Bridge and by two tracks over the bridge to a point of connection with the lines converging at Queensboro Plaza in Long Island City.

(2) A two-track tunnel line from Whitehall street at the Battery under the East River to Montague street, Brooklyn; thence under Montague street to the Borough Hall; under Borough Hall Square and Fulton street to Willoughby street, and under Willoughby street to a point of connection with the Fourth avenue subway in Flatbush avenue.

(3) A two-track subway from a point of connection with the Fourth avenue subway tracks in Fulton street, Brooklyn, through St. Felix street and under the station of the Long Island Railroad Company to Flatbush avenue, at about Fifth avenue; thence through Flatbush avenue to Prospect Park Circle, and thence to a point of connection with the tracks of the Brighton Beach line at Malbone street.

(4) A two-track subway in Canal street, Manhattan, connecting with the tracks of the Manhattan Bridge line and proceeding westerly to a point of physical connection with the Broadway line at Canal street and Broadway.

(5) The completion of the Centre Street Loop Line to the Brooklyn Bridge, and an extension of two tracks from the said loop southerly through Nassau street and Broad street to a point of connection with the East River tunnel at Whitehall street.

(6) The completion of the Fourth avenue subway and its extensions to Eighty-sixth street, Brooklyn, such extension to carry four tracks from Fortieth street to Sixty-fifth street, and two tracks from Sixty-fifth street to Eighty-sixth street, with provision for a connection at or about Sixty-fifth street with the proposed tunnel line to Staten Island, and with the tracks of the Sea Beach Railway.

(7) An extension of the Fourth avenue subway from Fourth avenue and Thirty-eighth street, Brooklyn, through the property of the South Brooklyn Railroad Company to about Tenth avenue as a subway, thence by a three-track elevated line over Tenth avenue and New Utrecht avenue to a point near Eighty-first street; thence over private property to Eighty-sixth street and thence over Eighty-sixth street and Stillwell avenue to Surf avenue, Coney Island.

(8) A three-track elevated line from a point near Thirty-eighth street and Ninth avenue, Brooklyn, over the line of the present "Culver Route"—that is, over private property to Gravesend avenue, over Gravesend avenue to about Avenue X, and thence over Shell road to Surf avenue, Coney Island.

(9) A two-track subway from Sixth avenue and Fourteenth street, Manhattan, through Fourteenth street and under the East River to North Seventh street, Brooklyn, thence through Metropolitan and Bushwick avenues to Johnson avenue, thence as a two and three-track elevated line over Johnson avenue and private property to Wyckoff avenue, and over Wyckoff avenue and private property to a point of connection with the Broadway elevated line at Broadway and East New York.

(10) A two-track subway and tunnel route to be laid out from a point in the Fourth avenue subway, near Sixty-fifth street in Brooklyn, along, under or near the line of Sixty-fifth street and under the Bay to a point on Staten Island, near the foot of Arrietta street, with spurs to Saint George and Stapleton.

(B) To be constructed by the operating company at its own expense; but title to vest in the company, subject to terms of recapture by the City:

(11) A two-track extension of the Brighton Beach elevated line from the intersection of Fulton street and Franklin avenue through Greenpoint and Long Island City to the

Queensboro Bridge Plaza, there connecting with the lines to Astoria and Corona.

(12) A two-track elevated line to Jamaica, with privilege of three tracks, running from the present termination of the Cypress Hill elevated by way of Jamaica Plank road to Grand street.

(13) A two-track elevated line, with privilege of three tracks, from the present termination of the elevated tracks in Liberty avenue, at a point near the old Brooklyn City line, through Liberty avenue to about Lefferts avenue, Richmond Hill.

(*C*) *Third tracking or reconstruction of existing lines at the expense of the Operator, subject to recapture by the City*:

The third tracking of the Fulton Street elevated line from Brooklyn Bridge to East New York; the Broadway line from Williamsburg Bridge to East New York, with the privilege of extending either of said third tracks to the present terminus of such lines; and the third tracking of the Myrtle avenue line from Broadway to Ridgewood, with a physical connection between the Myrtle avenue and Broadway tracks.

(*D*) *Reconstruction or other improvements of existing lines—for the purpose of eliminating grade crossings and generally facilitating rapid transit—at the expense of the Operator*:

(14) Reconstruction of the Sea Beach line from a connection with the Fourth avenue subway at Sixty-fifth street to Coney Island, such line to carry either two or three tracks where necessary and to be depressed or elevated as may be found practicable.

(15) (*a*) Provision for two additional tracks on the Brighton Beach line from Malbone street to Church avenue, thus continuing the four-track line of this road to a point of connection with the subway in Flatbush avenue; and

(*b*) the removal of grade crossings on the Brighton Beach line through the elevation of two of the existing tracks and the addition of two other tracks between Neptune avenue and the new terminal at Coney Island.

(16) Removal of grade crossings for rapid transit service on the Lutheran Cemetery line, between Ridgewood and Fresh Pond road, by elevation of two tracks, with connections at Ridgewood with existing elevated structures.

(17) The establishment of a comprehensive elevated terminal at Coney Island, upon private property and across intersecting streets, between the Culver and West End terminals, and with connecting tracks to enable the use of such terminal facilities by the Brighton Beach and Sea Beach lines and by the city-owned lines in New Utrecht avenue and Gravesend avenue.

(18) Installation of additional tracks to facilitate the connection of the various elevated lines converging at East New York.

Interchange of Traffic Rights:

(19) The right is reserved to the City to grant trackage rights over the following sections of the enlarged system, on a basis which shall be equitable to each operator exercising such rights:

(*a*) Between the Interborough Company and its successor or successors in the operation of either subway or elevated lines over the Jerome Avenue line and the White Plains Road extension in The Bronx; and

(*b*) Between the Interborough and the Brooklyn Companies or the successors of either over the lines to Astoria and Corona, converging at the Queensboro Bridge Plaza.

(20) All of the new routes proposed for either system have been either completely legalized, or approved by the Public Service Commission and transmitted for the action of your Board and of the Mayor, as a preliminary to legalization, except:

(*a*) The extension of the Seventh Avenue line through Park Place and Beekman street in Manhattan to the Wall

street district and Brooklyn Heights, where the formal consent of the Federal authorities for a curve under the post office building is still to be secured; and

(*b*) The route from Bay Ridge to Staten Island, the exact line of which will depend upon surveys now being made.

Third Tracking and Extensions on the System of the Manhattan Elevated Railways Company; to be Operated by the Interborough Rapid Transit Company:

(1) The completion of the third track of the Second avenue line from City Hall station to One Hundred and Twenty-ninth street; and of the Third avenue line from City Hall station to One Hundred and Twenty-ninth street and the Harlem River, with the necessary track changes to abolish grade crossings at Chatham Square; the construction of a four-track bridge across the Harlem River and a four-track line between the Harlem River and One Hundred and Forty-ninth street in The Bronx with the extension of the third track thence to One Hundred and Forty-seventh street, with the privilege of thereafter extending such third track to the present terminus of the Third avenue line at Bronx Park; and the completion of the third tracking of the Ninth Avenue line from Rector street to One Hundred and Fifty-fifth street.

(2) The construction of a two-track elevated line from about One Hundred and Fifty-seventh street and Eighth avenue across the Putnam Railroad bridge over the Harlem River; thence over the right of way of the New York Central & Hudson River Railroad and private property; thence as a tunnel under private property and One Hundred and Sixty-second street, emerging as an elevated structure in One Hundred and Sixty-second street near Jerome avenue, and thence over One Hundred and Sixty-second street to River avenue and to a point of connection with the elevated structure of the Jerome avenue extension of the Lexington avenue subway.

(3) A two-track elevated extension from the Third avenue line at about One Hundred and Forty-third street over private property and Willis avenue and Bergen avenue to a point of connection with the West Farms division of the subway at or about Park avenue.

(4) A two-track extension from the Third avenue line at Fordham avenue through Webster avenue, Gun Hill road and White Plains avenue to a point of connection with the Becker avenue extension of the subway in White Plains road.

(5) A two-track extension from the Second avenue line at Fifty-ninth street across the Queensboro Bridge to a point of connection with the elevated and subway lines converging at Queensboro Bridge Plaza.

OPERATING TERMS.

The operating and financial terms proposed for the contracts under consideration have been revised in various particulars, and at various times, since the joint report of the Conferees to the Board of Estimate and Apportionment. It will, no doubt, aid the Board in its consideration of the whole matter to afford a more definite basis for its present action, if these terms are restated. They are as follows:

Terms Applying to Either Operating Company. Rate of Fare—

(1) The rate of fare for one continuous ride over any part of the system operated by either operator, including transfers, is to be five cents.

Terms of Leases—

(2) All contracts for the operation of lines in either system title to which is vested in the City, whether such lines be constructed by the City or by the operating company, or upon a basis of division of cost between the City and the company, are to fix the term of the lease at forty-nine (49) years from the beginning of operation; except that

the so-called Centre street loop lines in Manhattan with the extension thereof in Nassau and Broad streets and the necessary tracks on connecting bridges may be leased for twenty (20) years with the privilege of renewal, upon an adjustment of terms, for twenty (20) years in addition.

(3) All franchises granted for extensions of existing elevated railroads, or for additional tracks on such elevated railroads, title to which is to vest in the company, but subject to recapture by the City, will be for eighty-five (85) years from the time such extensions or additional tracks are put into operation.

Provision for Recapture—

(4) The City will retain the right to take over at any time after ten years of operation, if it so elects, the line or lines covered by any forty-nine year operating contract title to which is vested in the City, upon payment to the operating company of

(*a*) The amount of the company's money investment, if any, in either construction, or equipment, plus fifteen (15%) per centum—which aggregate sum shall decrease gradually—and less the amount accrued in any sinking fund created for amortization of the company's investment, and of any deferred maintenance charges with respect thereto, and as the term continues, so that at the end of the contract, the invesment shall have been completely amortized and the lines become the property of the city without further payment;

(*b*) The unamortized amount of brokerage charges as hereinafter defined.

(5) The City, in the event of any such recapture, may, upon its option, either

(*a*) Pay from its own funds the amount required to reimburse the operator; or

(*b*) Transfer or assign any of the lines to a second operator upon direct payment by such second operator to

the original operating company of the amount unamortized and remaining due on account of its investment.

(6) The contracts are to provide that if the City shall at any time exercise its right to recapture either one or all of the groups described under the heading of routing terms, the pooling arrangement for determining the amount of compensation to be paid respectively to the City and the company shall, at the option of either party, be readjusted; the respective compensation reserved to either party from the results of operation of the lines remaining in the pooling arrangement to be such as they shall agree upon, or, in the case of their failure to agree, such as shall be determined by arbitration in a manner to be prescribed in the contract.

Construction—

(7) The contributions of capital furnished by either Operator toward the payment of the cost of construction are to be apportioned to particular lines or groups of lines subject to recapture, so as to afford a basis for proper financial adjustment between the Operator and the City in case such lines are at any time retaken.

(8) The cost of construction, whether borne by the City or by the Operating Company, or upon a basis of division between the City and the Company, is to be the actual money cost and will include:

(*a*) All contracts for original construction work, and all labor and materials entering into such construction, including roadbed, tracks and station finish;

(*b*) Engineering expenses, including those of the Public Service Commission directly chargeable to construction work;

(*c*) All carrying charges during construction;

(*d*) Extras and damages;

(*e*) Real Estate and easements;

(*f*) Such other incidental charges as may be agreed upon.

(9) It is understood that, subject to its necessary uses for transit purposes, the City may sell, lease or otherwise dispose of the surface of any real estate acquired for construction purposes, the proceeds of such sale to be credited towards the reduction of the construction cost account.

(10) It is also understood that any incidental fee damages allowed by the courts for rights of way in acquiring streets and public places shall be paid from the City's general fund and not from the subway construction fund.

(11) The several lines embraced within either system are to be constructed according to the plans of the Public Service Commission, and under contracts to be duly awarded for the City in the manner prescribed by law, after public bidding, and to responsible contractors.

The construction of the several lines is to proceed in the manner determined by the Public Service Commission, due regard being given to the necessity for relieving first those sections where present traffic is most congested, and for the letting of contracts in such order that those requiring the longest periods of construction shall, so far as practicable, be given precedence.

Cost of Equipment—

(12) The cost of equipment, all of which is to be furnished by the operating company, will be the actual cost, and will include:

(*a*) All equipment for the supply and transmission of power, all cars, yards, and yard terminals, third rail, signals and interlocking, and such other supplies, materials or labor coming under the head of equipment as defined in the contract;

(*b*) The cost of acquiring all necessary real estate or of interest therein;

(*c*) Engineering expense;

(*d*) All carrying charges on the cost of equipment prior to the operation thereof; and

(*e*) Such other incidental charges as may be agreed upon.

Pooling of Receipts and Payments Therefrom—

(13) When the new subway and elevated lines shall have been equipped and put into operation, the gross receipts from the operation of all the lines, either subway or elevated, to be operated under the contract, are to be pooled for and during the full term of forty-nine (49) years, and from the total of such gross receipts deductions shall be made in the following order:

(*a*) To the Operator: All operating expenses, including damages for accidents, provision for depreciation, renewals and obsolescence, taxes and other governmental charges, insurance, general and administration expenses, rental of leased lines or other properties, if any, used in operation, and amortization of brokerage charges; it being understood that brokerage charges are not to exceed three (3) per centum of the amount of the investment by the Operator in the cost of construction and equipment; and it being further understood that no charges under any of the foregoing headings shall be thus deducted that are in any way different from or additional to the charges deducted by the operating companies in the process of determining their present net earnings as referred to in the clause following:

(*b*) To the City: An amount equivalent to the rental, if any, payable under existing subway contracts at the date of the beginning of general operation under the pooling arrangement;

(*c*) To the Operator: A sum representing the average net earnings from the operation of the existing subway and elevated lines and equipment to be included within the pooling arrangement. The amount thus reserved to the companies is to be the amount of the earnings after the payment of operating expenses. From it, however, the companies are to pay all interest, sinking fund and other

fixed charges upon their present investments of capital. The process of determining the amounts to be allowed each company in lieu of present net earnings will be as hereafter stated in the clauses relating specifically to each.

(*d*) To the Operator: A sum equal to six (6%) per centum per annum upon the investment of the operator in construction or equipment after the date of the contract, of all lines covered by the contract, where such investment is made prior to the beginning of general operation; and actual interest charges plus an additional one (1%) per centum for sinking fund upon such additional expenditures as the Operator may from time to time make after the beginning of operation for betterments or improvements in construction or for equipment chargeable to capital account;

(*e*) To the City: A sum equal to the actual interest charges plus an additional one (1%) per centum for sinking fund upon the bonds it issues to provide for the construction of new lines (with such further sum, in the case of the lines to be operated by the Interborough Company, as is hereinafter set forth);

(*f*) To the City: Actual interest and sinking fund charges at the rate of one (1%) percentum per annum upon such bonds as it may issue to cover its share in betterments or improvements upon either the old or the new lines under the pooling arrangement, wherever chargeable to capital account.

(*g*) The remainder of the earnings and profits after the foregoing deductions to be divided between the City and the Operator share and share alike.

(14) It is understood that if deficiencies in any year in meeting the aforesaid payments to the Operator, such deficiencies shall be treated as cumulative and shall be paid off and discharged annually so far as possible out of future receipts before payments are made to the City.

In the same manner, deficiencies arising in any year in meeting the aforesaid payments to the City will be treated

as cumulative and paid off and discharged annually out of future profit when available before any equal division of clear profit becomes effective.

Operating Expenses—

(15) The classification and character of operating expenses under either contract is to be that prescribed by the Public Service Commission and in the event of any dispute arising with regard to either the character or the amount of specific items charged to operating expenses, either the company or the city shall have the right to review the question at issue through an appeal or certiorari to the Appellate Division of the Supreme Court.

Commencement of Operation and Provision for the Lines Ready for Operation in Advance of Pooling:

(16) It is understood that the date from which the new leases will run shall not be later than four (4) years from the time that formal contracts are entered into between the City and the operating companies; unless strikes, injunctions or other causes beyond the companies' control prevent the opening of the new lines within such period; in which event an allowance of time corresponding to the period of delay shall be added.

(17) In the event of the completion of any substantial portion of the new lines in advance of operation under the pooling arrangement, such lines may be leased upon a temporary basis from such times as they are ready for operation until the beginning of the forty-nine year periods; or the gross receipts from the operation of present subway or elevated lines may be pooled with the gross receipts from the operation of such newly built portion, and the receipts so pooled distributed in the proportion to which the new lines bear to the whole system, in the same general manner as that provided for the ascertainment and the distribution of receipts from the operation of lines under the clause relating to extensions.

(18) It is understood that out of the sums which the operating company receives as aforesaid, it will pay all charges for interest, as the same become due, and provide sinking funds sufficient to retire and to pay off at maturity the principal of its original investment in either construction or equipment. If, however, at the termination or taking over of any lease, there remains any unamortized portion of the investments of the Operator for construction, betterments of or additions to the equipment, such unamortized portion is to be assumed by the City.

Extensions—

(19) Each contract is to contain a clause under which the Operator will agree to operate lines additional to those included in the present plan, as part of the single fare system, whether such lines be built now or hereafter, upon the following conditions:

A separate account shall be kept of the gross earnings of any such extension or extensions, to be ascertained from the value of the tickets collected at the stations on such extensions and any other miscellaneous revenues derived from such stations. From the gross earnings thus ascertained, there shall be deducted:

First: (*a*) All station expenses;
(*b*) Maintenance of way and structure;
(*c*) Damages from accidents happening on the division.

Second: Other operation costs, to be determined according to the unit costs on the system, upon a per-passenger basis:

(*a*) Conducting transportation;
(*b*) Maintenance of equipment and depreciation;
(*c*) Cost of power;
(*d*) General and administration expenses;
(*e*) Taxes, if any.

After the payment of these charges, the Operator will receive the actual annual charges for carrying the cost of such equipment as may be necessary and properly allotted to the extensions, together with the proper sinking fund thereon.

From the balance then remaining, there shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction.

If the income from the operation of the extension shall be insufficient to meet these several charges or any part thereof, deficiencies shall be paid annually by the City either from its portion of the earnings of the entire system or from such other sources as it may determine.

The net profits remaining after provision has been made for the foregoing charges will be divided equally between the City and the Operator; but when any of the extensions shall become profitable and when all deficiencies attributed to the operation of the particular extension shall have been fully paid and discharged, such extension shall, beginning on July first of the year following, be operated as a part of the general system and be governed by all of the provisions applying thereto.

Examination of Existing Properties—

(20) Provision will be made in the contracts for the examination by the Public Service Commission of the physical condition of the plant and equipment of the present systems, both subway and elevated, before they are taken over for operation under the pooling arrangement, so that the City may definitely assure itself that the property has been properly and adequately maintained; and any expenditures deemed necessary by the Public Service Commission to cover any deferred maintenance or depreciation in either plant or equipment shall be made by the companies before the pooling of receipts proceeds, either out of surplus, reserves or current earnings as the company may elect.

Maintenance and Operation—

(21) The contracts will contain provisions embodying substantially the essentials of the Public Service law with relation to both operation and management, together with such added and reasonable guarantees as the City may require with relation to the character and sufficiency of the equipment to be furnished and of the service to be given.

(22) The Public Service Commission will also exercise its right to supervise all accounts of the operating companies with relation either to construction, equipment or operation and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in profits are based.

(23) Provision will also be made that the management of the enlarged system covered by either contract shall be conducted by one company; and, without the consent of the City, no lease, transfer or assignment, in whole or in part, of any of the rights granted by the City shall be made, nor any subsidiary company be created to operate or maintain either the whole or any part of the enlarged system or to furnish to it power, supplies or any other operating necessity.

Terms Applying to the Interborough Company.

Levelling of Leases—

(1) The existing leases of the City to the Interborough Company under which the original subway from Ann street northward, in Manhattan, and the Brooklyn extension from Ann street in Manhattan to Atlantic avenue in Brooklyn, are operated, together with a right to renewal terms thereunder, are to be levelled so that the leases of the existing subway shall be coterminous with leases to the Interborough Company for the operation of the new lines.

Exchange of Manhattan Lines—

(2) The City will be given the right if it so elects to obtain possession of either a complete East Side or a com-

plete West Side subway line in Manhattan. To this end the Interborough Company will consent, provided that "the lien of any duly authorized mortgage be not disturbed," to modify contracts numbers 1 and 2, under which the existing subways are operated, so that either portion of the present subway extending southward from Forty-second street in Manhattan to Atlantic avenue in Brooklyn, or that extending northward from Forty-second street in Manhattan to The Bronx, shall be held under a lease terminable at any time after ten years from the beginning of operation of the proposed Seventh Avenue or Lexington Avenue Line, upon receiving as compensation therefor the right to hold either the proposed Seventh Avenue Line from Times Square southward to the Borough Hall in Brooklyn or the proposed Lexington Avenue Line with its extensions from Forty-second street in Manhattan northward under a non-terminable lease for forty-nine years from the date the pooling arrangement of the new and old lines commences; the differences in values upon such an exchange to be adjusted by agreement between the City and the company, or, if they cannot agree, to be fixed by arbitration upon terms and conditions to be agreed upon.

Recapture—

(3) The Interborough Company agrees that the City's right of recapture after ten years shall be exercised with respect to the whole system of new lines now to be built or to any one or more of the separate groups of lines coming within the system hereinbefore specified under the general head of "Recapture".

The company also agrees that if the City take over the new lines after a period of ten years from the beginning of operation, it shall have the right to take over as well, at any time after thirty-five years, the lines of the present subway upon payment to the company of a sum equal to the then present worth of the unexpired portion of the company's leases under Contracts 1 and 2, estimated upon

the basis of the annual profits for the five-year period immediately preceding such recapture, or, if the period of final amortization has been passed, then for the five years immediately preceding the completion of amortization.

Expenditures for Construction and Equipment—

(4) The investment of the Interborough Company in the new lines to be added to its system, and in the equipment therefor, is to be not less than $77,000,000; or $56,000,000 for construction and $21,000,000 for equipment; so that with the company's capital investment in the present subway, aggregating on June 30, 1911, approximately $48,000,000, its total investment shall be $125,000,000.

(5) If less than $21,000,000 is required to equip the company's new lines to meet the requirements of the first year of operation, the amount of the difference is to be added to the fund the company will expend for construction.

(6) If more than $21,000,000 be required to provide the equipment necessary to meet the requirements of the first year of operation, the company is to furnish the excess and upon this it will receive annually during the period of forty-nine years in the order defined in paragraph (e) of section 13 of the general operating terms sums equal to the actual cost of such additional capital for equipment plus a sinking fund therefor of not exceeding one (1) per centum per annum.

(7) When further outlays chargeable to capital account are required for betterments or improvements in the construction of either the old or new lines, such capital is to be furnished share and share alike by the city and the company. Capital required for betterments or improvements in equipment, chargeable to capital account, or for additional equipment, will be furnished by the company alone.

(8) The company is to contribute all of its right, title and interest in the Belmont tunnel—representing an outlay on its part of $8,500,000—at a nominal valuation of $3,000,-

000; this to be accepted as a part of its half in the construction cost of the entire system.

(9) The company will also accept as part of the city's half of the cost of construction all of the contracts already let for sections of the subway in Lexington avenue.

Amortization of New Equipment—

(10) The equipment of the existing subways owned by the company is to be taken over by the city in the manner provided for under the present contracts between the City and the Interborough Company at the termination of the new forty-nine (49) year lease, the city paying to the company its then value. All new equipment for the operation of the enlarged system, covering both old and new lines, is to be amortized through the sinking fund and its accretions and become the property of the city, without further payment, at the end of the lease.

Pooling of Receipts and Payments Therefrom—

(11) The manner of determining the amount to be reserved to the company on account of the earnings of the present subway lines is to be as follows:

After the deduction of operating expenses as hereinbefore defined, and after the deduction of the amount of the rental to the city for the present subway, the Interborough Company is to receive from the gross receipts of its expanded system for each of the forty-nine (49) years of its lease a sum representing the average annual income from the operation of the existing lines for the two fiscal years ending June 30, 1911—which is $6,335,000. This sum is to be reserved not only as an equivalent of present earnings, but "as compensation for the pooling of the receipts of the old lines and the new; the levelling of leases of the existing subway and the exchange of the legs; for services in connection with the operation of the property and for the company's agreement to furnish * * * one-half of the cost of the

construction of the proposed new subways and the entire cost of the equipment therefor."

(12) The payment of interest and sinking fund charges upon new investment will follow in the manner prescribed by paragraphs and of the general operating terms.

Terms Applying to the Brooklyn Company.

Expenditures for Construction and Equipment—

(1) The Brooklyn Company is to expend not less than $13,000,000 upon the construction of the city-owned lines in its system, this investment to be apportioned to the elevated extensions of the Fourth avenue subway in South Brooklyn, the Flatbush avenue connection with the Brighton Beach lines and the Canal street connection with the Manhattan Bridge.

(2) The Company will expend approximately $21,000,000 upon the extension and improvements in its own elevated system, and $26,000,000 for the equipment of the combined lines it is to operate.

Pooling of Receipts and Payments Therefrom—

(3) The lines operated by the Brooklyn Company, the receipts from the operation of which are to be pooled, will include all of the City lines to be allotted to the company under the general heading of routing terms, the Sea Beach line from Fourth avenue in Brooklyn to Coney Island, and the existing lines of the Brooklyn Union Elevated Railroad Company and the Canarsie Railroad Company (including trackage rights over the Brooklyn and Williamsburg Bridges), with the enlargements and extension also enumerated under the heading of routing terms.

(4) The manner of determining the amount to be reserved to the company on account of the earnings of its present lines is to be as follows:

After the deduction of operating expenses as hereinbefore defined, the Brooklyn Company is to receive from the

gross receipts of its expanded system for each of the forty-nine (49) years of its lease a sum representing the average annual net earnings from the operation of the lines and stations of the Brooklyn Union Elevated Railroad Company, the Canarsie Railroad Company and the Sea Beach Railway Company during the four years preceding the June thirtieth next before the date of the beginning of pooling, such average to be ascertained in either one of the following two ways:

(a) An amount equivalent to forty per cent. of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

(b) The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the Brooklyn and Williamsburg bridges during the year prior to the beginning of operation in Manhattan beyond the present terminal, less the operating expenses computed upon the per passenger basis; such balance not to exceed in any year $3,500,000 nor to be less than the net earnings of the Brooklyn Union Elevated Railroad Company for the year ending June 30, 1911.

The net operating income of the lines in question for the year ending June 30, 1911, amounted to $3,211,723.

If the earnings of the Sea Beach Railway Company be included, a corresponding allowance would be made.

(5) It is understood that the pooling of receipts of the lines to be operated by the Brooklyn Company shall not proceed until the Broadway line from the Battery to Queensboro Plaza and the line connecting Manhattan Bridge and Broadway through Canal street have been completed and turned over for operation; or until such later time, within four years, as the Public Service Commission may determine.

Recapture—

(6) The company agrees that the City's right of recapture after ten years shall be exercised with respect either to the whole system of new City-owned lines now to be built—with the exception of the loop lines through Centre, Nassau and Broad streets—or to any one or more of the separate groups of lines hereinbefore specified under the general heading of "Recapture."

(7) If the City should exercise its right to terminate the contract as to all of the City-owned lines excepting the loop through Centre, Nassau and Broad streets before the expiration of twenty years from the beginning of pooling, the company would continue to equip, maintain and operate the said loop lines under the general provisions of the contract except that the rental therefor, after such termination, and for the remainder of the lease, will be such as the original contract may prescribe.

(8) In the event of recapture by the City of the lines essential to the operation of the trains of the Brighton Beach road into Manhattan and should not recapture the connecting link between the Brighton Beach road and the Flatbush avenue extension, it is understood that sufficient trackage rights will be reserved to the Brooklyn Company for entrance to Manhattan over the lines the City retains.

(9) The City is to retain the right of recapture, after ten years, of all the elevated extensions, title to which remains vested in the company, and of all the equipment attaching thereto. The City will also retain the right to retake any of the additional tracks placed upon existing elevated structures in and along the public streets or places at any time after ten years; though not for railroad transit operation, either by itself or by any other party.

(10) In the event of the recapture either of additional tracks or of elevated extensions, the City will make payments therefor in the same manner as in the case of the recapture of lines covered by the forty-nine year contracts.

(11) The cost of additional tracks or extensions, together with the equipment therefor, is to be amortized during the life of the contract, so that at the termination thereof they will become the property of the City without further payment therefor, except as to unamortized portions of additions, betterments or improvements added during the life of the contract.

Terms Applying to the Manhattan Elevated Lines.
Rates of Fare—

(1) The rate of fare over any part of the Manhattan elevated system with its proposed extensions is not to exceed five cents.

Length of Lease—

(2) The franchise for the construction of additional tracks upon the structure of the Manhattan Elevated Company are to be embodied in a certificate issued to the Manhattan Company, for a term of twenty-five years with three renewal periods of twenty years each for the purpose of readjustment of rentals. The right of recapture is to accrue to the City either upon the termination of the ten-year period or at the termination of the franchise; but not for railroad transit operation, either by the City itself or by any other party.

(3) The franchises for the elevated extensions are to be embodied in a certificate issued to the Interborough Company, for a term of eighty-five years from the time the extensions are put in complete operation. Both the extensions and equipment attaching thereto are to be subject to recapture by the City at any time after ten years upon the same terms applicable to the subway lines. If, however, either the White Plains or the Jerome avenue extensions shall be taken over by the City at any time under the recapture clause, trackage rights will be reserved to the company over these lines in order to enable it to reach any ter-

minals, storage yards or shops located upon such extensions and used for its purposes.

Compensation to the City—

(4) The compensation for the third-tracking franchises is to be not exceeding two per cent. (2%) of the increased gross receipts of each station served by express trains. As soon, however, as the elevated extensions, as well as the third-tracking improvements, have been constructed and placed in complete operation, the gross receipts from these are to be pooled with the gross receipts of the present lines, including the third-tracking and other improvements; and from the receipts so pooled, and after the deduction of rentals, operating expenses and the two per cent. franchise tax referred to, the company is to pay to the City fifty per cent. (50%) of all increase of net revenue above its present earnings. The average of the net operating receipts of the present system for the two years ending June 30, 1911, is to be the sum thus allowed.

(5) If in any year the receipts or profits of the company from the operation of the enlarged system are less than the average of the receipts of the present system for the two years referred to, the deficiencies so occurring are to be treated as cumulative and as a charge to lie against future profits before the even division with the City proceeds.

EXTENT OF THE NEW SYSTEM.

The magnitude of the proposed new system may be indicated by the fact that the total road mileage of rapid transit routes, subway and elevated, now serving the city—exclusive of the Hudson & Manhattan lines—will be increased from 66.9 to 172.4. The increase in the mileage operated by the Interborough Company will be from 25.9 to 74.4; and in the mileage operated by the Brooklyn Company from 41 to 98. These increases, with the increases of track mileage, and the division between subway and elevated lines, shown in detail, are as follows:

	Road Miles.	Track Subway.	Track Elevated.	Total Track.
(1) *Interborough Company*—				
Company's present lines	25.9	56.1	16.9	73.
New—built jointly by city and company	48.5	75.6	71.3	147.1
	74.4	131.7	84.4	220.1
(2) *Brooklyn Company*—				
Company's present lines	41.04		104.9	104.9
New—built by the company	50.14	1.6	84.1	85.78
New—built jointly by city and company	26.9	69.9	6.	75.96
	98.08	71.5	195.	266.64
(3) *Combined Dual System*—				
Present lines	66.94	56.1	121.8	177.9
New lines	105.54	147.16	161.68	308.84
Totals	172.48	203.26	283.48	486.74

The benefit following this expansion of lines will be extended to all parts of the city.

Manhattan will secure the completion of the so-called "H" system, through which a continuous line north and south will traverse the length of the Island on the east as well as on the west side, instead of leaving it as at present half a line on each. The Lexington Avenue line, through which direct transit to the Bronx will be shortened by many minutes, will incidentally open to development one of the most promising areas of the east side. The greater lower west side district, which will shortly be opened through the extension of Seventh Avenue southward, with the subway running beneath, will also be given new life. The Pennsylvania Railroad station, entering the city in this section, will be placed in touch with lines of communication reaching every borough. The service given the rapidly growing districts of the upper West Side and Washington Heights will be considerably aided through the lessening of the pressure of the Bronx traffic, all of which now runs into the present main line at Ninety-sixth Street.

The City Hall and Wall Street districts will be tapped by five great lines instead of one. The William Street and Hanover Square line, rounding the post office from Green-

wich Street, will bring the West Side into immediate touch with the financial district, and proceeds to the now neglected area of Brooklyn Heights. The Church and Nassau Street lines of the Brooklyn system, while giving two more avenues of access to Brooklyn, will at the same time put lower Manhattan in closer touch with its theatre and hotel district through the express service on Broadway. The third tracking of the elevated lines will add to the convenience and facility not only of the long haul but of the short distance traffic in all parts of the Island.

Brooklyn will gain greatly in the articulation of its forty miles of existing elevated road with all of lower and central Manhattan through the Broadway line, and through the third tracking and general improvement of practically all of its present rapid transit lines. It will be served, in reality, by two great loops; the one proceeding by way of Broadway and Seventh Avenue to Fifty-ninth Street and Long Island City, with connections both at the Battery and by way of Manhattan Bridge, and the other by way of the Williamsburg and Brooklyn Bridges through the Centre, Nassau and Broad Street Loop, back to Borough Hall. It is understood that the Centre Street section of the Bridge Loop line can be placed in operation within sixty days after the signing of the pending contracts.

Flatbush Avenue will have a subway of six tracks; four traversing the Flatbush and Eastern Parkway district, with branches through Nostrand Avenue and to Brownsville, and two tracks linking the present Brighton Beach lines with the Manhattan Bridge.

South Brooklyn will secure the extension of the Fourth Avenue subway as far as Eighty-sixth Street, as well as the linking of the subway with the new elevated lines that are to replace the present lines of the old steam roads and cross the broad territory of New Utrecht and Gravesend, as well as the section along the Narrows, to Coney Island.

The entire city below Fifty-ninth Street will receive the benefit of the five cent fare to Coney Island.

The Eastern District of Brooklyn will gain a new subway and tunnel line from the Bushwick Station to Sixth Avenue and Fourteenth Street in Manhattan, with transfers to the intersecting lines in both boroughs, and a connecting elevated service from Bushwick eastward to Ridgewood and East New York. It will secure also the third tracking of the Broadway elevated line, passing through its chief business district and across the Williamsburg Bridge, running directly to the Wall Street district in Manhattan and transferring north; also the third tracking of the Fulton Street and Myrtle Avenue lines westward to the Brooklyn Borough Hall. From Queensboro Plaza, in Long Island City, across Newtown Creek and through Greenpoint and Williamsburg, a new elevated line will run to a point of connection with the Brighton Beach road, thus furnishing a new highway of travel, through both Brooklyn and Queens, running literally from the South to the Sea.

The Bronx will secure practically three new lines; those on Southern Boulevard and Westchester Avenue, Jerome Avenue and the White Plains Road line, and will have the benefit of the third tracking of the elevated lines as well. The crossing of lines, and the establishment of new connections, will, moreover, permit of a general interchange of passengers, destined for either the west side or the east side of Manhattan, without extra fare. On the other hand —in the reverse direction of traffic—the entire city will be brought within easy access of the great park and beaches at Pelham Bay, the single fare in this case serving the same social purpose as the five-cent fare to Coney Island.

The Borough of Queens will secure the opening of the Steinway tunnel and its connection with the present subway lines, of the Interborough Company, both at Grand Central station and at Times Square. At Queensboro Plaza, there will be a union station, at which trains over the elevated lines from Astoria and Corona will proceed southward and through either the Steinway tunnel or the line across Brooklyn; or connect by way of the bridge with

the Second Avenue elevated line at Fifty-ninth Street. In South Queens, as a part of the system of the Brooklyn Company, two new elevated lines; one on either side of the lines of the Long Island Railroad, will run to Jamaica and Richmond Hill.

The building of the subway to Richmond will be brought measurably nearer through the extension of the Fourth Avenue subway to the point selected for departure to Staten Island at Sixty-fifth Street. The Conferees renew the recommendation of the joint report that effort be made to secure the co-operation of the freight carrying trunk lines terminating in Staten Island in the building of a tunnel between these points which would serve the purpose of both freight and subway passenger traffic, and the cost of which might be borne equally by them and the city. This plan would, incidentally, enable the city to carry the pipes of the new Catskill Water System, destined for Staten Island, at a saving of approximately $1,000,000 over the present plans of the Water Board. A supplementary report upon the possibility of this plan will be submitted, we trust, at an early date. Staten Island, meanwhile, will secure an additional subway connection at the Battery with the Broadway line and the other branches of the projected Brooklyn system, as well as the Seventh Avenue line of the Interborough system. With the linking of the Staten Island ferry with these new connecting lines, an effort will be made to secure a transfer basis with both the operating companies that will permit interchange of passengers from either system for a five-cent fare. There is good reason to hope that some arrangement of this sort may be brought about.

In plotting the new lines, the old plan of dependence upon straight north and south routes has been broken, and the beginnings laid for a radial system that should go far in shaping the city's better development. Subways have been provided wherever the congestion of traffic and consideration for the freedom of street surfaces seem to warrant.

Where subways would appear to be too expensive, elevated lines, costing from one-third to one-fifth as much, will be utilized.

Your Committee and the Public Service Commission are of the opinion that through the greater development of taxable values that must follow the construction of the dual system, the city will receive a return in annual taxes, and through other means of indirection, that will repay many times the cost of the immediate capital outlay that it will make.

Estimates of Cost.

The cost of construction of all the new lines and improvements, both subway and elevated, embraced within the dual plan—exclusive of the cost of the Fourth Avenue and Bridge Loop lines, which are nearing completion and for which the city has already provided—will be approximately $214,000,000. The cost of equipment will be $47,000,000, making a total combined outlay on the part of the city and the operating companies of $261,000,000. The Interborough Company will spend, in addition, about $25,000,000 upon the extensions and improvements to the Manhattan elevated system. The city's additional investment in the Fourth Avenue and Bridge Loop Lines, which are to be taken into the Brooklyn system, will be about $28,500 more.

Changes made in certain of the routes within the past few days will slightly alter the estimates upon which these figures of the new work are based; but they may be taken as approximately correct.

For the Interborough system, the company is to furnish not more than $56,000,000 for construction and $21,000,000 for equipment; a total of $77,000,000. The city is to furnish an amount equal to the investment of the company in construction, and any sum additional to this that may be necessary to complete the lines projected.

According to the present estimates, the cost to the city for the completion of all the lines to be operated by the Interborough Company would be $59,649,250. The Public Service Commission has, however, effected many economies in the reshaping of the plans for the Lexington Avenue and Broadway routes, the construction of which is under way; and it is to be expected that through similar economies the total amount actually required of the city will come within an even half of the total outlay.

The Brooklyn Company will furnish, all told, $60,000,000 of new capital, $13,000,000 of which will be applied on account of the construction of city-owned lines, about $21,000,000 on account of extension and improvement of its existing elevated lines, and $26,000,000 for equipment. The lines to be built by the city for the Brooklyn system, in addition to the Fourth Avenue and Bridge Loop lines, will cost approximately $64,700,000 in addition to the company's contribution.

The cost of all the lines and of the required equipment, the detailed estimates of which are shown in an appendix at pages 46 and 47, would be as follows:

COST OF CONSTRUCTION:		
(1) *Interborough System*—		
By the City	$59,649,250	
By the Company	56,000,000	
		$115,649,250
(2) *Brooklyn System*—		
By the City—New Lines	$64,722,950	
By the Company—For City Lines	13,000,000	
		77,722,950
By the City for the Fourth avenue and Loop Lines under construction		28,486,000
By the Company for elevated extensions and improvements		21,000,000
		$127,208,950
(3) *Combined Dual System*—		
By the City—New Lines	$124,372,200	
By the City—Under construction	28,486,000	
By the Operating Companies	90,000,000	
		242,858,200
COST OF EQUIPMENT:		
Interborough Company	$21,000,000	
Brooklyn Company	26,000,000	
		47,000,000
		$289,858,200

The engineering expenses of the Public Service Commission have previously been paid from the appropriations allowed to the Commission in the annual city budget. Under the amendatory act recently passed by the Legislature, it would be permissible to charge these expenses to the cost account, if the Commission and the Board of Estimate so desire. No figures under this heading are, however, as yet included.

It will appear that upon the present estimates, the city's total new obligation in carrying out the dual plant would be limited to $124,372,200, to its share in the building of a tunnel to Staten Island and to the cost of the purchase of such real estate and easements as may be involved in the acquisition of rights of way.

When the present subways were built the cost of real estate was borne by the city separately, and did not enter into the construction account. Under the pending contracts, real estate costs may be so included if the city elects; but there is much doubt as to whether this would be a wise proceeding. Your Committee is of the opinion that it will be cheaper for the city, in most instances, to acquire the fee—rather than an easement merely—and to dispose of such properties later, subject to the continued existence of the easements. Various parcels taken in fee by the Public Service Commission for the purposes of the Centre Street Loop have been sold at a profit, and there seems to be little reason to doubt that a like experience will be met wherever this method is followed. It does not, therefore, seem necessary to carry the item of real estate under the head of permanent investment in subway building, although it will be necessary, of course, to provide from current funds for the properties required for immediate use. The amount of real estate—either fee or easements—has not been accurately estimated; but it is not expected to exceed a total of $6,000,000 for either system, or $12,000,000 in all.

According to the estimates followed, the distribution

of the total cost of construction and equipment between the city and the operating companies (exclusive of the Fourth Avenue and Bridge Loop Lines and of the cost of real estate) will be as follows:

(1) *By the City*—		
Interborough System	$59,649,250	
Brooklyn System	64,722,950	
		$124,372,200
(2) *By the Interborough Company*—		
Construction	$56,000,000	
Equipment	21,000,000	
		77,000,000
(3) *By the Brooklyn Company*—		
Construction	$34,000,000	
Equipment	26,000,000	
		60,000,000
		$261,372,200

The contracts already let by the city for the construction of the Lexington Avenue line, aggregating $28,230,000, will be accepted by the Interborough Company as part of the city's share in the construction of its system. Contracts already let for the two sections of the lower Broadway line, aggregating $4,650,000, will go toward the city's expenditure on account of the Brooklyn system.

It is to be borne in mind that the construction of all the new roads to be embraced within either system—excepting the extensions to the existing lines of the Brooklyn Company and the elevated extensions of the Fourth Avenue line in South Brooklyn—is to be municipal construction; that is, the city is to let all the contracts and to make all payments on account of such construction.

The City's Available Credit.

Your Committee is informed that, including the amount of contracts already let for the construction of sections of

the Broadway and Lexington Avenue lines, the City will probably have a legal credit margin for rapid transit purposes, during the current year, aggregating $100,000,000—and this probably without drawing more than a relatively small balancing margin from its reserve of credit for other municipal purposes. This credit is arrived at as follows:

Legal borrowing margin secured through the exemption of rapid transit bonds issued prior to December 31, 1910, under the recent constitutional amendment	$47,482,725 18
Additional margin or credit to be secured through the exemption of rapid transit bonds to cover issues since December 31, 1910 (under an act of the recent Legislature) which are self-carrying	3,029,984 74
Portion of outstanding authorizations for expenditures under Contracts 1 and 2 for the building of the present subway, which outlays when made will come within the exemption clause, estimated at	2,000,000 00
Amount specially reserved for rapid transit purposes by resolution of the Board of Estimate and Apportionment on April 8, 1910	13,000,000 00
Estimated proportion of additional borrowing margin which may be secured through the exemption of dock bonds, and which could be applied to rapid transit purposes	28,714,674 43
	$94,227,384 35
Balance to be drawn from reserve for general municipal purposes	5,772,615 65
	$100,000,000 00

The total amount of outstanding bonds issued for dock purposes up to December 31, 1909, and that may be exempted from the debt margin, and thus rendered available for either transit or dock purposes, is computed at $78,714,674. Your Committee has been assured by his Honor the Mayor and by the Comptroller that not more than $50,000,000 of this sum will be required as a reserve to cover the cost to the City of the river and harbor improvements now under contemplation by the Dock Department. It is, we understand, a matter of general agreement in the Board that the amount remaining and above specified shall be so used for transit purposes as the constitutional amendment permits.

The City's total borrowing margin, exclusive of the above named transit and dock reserves, was on February 29, 1912, $92,950,936. Against this total sum there were outstanding authorizations of Corporate Stock, against which contracts had not as yet been awarded but little or none of which could properly be cancelled, amounting to $59,209,536, leaving a balance of borrowing capacity for general municipal purposes on the date named of $33,741,400.

From the latter amount a sufficient sum may readily be spared to round out an even $100,000,000 margin for rapid transit purposes. Further, there can be no doubt that the increases in borrowing capacity secured in 1913, and in the immediately succeeding years, through the increased valuation of taxable real estate, will run to a normal average of from $30,000,000 to $40,000,000. As the period of construction of the new subway and elevated lines comprised within the dual plan will cover from three to five years, and as the building of some of the outlying extensions cannot be commenced until the trunk lines with which they are connected have been completed, it follows that the comparatively small amount required to complete the City's share in the cost of the lines will be found readily available before the period of construction has passed.

The Operating Basis.

The financial and operating terms proposed for the prospective operators have been given in detail, and hardly need further review. The fact should be emphasized, however, that the city is securing the use of the established rapid transit lines, and their connection with the new lines built for either system, on the basis of a universal 5-cent fare, at the most reasonable consideration that it is possible to secure. The negotiations with relation to terms have been protracted and arduous, and your committee is convinced that the operating companies, in making the many concessions that they have, have yielded the most that they can afford to yield without actually retaining their existing lines for continued separate operation.

As the value of the Interborough lines, developed during the seven years of their operation, is greater in certain degree than the value of the Brooklyn lines, the amount of consideration paid for their use, and for the pooling of their earnings, must be correspondingly greater. As it is, the Interborough Company agrees to operate a system of three times the mileage of its present, to advance $77,000,000 of new capital without further return than the payment of its interest and sinking fund charges, to readjust its present leases so as to add to the city's degree of control upon them, and to give the city the benefit of forty-nine years of its skilled management and services—all in return for the continued allowance of the profit it is receiving today. The amount of that profit, moreover, is to be limited and can go no higher until the city is earning the carrying charges upon all of its own new investment and a bonus of 3½ per cent besides.

A statement, frequently made, that a "profit" of 8.76 per cent. is to be allowed the company upon the new money it invests is without foundation. Upon its new money, the company is to receive just 6 per cent., and all of that will go for interest and sinking fund. The basis of this state-

ment as to an alleged profit of 8.76 per cent. is the fact that if the earnings of the present system, amounting to 13.2 per cent. upon an investment of $48,000,000, were combined with the carrying charges paid upon the new investment of $77,000,000, and the whole spread out over the entire system, there would be an average profit of the percentage named. That, however, has no relation to the actual basis of settlement. The present earnings of the company cannot be taken away from it; and if it be true that if in the face of the competition of the new lines, if these were grouped in a separate system, the present earnings would shrink, it is also true that this shrinkage would be for a brief period only; and that the present rate of profit would soon be restored and probably maintained, with but temporary variation, throughout the term of the company's present lease. In return for any degree of protection given against a short period of sag under competition, the company yields to the city the very material concessions we have enumerated.

The percentage of 8.76, even if it were applied to the new money of the company—as it certainly is not—would by no means mean a "profit" in this amount. From the amount reserved to the company, it is to pay all of the fixed charges, interest, sinking fund, instalments, etc., upon its present investment.

Taking these at 6 per cent., the actual profit remaining is not 8.76 but 2.76. If the net returns of today be compared with those spread over the proposed enlarged system, with 6 per cent. deducted from each for carrying charges, it would mean that the present actual profit of 7.2 per cent. above such charges is reduced to 2.76 per cent., and that the lower figure can not be exceeded—in view of the City's prior claim to a profit upon its own investment before any further division proceeds—for a number of years to come.

Ahead of any allowances to be paid to the company will come the continued payment of $2,700,000 annually to the

city on account of the present lease. It was argued in the course of the recent Saratoga arbitration, on claims of the company for extra work upon the present subway, that the City's right to annual payment, based as it is upon the amount of its interest and sinking fund charges, would expire when its bonds have been amortized, and that for the last eight or nine years of the present lease the company would be under no obligation to pay the City anything. This claim, though of doubtful validity, has at least been waived as one of the conditions of the new contract, and the priority of the rental to the City will proceed until the end of the new lease.

After the City's rental, the company is to receive its actual operating expenses, including its charges for taxes, obsolescence, etc. It has been stipulated, however, that no charge shall be allowed that has not been taken into account in ascertaining the company's net earnings in the past, and that has not been covered, therefore, in the fixing of the preferential based on present earnings. It appears that the structures and equipment of the present subway have been maintained at a high standard of efficiency; expenditures aggregating something over $9,000,000 for "maintenance of way and structures, and maintenance of equipment" having been made from the time the subway was opened, in October, 1904, to the close of the fiscal year 1911. Nevertheless, as an added protection to the City, the contract will stipulate that the present plan shall be carefully examined by the Public Service Commission, and that deferred depreciation of any sort in either the subway or its equipment shall be made good, to the satisfaction of the Commission, before any pooling of receipts proceeds. If the cost of caring for obsolescence increases with the age of the plant, that would not be unnatural; but the company states that the higher general operating ratio upon which it is figuring will amply cover any increase of the sort.

The preferred allowance made to the Brooklyn Company after the payment of operating expenses is also to be

based upon an average of the net earnings of its present lines. The ratio will be less for the reason that the earnings are less. The receipts of the old lines of the Brooklyn Company, on the other hand, are bound to increase materially as soon as they are linked up with the new City lines. The anticipated returns from the Brooklyn system, will, for the reason that so much more of the investment, in new lines will represent City capital, accrue more promptly. The question of the precedence of the Brooklyn Company's preferential has possibly for these reasons been debated less. The principle underlying the two contracts in this particular is essentially the same.

Anticipated Results of Operation.

Any discussion of the probable operating results of the dual system must, in the nature of the case, be more or less speculative. There are three elements to be considered: First, the volume and distribution of future traffic; second, the carrying capacity of the new roads and developed under operation; and, third, the ratio of operating costs.

That the growth of street railway traffic in the City will, in a very few years give the new roads all the carrying they can attend to, is a matter beyond much doubt. Experience in the past has shown that increases of traffic are due not only to added population, but to the constantly increasing ratio in the number of rides per capita. During the ten years from 1901 to 1911, the average annual increase in traffic of all lines, subway, elevated and surface, was 5¾ per cent. There is no reason to believe that this percentage will diminish; but taking for the sake of conservative view, an annual increase of 5½ per cent. during the decade to come, and of 5 per cent. in the decade following that, significant results are secured. During the year 1911 the various lines—exclusive of those of the Hudson & Manhattan system—carried 1,551 million passengers. At the 5½ per cent. rate of increase, this would grow in the year 1917 (taken as the first year of universal operation of all the

new lines) to 2,138 millions. In that year it would be proper to deduct at least 60 millions to represent the double fares now paid by those who exchange from one route to another and that with the new connections will become single fares. In other words, the probable traffic of all lines in the year 1917 would be 2,038 millions. Taking the estimates of the operating companies, the number of passengers that will be carried in the first year of operation—and their own figures as to future increases—the result would be as shown in the following table:

Year.	Total Millions.	Total Increase.	Manhattan Elevated.	Total Surface.	Interboro Subway.	Brooklyn Company.	Total.	Surplus.
1917	2,138							
	60							
	2,078		365	850	450	385	2,050	28
1918	2,192	114	380	861	490	423	2,154	38
1919	2,313	121	395	873	525	457	2,250	63
1920	2,440	127	405	890	560	484	2,339	101
1921	2,574	134	420	903	592	512	2,427	147
1922	2,703 (5%)	129	440	916	625	544	2,525	178
1923	2,838	135	450	930	660	576	2,616	212
1924	2,980	142	450	944	697	610	2,701	279
1925	3,129	149	450	959	736	646	2,791	338
1926	3,286	157	450	975	775	686	2,886	400

It will be seen that after taking care of all the traffic claimed for the several systems there would still be a large surplus of traffic that either would be added to the figures the companies show, or that else would be unprovided for. A more minute study of these figures, and of the history of traffic development generally in the past several years, confirms the belief of your Committee that the new lines will carry a greater number of passengers than is claimed today. The new rapid transit lines extending to every part of the City will, for instance, parallel perhaps three-fourths of the existing surface lines. A large part of the travel that now follows these lines is certain to shift to those that are quicker and more convenient. The City's transit system, in short, will be re-standardized, and it may safely be assumed that the great bulk of traffic increase will go to the lines of the re-standardized type.

Various figures have been published questioning the capacity of the new lines to carry a sufficient number of passengers to pay in full the charges to be placed against them. We believe that such figures, which, it might be added, are the most speculative of all, are without correct bases. The present subway lines, with a road mileage of 25.9, are carrying 300,000,000 passengers per year. If such a ratio were carried out according to the increase in mileage, the capacity at the present rate of congestion would rise to 900,000,000. With due allowance, however, for the fact that the proportion of trunk lines to feeders in the new system is not as great as such proportion in the present system, your Committee has taken no higher estimate than 775,000,000 as the maximum future capacity. A similar figure has been taken for the more extensive mileage of the Brooklyn Company's system. That these figures will be reached without approaching the congestion of today, we believe is beyond reasonable doubt. The development of the art of transportation is constantly producing new means for greater carrying capacity. In the present subway system, the increase of traffic in the non-rush hours and the growth of new traffic centres serving short haul districts is already apparent. The increase in the length of trains from eight to ten cars during the past year has alone added 17 per cent. to the capacity under former conditions; and future development along the same lines is only beginning to show its possibilities. We have been impressed, for instance, by the arguments of Mr. Walter Wellman, who has made a careful and expert study of this subject, and who believes that through the continued lengthening of trains and corresponding adaptation of station platforms the present car mile capacity may be increased by 50 per cent. We have no doubt that the Public Service Commission, as well as the operating companies, will make their independent studies along these lines. The main thing is that the City, under the proposed contracts, secures possession of the

plant, and that whatever added income may be derived from increased carrying will enure to its benefit.

In estimating margins of future profit, your Committee has figured upon a probable ratio of 50 per cent. for operating and taxes for both systems, during the first three years of operations, with a gradual decrease of 1 per cent. a year, down to 44 per cent.

The operating ratios upon the existing subway during the first six years of its operation—exclusive of taxes, which have averaged 2 per cent.—were as follows:

1906	42.23	1909	37.33
1907	45.64	1910	34.08
1908	43.14	1911	41.31

The ratios of the Brooklyn Company for four years have been as follows:

1908	53.45	1910	49.47
1909	54.37	1911	47.17

From all of the advice that we have received, we have no reason to doubt that the comparatively high figure taken for the first three years of the new system will amply cover the charges coming under this head. The increase of traffic must naturally tend to force that figure down, though we do not estimate upon any lower amount than 44 per cent.

Upon the several bases therein stated, the Finance Department has prepared a series of tables showing prospective results of operation. These are arbitrary in their nature, as all estimates for the future must be. They show, however, that under the Interborough Company's share in operation, the deficiencies of the company—which are not to be guaranteed but which must be discharged from future revenues—will probably occur only in the first three years; and that there would be no deficiencies in the City's annual account after six years. They show also that the City's cumulative deficiency account would probably be wiped out

in the year 1928, or after eleven years of operation; and that the year following the City would also receive in full the first annual installment of its added allowance of 3½ per cent.

Under the Brooklyn plan, no deficiencies would occur in the interest account of the company, and there would probably be no deficiencies in the account after four years. The cumulative amount of the City's deficiencies would thereupon disappear in eight years, and a division of profit would proceed in the year following.

It is to be borne in mind that although the cost of carrying the City's part in the Interborough Company's plan would be greater, for reasons that have been set forth, the City's account of profit and loss from the two systems would be pooled; the one, in a sense, aiding the other. The City's half share in the increased profit from the extension of the Manhattan elevated lines would go into the same account, further liquidating such temporary deficiencies as it may be necessary to carry.

It would appear from the tables showing the above results that as the City's investment in the Brooklyn Company's lines would likely become self-supporting in the fifth year of operation (1921), the entire amount of such investment, which at that time would not be less than $100,000,000, would be released from the debt limit, placing at the City's disposal a corresponding margin of borrowing capacity for further subway development. By the same rule, the City's investment of $56,000,000 in the Interborough system would be released in the seventh year of operation (1923).

Under the proposed terms, the City would carry such deficiencies as may occur in its own interest and sinking fund account—we assume through the issue of revenue bonds to be redeemed from future profit after the period of deficiencies has been passed. Upon the estimates above referred to, the cumulative total of deficiencies of the first

six years would not be greater than $17,640,000 on account of the Interborough system and $9,342,000, for the first four years, on account of the Brooklyn system. As this cumulative would be paid from the actual earnings of the system, the city merely using its credit to tide over the less profitable years, the ultimate cost to the city would not be greater than the cost of carrying the interest on the bonds themselves. That, comparatively, would be trifling.

RECAPTURE.

It is to be borne in mind that although the financial and operating terms granted by the City to either of these companies are framed to cover the full period of the lease, they may be cancelled at any time after ten years, if the City so disposes, through the exercise of its right of recapture. In order to facilitate the City's control in this respect, the companies would be required to divide the various lines into groups that might readily serve as the component parts of an independent system, each of which would be subject to recapture separately. These are as follows:

Under the Interborough Company's Plan.

(1) The lines comprising the H, being the Seventh Avenue line from Borough Hall, Brooklyn, and the Lexington Avenue line to 135th street, with its branches in The Bronx.

(2) The Steinway tunnel from Times Square to Queensboro Plaza, Corona and Astoria.

(3) The Flatbush Avenue and Eastern Parkway extensions, with their branches to Nostrand Avenue and Brownsville.

(4) The White Plains Road extension in The Bronx.

Under the Brooklyn Company's Plan.

(1) The Broadway line from the Queensboro Plaza through Fifty-ninth Street to Willoughby Street in Brooklyn.

(2) The Fourth Avenue line, with the elevated extensions in South Brooklyn, and the projected extension to Staten Island.

(3) The line from Union Square, Manhattan, to the Eastern District of Brooklyn.

(4) The Bridge Loop lines in Manhattan, which, however, will be held at the outset under a lease for twenty years.

RECOMMENDATIONS.

Your committee recommends the following action:

(1) That your Board inform the Public Service Commission that if a contract be executed with the Interborough Rapid Transit Company for the equipment and operation of new rapid transit lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, and the company's communication to the Public Service Commission dated February 27, 1912, such contracts, when presented to your Board, will have its approval.

(2) That your Board inform the Public Service Commission that if a contract be executed with the Brooklyn Rapid Transit Company, or with a company organized in its interest, for the equipment and operation of new rapid transit lines, and for the operation of the existing elevated lines of the Brooklyn Rapid Transit Company in conjunction with such new lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, such contract, presented to your Board simultaneously with the presentation of the contract for the Interborough Rapid Transit Company, will have its approval.

(3) That your Board inform the Public Service Commission that if application be made to it by the Interborough Rapid Transit Company for certificates for the exten-

sion and third tracking of its Manhattan elevated lines, and for the cession of the Steinway tunnel to the city and the immediate operation thereof, in accordance with the terms herein set forth, and in advance of the execution of the general contract for the operation of new rapid transit lines, such certificates, when presented, will have your approval.

(4) That the resolutions adopted by your Board dated July 21, 1911, and such other resolutions heretofore adopted that may be inconsistent with the present recommendations, be rescinded; and

(5) That the Special Committee be continued for the purpose of further conferences with the Public Service Commission with relation to any questions of detail that may arise between the two bodies affecting the contracts to be prepared.

All of which is respectfully submitted.

George McAneny, President, Borough of Manhattan; Cyrus C. Miller, President, Borough of The Bronx; George Cromwell, President, Borough of Richmond, Special Committee on Pending Transit Proposals.

I.—Cost of Projected Lines, Detailed Mileage and Probable Periods of Construction.

(Estimates of Public Service Commission.)

A. Proposed for Operation by the Interborough Rapid Transit Company: (Line to be constructed by the City; part contribution by the Company)	Sub. or El.	Tracks.	Road Miles.	Track Miles.	Probable Period of Construction Years.	Total Cost.
1. Seventh avenue line, four tracks from Times Square to Greenwich street and Park place, and two tracks to the Battery	S	4 & 2	4.27	17.1	3½	$20,700,000
2. Eastern extension of Seventh avenue line through Park place, City Hall Park and Old Slip to Brooklyn	....	....	.....	.....	....	9,601,350
3. Flatbush avenue, from Atlantic avenue to Eastern Parkway, and Eastern Parkway to Buffalo avenue, Brooklyn	S	4	3.18	12.7	3	9,259,800
4. Nostrand avenue, from Eastern Parkway to Flatbush avenue	S	2	2.42	4.8	3	4,324,000
5. Livonia avenue, from Eastern Parkway to New Lots road	L	2	2.57	5.1	2	1,562,850
6. Lexington avenue, from 32d street, Manhattan, to 135th street in The Bronx	S	4	5.15	20.6	3½	32,465,500
7. Southern Boulevard and Whitlock Branch of Lexington avenue line, from 135th street to the Bronx River	S	3	3.2	9.6	3½	8,857,300
7a. Westchester avenue branch, from Bronx River to Pelham Bay Park	L	3	3.94	11.8	1½	3,409,750
8. Jerome avenue branch of Lexington avenue line, from 135th street to Kingsbridge road	S	3 & 4	1.1	3.1	3½	3,673,100
	L	3	3.4	10.1	1½	2,812,900
8a. Jerome avenue branch, Kingsbridge road to Woodlawn	L	3	1.65	5.	1½	1,260,400
9. White Plains road to Becker avenue	L	3	4.92	13.7	1½	4,119,300
10. Times Square to Steinway tunnel	S	2	.42	.8	3½	1,495,000
11. Steinway tunnel adjustment at Grand Central Station	S	....	.....	.....	....	2,001,000
11a. Steinway tunnel	S	2	1.6	3.2	1½	3,000,000
11b. Steinway tunnel extension to Queensboro Plaza	S & L	2	.89	1.8	1½	721,050
12. Astoria line, from Queensboro Plaza to Ditmars avenue	L	3	2.51	7.5	1½	1,960,750
13. Corona and Woodside line	L	3	5.48	16.5	1½	4,425,200
						$115,649,250

II.—Cost of Projected Lines, Detailed Mileage and Probable Periods of Construction.

(Estimates of the Public Service Commission.)

B. Proposed for Operation by the Brooklyn Rapid Transit Company: (Lines to be constructed by the city; part contribution by the company)	Sub. or El.	Tracks.	Road Miles.	Track Miles.	Probable Period of Construction Years.	Total Cost.
1. Broadway, from the Battery to Seventh avenue and 59th street	S	4 & 2	5.	18.	3½	$28,846,600
1a. Fifty-ninth street, Seventh avenue to Queensboro Plaza	S & B	2	2.23	4.46	2	2,495,500
2. Battery tunnel to Willoughby street, Brooklyn	S	2	2.	4.	3	6,963,250
3. Connection between Manhattan Bridge line at Fulton street, Brooklyn, through Flatbush avenue to Eastern Parkway and junction with Brighton Beach line	S	2	1.20	2.40	2½	1,971,100
4. Canal street, from Manhattan Bridge to Broadway	S	2	.8	1.6	2	4,663,250
5. Extension of Bridge Loop lines through Nassau and Broad streets to the Battery	S	2	1.	2.	2½	4,397,600
6. Extension of Fourth avenue line in Brooklyn	S	4 & 2	2.27	6.90	2	4,014,650
7. Connection between Fourth avenue and New Utrecht avenue	S & cut	2	.94	1.88	1	2,085,000
7a. New Utrecht avenue, from 39th street to Coney Island	L	3	5.5	16.5	2	3,335,000
8. Gravesend avenue, from 39th street to Coney Island	L	3	5.35	16.05	2	4,001,000
9. Fourteenth street, from Sixth avenue, Manhattan, with tunnel under East River to Eastern District of Brooklyn	S & L	2	7.	14.	3½	14,950,000
						$77,722,950
(To be constructed by the Company)						
10. Fulton street, Brooklyn, to Queensboro Plaza, Long Island City	L	2	5.5	11.	2	$3,280,000
11 & 12. Jamaica lines	L	2	4.6	9.2	2	2,796,000
13. Third tracking of existing elevated lines	L			9.3	2	3,117,000
14. Sea Beach extension and elevation of existing lines	O C & Emb.	3	5.35	16.05	2	2,720,000
15. Brighton Beach connection—Malbone street to Eastern Parkway	S	2	.9	1.8	1	1,735,000
16. Myrtle avenue (Lutheran Cemetery extension)	L	2	1.	2.	1	607,000
17. Coney Island terminal connections	L				2½	4,453,000
18. Additional tracks at East New York for connections	L				2	1,340,000
19. Additional tracks, Brighton Beach line	Op. cut		1.	2.	1½	869,000
						$20,917,000
(Under construction by the City)						
20. Centre Street Loop	S	4 & 2	1.5	5.6	2½	$11,179,000
21. Fourth avenue in Brooklyn	S	4	3.9	17.	—	17,307,000
						$28,486,000

III.—Statistics of Street Railway Traffic in New York City, 1902 to 1911.

(Exclusive of Hudson & Manhattan Tunnel Lines)

(*A*) *Total Traffic—Surface, Elevated and Subway.*

Year Ended June 30.	Surface Railways.	Elevated Railways.	Subways (Interboro).	Total Fares	Increase of Total Over Preceding Year.	Percentage of Inc.
1902	651,767,050	285,858,707	.....	937,625,757	.....	....
1903	671,551,057	327,609,630	.....	999,160,687	61,534,930	6.6
1904	680,542,482	383,643,900	.....	1,064,186,382	65,025,695	6.5
1905	680,611,313	375,522,841	72,722,890	1,128,857,044	64,670,662	6.0
1906	730,381,105	383,018,585	137,919,632	1,251,319,322	22,462,278	1.9
1907	719,993,712	429,143,819	166,363,611	1,315,501,142	64,181,820	5.1
1908	716,464,745	435,899,497	200,439,776	1,352,804,018	37,302,876	2.8
1909	722,070,823	427,449,742	238,430,146	1,387,950,711	35,146,693	2.6
1910	760,327,590	459,564,764	268,962,115	1,488,854,469	100,903,758	7.3
1911	802,846,296	471,981,111	276,704,796	1,551,532,203	62,677,734	4.2

(*B*) *Total Surface, with Elevated and Subway (Rapid Transit) Combined.*

Year Ended June 30.	Total Surface.	Annual Increase.	Percentage of Increase.	Elevated and Subway.	Annual Increase.	Percentage of Increase.
1902	651,767,051	.....	.....	285,858,707	.....	.....
1903	671,551,057	19,784,007	3.	327,609,630	41,750,923	14.6
1904	680,542,482	8,991,425	1.3	383,643,900	56,034,270	17.1
1905	680,611,313	68,831	.01	448,245,731	64,601,831	16.8
1906	730,381,105	49,769,792	7.3	520,938,217	72,692,486	16.2
1907	719,993,712	†10,387,393	*1.4	595,507,430	74,569,213	14.3
1908	716,464,745	*3,528,967	*.49	636,339,273	40,831,843	6.8
1909	722,070,823	5,706,078	.79	665,879,888	29,540,615	4.6
1910	760,327,590	38,256,767	5.28	728,526,879	62,646,991	9.4
1911	802,846,296	42,518,706	5.6	748,685,907	20,159,028	2.7

† Subway opened 1905. * Decrease.

Traffic.

Queens.			Richmond.			All Boroughs.		
Fares.	Increase.	Per Cent.	Fares.	Increase.	Per Cent.	Fares.	Increase	Per Cent.
13,719,387	.....	.....	7,119,013	.....	.....	651,767,050	.....	.....
15,689,210	1,969,823	14.4	7,435,135	316,122	4.4	671,551,057	19,784,007	3
16,701,653	1,012,443	6.3	7,762,677	327,542	4.4	680,542,482	8,991,425	1.3
20,533,487	3,831,834	22.5	7,743,987	*18,690	.24	680,611,313	68,831	.01
25,151,054	4,617,567	21.9	8,945,914	1,201,927	15.5	730,381,105	49,769,792	7.3
28,514,743	3,363,689	13.5	9,971,652	1,025,738	11.4	719,993,712	10,387,393	1.4
29,797,750	1,283,007	4.5	10,966,852	995,200	9.98	716,464,745	3,528,967	.49
30,545,776	748,026	2.5	11,367,091	400,239	3.6	722,070,823	5,706,078	.79
34,430,074	3,884,298	12.5	11,712,623	345,532	3.1	760,327,590	38,256,767	5.28
42,515,629	8,085,555	23	12,301,757	589,134	5	802,846,296	42,518,706	5.6

(C) Surface

Year Ended June 30	Manhattan.			The Bronx.			Brooklyn.		
	Fares.	Increase.	Per Cent.	Fares.	Increase.	Per Cent.	Fares.	Increase.	Per Cent.
1902	388,947,189			28,020,185			213,961,296		
1903	396,570,432	7,623,263	2	30,714,781	2,694,596	96	221,141,499	7,180,203	3.4
1904	389,928,464	*6,641,968	1.7	34,763,809	4,049,028	14	231,385,679	10,244,180	4.6
1905	374,554,075	*15,374,389	3.9	37,124,805	2,360,996	6.9	240,654,959	9,269,080	4
1906	391,708,063	17,153,988	4.6	39,893,116	2,768,311	7.5	264,682,958	24,027,999	10
1907	377,017,192	*14,690,871	3.7	42,186,533	2,293,417	6	262,303,592	*2,379,366	9
1908	366,690,345	*10,326,847	2.7	44,237,229	2,050,696	4.9	264,772,569	2,468,977	.94
1909	362,077,665	*4,612,680	1.3	50,671,779	6,434,550	14.6	267,408,512	2,635,943	.99
1910	371,888,469	13,810,804	3.8	56,524,261	5,852,480	11.7	281,772,163	14,363,651	5.4
1911	386,952,020	11,063,551	2.9	62,777,966	6,253,705	12	298,298,924	16,526,761	5.8

* Decrease.

(D) Elevated Traffic.

Year Ended June 30	Manhattan Railways Co.			Brooklyn Rapid Transit.			Totals.		
	Fares.	Increase.	Per Cent.	Fares.	Increase.	Per Cent.	Fares.	Increase.	Per Cent.
1902	211,259,345			70,599,362			285,858,707		
1903	246,187,022	34,927,677	14.6	81,022,668	10,423,246	14.6	327,609,630	41,750,923	14.6
1904	286,634,195	40,047,173	16.3	97,009,705	15,987,097	19.7	383,643,900	56,034,270	17.1
1905	266,781,930	*20,752,265	7.1	109,140,911	12,131,206	12.5	375,922,841	*8,121,059	2.1
1906	257,796,754	*8,585,176	3.2	125,221,831	16,080,920	14.7	383,018,585	7,095,744	2
1907	292,924,273	35,127,519	9.7	146,219,546	20,997,715	16.7	429,143,819	46,125,234	12.04
1908	292,843,904	*79,409	.02	153,055,633	6,836,087	4.7	455,899,497	6,755,678	1.6
1909	276,250,196	*6,593,668	2.2	151,199,546	*1,856,087	1.2	427,449,742	*8,449,755	1.9
1910	293,826,780	17,576,084	6.4	165,716,484	14,516,938	9.6	459,543,264	32,115,022	7.5
1911	301,449,792	7,623,012	2.5	170,531,819	4,793,335	2.9	471,981,111	12,416,347	2.9

* Decrease.

(E) Subway Traffic.

Year Ended June 30.	Interborough Company. Fares.	Increase.	Per Cent.
1905	72,722,890	72,722,890	.....
1906	137,919,632	65,196,742	91.0
1907	166,363,611	28,443,979	21.0
1908	200,439,776	34,076,165	31.0
1909	238,430,146	37,990,370	19.0
1910	268,962,115	30,531,969	13.0
1911	276,704,796	7,742,681	2.9

*Decrease.

The President of the Board of Aldermen presented the following:

To the Members of the Board of Estimate and Apportionment:

Gentlemen: While I have always believed that the proper solution of the transit question lies in the building of a new separate and complete rapid transit system by the city and its operation under city control, I was prepared last July to accept the dual plan as a satisfactory settlement of the question, provided that plan be based upon operating terms such as to give the city a control over the new subways, assurance of fixed charges on its investment and a share of the profits that the new system might be expected to produce. I still feel that an independent city built line is the best solution of the question, but I am prepared today, as I was last July, to accept the dual plan upon proper terms.

I am opposed to the acceptance of the present offer of the Interborough not because it involves the dual plan, not because of the identity or record of this particular operator, but because the offer proposes a bad business bargain for the city and entails an abandonment of the accepted and approved rapid transit policy of the City of New York.

The present offer of the Interborough Company is substantially the proposition of last July, which the board by

a majority vote rejected at that time. The form is somewhat changed. Certain minor concessions have been made. In some respects the terms are worse for the city, but in substance, and in fact, the proposition is the same.

The fundamental scheme upon which this offer is predicated, is a practical if not a legal guarantee to the company of its entire net earnings of the present subway, in addition to carrying charges on new capital. It offers to the people of the City the alternatives of perpetual congestion or a subsidization of private investors through the carrying of deficits in taxes. It is directly opposed to the policies of municipal construction, municipal control and municipal profit sharing, approved by popular election and which the members of this board were sent here and expected to carry out.

The defects of this offer are of two classes; those that attack and violate the principles of municipal control and municipal profit sharing; and those that conflict with ordinary business sense and which when understood, I am confident that no member of this board can approve whatever his views upon questions of principle and policy may be. These defects of both classes I propose to enumerate. No one of them is incurable were the company minded to meet the city upon fair terms. If these objections were met by the Interborough Company, the city would be placed in a position to control a complete and cohesive transit system and to share in the profits therefrom. If that were done I should be prepared to vote for the dual plan, though still believing that an independent system is the better solution.

In justification of an abandonment of the policies that the members of this board were elected to carry out, it has been urged that without the dual plan and an Interborough contract, no adequate transit relief can be had. If in truth we were compelled to choose between this offer and no subways, then perhaps we might be justified in considering a change in that policy. Such, however, is not the fact.

The Broadway-Lexington avenue subway is at this moment under construction. There is absolutely nothing in the present situation to prevent the completion of this trunk line and its extension into The Bronx, Queens, Brooklyn and Richmond. There is no reason why the construction of a city planned and city built system of subways cannot be pushed with all speed, and while construction is in progress, an operating contract can be discussed, negotiated, advertised and awarded. Surely no lack of operators for the most lucrative rapid transit railroad in the world will be experienced. The Brooklyn company stands ready to undertake the contract to-day on terms advantageous to the city. If this company or its offer is unsatisfactory, then an open advertisement for competitive bids will bring others. But if the city should find none willing to operate on terms satisfactory to it, then municipal operation is still possible.

While I would prefer not to see the city enter the field of transit operation so long as a private operator can be had on fair terms, I would much prefer to see the city undertake it, with its attendant risks and prospective gains, rather than to make a contract with any company now by which the city assumes all the risks and the company absorbs all of the prospective gains.

The very object heralded as the chief advantage of an Interborough contract, the so-called universal five-cent fare, is forfeited by the plan proposed. The essence of this plan is dual operation. The Brooklyn Rapid Transit Company will cover all South Brooklyn and extend northward to 59th street only. The Interborough Company will cover all the Bronx and the northerly two-thirds of Manhattan and extend southward to Nostrand and Flatbush avenues in Brooklyn only. Two fares will be necessary between South Brooklyn and Coney Island or any point tapped by the Brooklyn Rapid Transit Company alone, and northern Manhattan and the Bronx or any point tapped by the Inter-

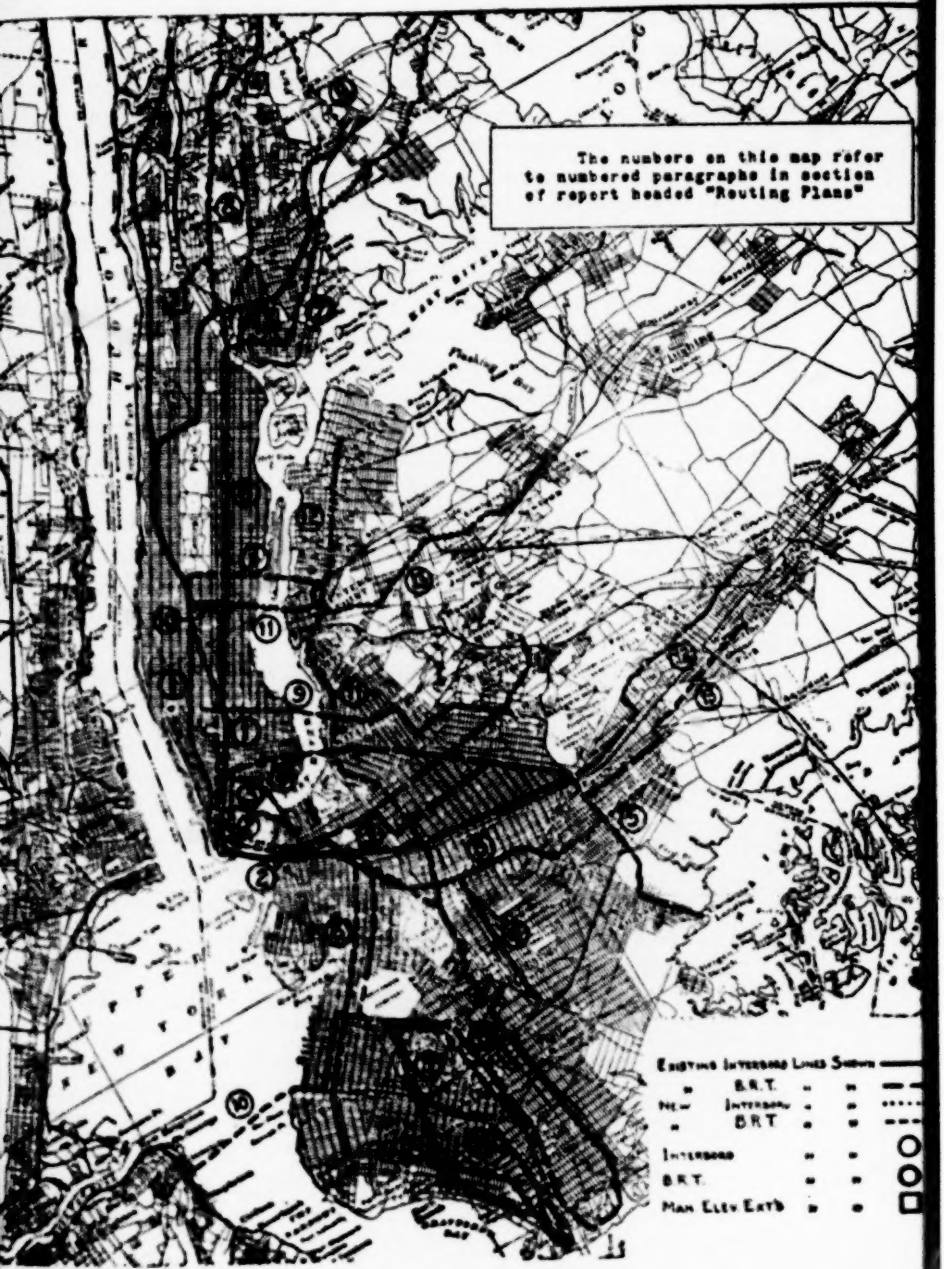
borough Company alone. This would not be true if the city let one operating contract for the Broadway-Lexington avenue and other lines proposed with these extensions. Two fares would then be necessary only between the west side of Manhattan and South Brooklyn or points tapped by the Brooklyn Rapid Transit Company alone. This is interesting when we consider how much emphasis has been laid upon the so-called universal five-cent fare.

It is not true that a Seventh avenue line need be lost by the rejection of this offer if the company refuses to modify it in a way to cure the foregoing vital defects. If built by the city that line could be connected at 42d street with either the new city-built Broadway 59th street line or with the present Broadway line and with the proposed Steinway tunnel line, under a proper operating arrangement with the Interborough Company.

There should be no misapprehension as to delay in construction. A rejection of this offer need not entail delay. It would mean merely more and cheaper building with city money instead of private capital.

A separate contract with the Interborough Company covering elevated extensions and third tracks and the Steinway tunnel with joint operation in Queens, is desirable and can proceed at once in any event.

Much has been said to the effect that the increase of taxable values to be expected upon the adoption of this plan justifies the sacrifices of income involved and will more than offset the city's losses. Two fallacies are involved in this argument.


The numbers on this map refer to numbered paragraphs in section of report headed "Routing Plans"
EXISTING INTERBORO LINES SHOWN
B.R.T.
NEW
INTERBORO
B.R.T.
INTERBORO
B.R.T.
MAN ELEV EXTS

In the first place the increase of taxable values will follow the establishment of rapid transit facilities irrespective of the operator. In the second place, increased values of taxable realty will not offset losses of income, for those increases will be necessary to carry the inevitable capital cost of general municipal improvements always entailed in the growth of localities and the spread of population.

If the city were compelled to choose between the present offer of the Interborough Company and a contract with the same financial terms as those of the present leases of the existing subway, bad as we all regard those terms today, I should not hesitate for a moment to vote for the latter. Under the present contracts 1 and 2, the city is at least assured of interest and sinking fund upon its bonds. The city is preferred as to that sum, though denied all profit. Under the present offer, not only must the city abandon hope of profit, but interest and sinking fund upon its bonds depend upon an increased congestion so intolerable that public policy and the enlightened city administrations that will surely come after us, can never permit it to be attained.

I am opposed to the Interborough offer for the following reasons:

On Fundamental Grounds of Principle.

I.

Because the Plan Proposed in this Offer Capitalizes Congestion and Insures, Through the Excessive Preferential Payments to be Made the Company, that the Traveling Public Will Either be More Crowded in Future Subways than They Are To-day or that the City Will Never Receive Interest and Sinking Fund on its Bonds Issued for Construction.

The offer provides that there shall be deducted annually from gross earnings, in the following order:

(a) Operating expenses including depreciation, renewals, obsolescence, taxes, rentals payable to the city under contracts numbers 1 and 2, etc.;

(b) A sum to be paid the company of $6,335,000 on account of its capital investment in the present subway, to be cumulative;

(c) A sum equal to six per cent upon all new capital to be invested by the company, to be cumulative;

(d) Interest and sinking fund upon the city's capital investment plus a further sum sufficient to bring the payments to be made to the city during the entire period of 49 years up to an amount equal to 8.76 per cent upon the city's capital investment, to be cumulative; and

(e) The remainder of gross earnings, if any, to be divided between the city and the company, equally.

Whether the city will ever receive any return from the enterprise, either interest and sinking fund upon its bonds or profit, will depend upon the amount of gross earnings and the cost of operating the road. All other factors are fixed by the terms of the contract.

Likewise, in any computation of the time at which the bonds of the city might become self-supporting, the only factors not definitely fixed by the contract are the same, namely, volume of traffic and the ratio of operating expenses to gross earnings. These two being determined, conclusions will follow as incontrovertible mathematical deductions. Whether, therefore, the city's bonds issued for construction will ever become self-sustaining, and if so at what time, and whether the city's cumulative deficit for interest and sinking fund on these bonds will ever be wiped out, will depend: on the volume of traffic that the new amalgamated Interborough subway may draw; on the maximum traffic of which it may be capable; and on the percentage of gross revenue represented by the operating expenses of the system. If these can be determined definitely in advance, we can say definitely whether the city's bonds will

ever become self-sustaining, and whether the city's cumulative deficit will ever be wiped out.

The Interborough Company submitted a written estimate on July 6, 1911, that the gross total traffic of the amalgamated Interborough system in the first year of operation —1917—would be 425,000,000 passengers. Although this estimate was modified by Mr. E. J. Gaynor, the auditor of the company, during the conferences recently held, to 400,000,000, I have preferred to accept here the more liberal estimate in order to give the benefit of the doubt to the proposed plan in making my computation.

It is futile to *speculate* as to gross total traffic increases for the combined traffic facilities of the entire city, if there is a point of saturation beyond which the traffic of the amalgamated subway cannot expand without creating congestion greater than that experienced in the present subway to-day. If this contract with the Interborough depends for its success on such a congestion in the new subways, then in that fact is found a good and sufficient reason for rejecting it.

The point of saturation of the new amalgamated Interborough system has been calculated in various ways. All point to the fact that the city can never hope to come out of the contract whole. The City Club and the People's Institute have both made such calculations and have put the point of saturation at 712,000,000 and 680,000,000 passengers, respectively. Each of these bodies has pointed out that this point of saturation will mean a congestion greater than that existing to-day. Both have pointed out the obvious fact that the carrying capacity of an entire subway system consisting of trunk lines and branches must necessarily be limited by the carrying capacity of trunk lines.

With this fact in view, it has seemed to me that the fairest, most accurate and most scientific basis of calculation is a comparison of the trunk lines and branches of the proposed amalgamated system with the trunk lines and

branches respectively of the present subway, on the basis of the number of passengers carried per car mile operated in each, in order to determine at what point congestion in the whole new system will equal present congestion, because this, it seems to me, should be taken as the point of practical saturation, whatever the point of theoretical maximum capacity may be.

Population figures for different routes or passenger density per mile of track, as a basis for estimating traffic capacity of a given line, are in themselves misleading because they ignore (1) the number and frequency of cars running past a given station and (2) the length of the route over which the cars run in making a single trip, both of which register themselves accurately in the number of car miles operated over a given line in a given period of time.

The present subway consists of a trunk line lying south of 96th street and two branches running north from that point.

Of the total car miles operated during the year ending June 30, 1910, there were run over the trunk and branches as follows:

Broadway Division.

Car miles		Car miles
Trunk, 14,097,906	Branch (North of 96)	7,832,081

Lenox Avenue Division.

Trunk, 16,756,809	Branch	10,906,893
Total, 30,854,715		18,758,974

Applying to this car mileage the figures of ticket sales during the year ending June 30, 1910 (as adjusted by the Public Service Commission in the report of the conferees, June 5, 1911), we find that:

In the same year the trunk carried 6.06 passengers per car mile.

In the same year the branches carried 4.38 passengers per car mile.

The proposed new Interborough subway system may be divided into trunk and branch lines, as follows:

Broadway line
Trunk from 96th street south,
New Lexington avenue line
Trunk from 138th street south,
New line, Brooklyn
Trunk from Eastern Parkway & Nostrand avenue, west.

The trunks, therefore, will be all tracks lying south of 96th street and Broadway, on the present subway, and south of 138th street in the Bronx and west of Nostrand avenue and Eastern Parkway, in Brooklyn, on the new subway.

The branches will be—

a. The lines of the present subway north of 96th street.

b. Jerome and River avenue subway in the Bronx (138th street to Woodlawn).

c. The White Plains Road line (180th street to Becker avenue).

d. Southern Boulevard & Westchester avenue line to Pelham Bay Park.

e. Eastern Parkway & Livonia avenue lines east of Nostrand avenue.

f. The Nostrand avenue line.

g. The Astoria line.

h. The Woodside line.

Applying the car mile figures (found to have been the result of operation on trunk and branch lines) of the present subway and allowing for the same congestion as found in the present subway, we get a traffic for the new lines as follows:

Trunk line (old and new)	426,038,519
Bronx branches (new)	126,452,760
Present branches (old)	82,032,296
Brooklyn branches (new)	29,880,566
Queens branches (new)	37,978,757
Total	702,382,898

In reaching this figure the new branches have been given a car mileage per mile of route, on the following ultra liberal basis:

Jerome and River avenue on basis of present Broadway branch.

Brooklyn branches on basis of present Broadway branch.

Queens branches on basis of present Broadway branch.

White Plains Road on basis of present Lenox branch.

Southern Boulevard on basis of present Lenox branch.

The total of 702,382,898 passengers is subject to the following adjustments owing to joint operation over certain branches:

Jerome Avenue Branch: This branch is to be used between 162d street and Woodlawn Cemetery jointly by elevated and subway. On the assumption that eight car elevated trains are to alternate with ten car subway trains, the elevated will get 41.45 per cent. of the total traffic of 30,320,743, which will mean a deduction of 12,567,948 due to elevated operation (elevated cars seating 46 persons to 52 for subway cars).

White Plains Road: Between Becker and Olin avenue there will be joint subway and elevated operation. The subway will lose, therefore, 41.45 per cent. of the total traffic of 15,710,806, or 6,512,129.

Queens: In Queens the Interborough Company will furnish service over the same tracks as the Brooklyn Rapid Transit Company. The Interborough Company will, however, give no through service beyond 42d street and Park

avenue, at which point passengers will have to change to crowded north and south trains. The Brooklyn Rapid Transit Company, on the other hand, will give through service across 59th street and south on Broadway. Furthermore, Second avenue elevated trains will be operated by the Interborough Company across the Queensborough bridge and over the Queens extensions. It is safe to assume under these circumstances that the Interborough subway division will not get more than one-third of the traffic. This will mean a deduction of 25,318,272.

The total deductions are, therefore:

Jerome avenue	12,567,948
White Plains Road	6,512,129
Queens	25,318,272
Total	44,398,349

We have, therefore, a gross total of	702,382,898	
less	44,398,349	
Corrected total		657,984,549

These 657,984,549 passengers would suffice to congest the new combined system to a point equal to 1910 congestion. 1912 congestion is, however, 11.62 per cent. greater in number of passengers carried. This means that when the new amalgamated system reaches a traffic of 734,442,352, it will be crowded to the present point and will attain practical saturation.

The second factor not fixed by the contract is the operating ratio.

The only accurate and scientific method of measuring operating expenses is that based upon the cost of operation per car mile operated. In view of the fact that general railroad practice and universal experience have resulted in the adoption of this basis of calculating operating cost, the use of it here scarcely requires justification. The hap-

hazard method of *arbitrarily apportioning* an assumed percentage of gross receipts to operating expenses is manifestly without accurate basis and is pure guesswork.

Having found the cost of operation in the new subway per car mile and knowing the number of car miles it will be necessary to run in the new subway to carry passengers with the same degree of congestion that has been experienced in the present subway, year by year, it becomes a mere matter of computation to determine the operating cost of the new subway and therefore the percentage of gross receipts that such operating cost will constitute.

The present subway in 1906 had a cost per car mile of 9.32 cents. This cost rose in the most expensive year to 10.43 cents, and in the present year is 10.4 cents. As the new subways cannot be expected to operate on a more economical car mile cost than the present subway (witness the recent increase in wages), the car mile cost of the present year, namely, 10.4 cents, has been taken as the car mile cost of operation in the new subways. Knowing precisely, as we do, the number of passengers carried per car mile in the present subway, year by year, and applying these figures to the assumed passenger traffic of the new subway, year by year, we find the number of car miles that it will be necessary to operate in the new subway each year in order to carry passengers with the same congestion experienced in the present subway, year by year.

The passenger figures for the years 1909 and 1910 have not been used because during these years there existed abnormal conditions, among them the opening of the Brooklyn extension. In their place I have used the average of the other years of operation of the present system, namely, 4.5 passengers per car mile. The percentage of operating cost is, therefore, reckoned as follows:

FOR THE YEAR 1917.

Operating cost per car mile	10.4 cents
Depreciation, per car mile (as per report of Bion J. Arnold, rendered to the public service commission)	1.5 cents
Total	11.9 cents
Assumed passenger traffic for 1917, 425,000,000. 425,000,000 divided by 4.32, the number of passengers per car mile which the present subway carried in the year ending June 30, 1906, equals 98,379,620 car miles. Multiplying this number of car miles by the operating cost—11.9—we have a total operating cost of	$11,707,172
Allowance for obsolescence of equipment, three-fourths of one per cent (taken from the report of conference committee of June, 1911) equals	420,000
Allowance for insurance of equipment, one-half of one per cent equals	280,000
Gross total	$12,407,172

This sum equals 58.38 per cent of the gross revenue of the new subways for the year 1917.

Similar calculations have been made for succeeding years, the number of passengers per car mile carried by the present subway in the year 1912 being used for all years following 1922.

Taking, therefore, 425,000,000 passengers, the Interborough's more liberal estimate, as the traffic of the first year of the new combined system, and 735,000,000 passengers as the point of saturation reached in the year 1926, and taking the car mile costs for operating expenses at 10.4 and the passenger density per car mile at that of the present subway, the company's cumulative deficit will not

be wiped out until the year 1941, and the city's cumulative deficit will never be wiped out. Further, the net earnings of the system will not be enough to pay current interest on the city's bonds in any year.

The net result will be that at the end of the contract term, the city will have paid approximately $118,000,000 out of the tax budget for interest and sinking fund upon its bonds issued for construction even if its deficits are not all funded. Whether this represents the limit of the city loss on account of interest and sinking fund, will depend upon the people's willingness to be crowded in the new subways as shamefully as they now are in the old. If popular opinion and comfort of fare-payers demand the construction of more subways before congestion has been reached equal to the present, the city's loss of interest and sinking fund will be proportionately and enormously increased. The amount of this loss, whatever it may be, must be found somewhere by the city, and can be had from but one source, whether defrayed during the life of the lease or upon its termination. That source is taxation.

II.

Because the Plan Proposed Combines All of the Worst Features of Municipal Operation with All of the Worst Features of Private Operation, and Forfeits for the City All of the Beneficial Features of Municipal Operation and Most of the Beneficial Features of Private Operation.

First: It makes the city underwriter of all losses and guarantor of the enterprise.

Second: It depletes the city's treasury and impairs its borrowing capacity without securing the objects of municipal construction.

Third: By making the company's profits independent of efficiency and economy it tends to make the company disregardful of public comfort and convenience.

Fourth: It gives to the company all of the profits of the enterprise.

Fifth: It deprives the city of control by making recapture impracticable or impossible.

Sixth: By giving to the company a large preferential profit and denying to it the prospect of any further profit, it removes all incentive to efficient management once the preferentials have been safely earned, and supplies the strongest motive for seeking indirect profits and for political chicanery.

If, as has already been demonstrated, there is no prospect that the city will earn interest and sinking fund on its bonds, there certainly is no prospect that there will ever be a surplus profit for division between the city and the company. The company therefore, once it has wiped out *its* accumulated deficit, and is in the safe enjoyment of its annual preferential income, will find no further incentive for economy or improved operations. It will, however, find strong incentive to lay its hands on any surplus earnings over its own preferentials which would otherwise go to defray, in part, the city's fixed charges. In other words, every motive is supplied for the organization of subsidiary companies for the sale of cars, equipment, etc. True, the contract provides that no such subsidiary companies shall be organized. In the first place, however, such a covenant is incapable of practical enforcement, because the city cannot be in a position to prove that any given corporation has been organized for such purposes or that the operator is interested therein. In the second place, it is easy to acquire an existing corporation, without going to the trouble of new organization, and this the contract does not inhibit. In point of fact that the Interborough Company already has such a subsidiary in the Rapid Transit Subway Construction Company, which has served in the past and is ready to hand.

Under a contract such as that proposed, there would be nothing to prevent the making of unduly lucrative contracts with favored individuals, should the operator so desire.

Another inherent vice lying in this absence of motives

of economy, is the invitation that the contract holds out to the operator to turn the administration of the new subways into the worst type of political machines, by filling the payrolls with supernumeraries once the preferentials have been earned. A motive is supplied in the threat of recapture by a subsequent city administration.

III.

Because for the Reasons Already Stated Under Points I and II Foregoing, to Enable the City to Get Back Even a Part of the Interest and Sinking Fund upon the Capital that It is about to Invest in the New Subways, Requires a Congestion, in the New Subways Equal To, or Worse Than, That in the Present Subway. This Board Ought Not to Force upon the People of New York the Choice of Indecent Congestion or a Burdensome Tax Rate, while Adequate Means of Relief through a City-Built, City-Controlled and, if necessary, City-Operated Line are Available.

It is quite clear that if the argument made under Point I holds good, the subway will never carry sufficient passengers in any one year to earn interest and sinking fund for that year upon the city's bonds issued for construction, unless through a crowding of passengers worse than that found in the present subway.

As the city in any case can never hope to wipe out its cumulative deficit by the earnings of the new subways under this contract, it must determine in advance of the first year of operation, how each deficit shall be met when it arises.

On the basis of the most liberal traffic estimate submitted for the first year of operation, of 450,00,000 passengers, the city's deficit that year would amount to $2,940,000, and on the basis of the Interborough's estimate at 425,000,000 it would be the same. The city, therefore, must determine in 1917 whether this deficit can be met by writing the amount thereof into the tax budget for the ensuing year or

by the issue of bonds to fund it. The funding of a deficit which the city can never expect to discharge, but which, as far as reasonable foresight can predict, will go on increasing during the life of the contract, would constitute reckless municipal financing. Such a course would shortly destroy the city's credit. We must expect, therefore, that the city's deficits in interest and sinking fund upon the city's bonds, as they occur from year to year, will be carried in the tax budget.

As the first such deficit, on the basis of all traffic estimates will amount to $2,940,000, it is quite clear that the city, in adopting this contract, is compelled to choose between deplorable congestion to relieve which it was supposed new subways were chiefly to be built, and large and burdensome additions to the tax rate.

On the other hand the estimates of traffic and cost prepared by the engineers of the Public Service Commission show that the independent city subway system, whether operated by the Brooklyn Rapid Transit Company or by some other operator will earn not only interest and sinking fund on the city's bonds, but within a few years will show a handsome profit to be shared with the city.

IV.

Because the City's Power to Recapture, Which Everyone Considers Indispensable, is Made Practically Impossible by the Proposed Terms and is Surrounded With Conditions that Practically Insure Confusion and Litigation.

(a) While the offer appears to conform to the condition precedent to a contract with the Interborough laid down by the Comptroller and myself in the transit committee's majority report of January 5, 1911, and in memoranda submitted to this board, namely, an exchange of its lease upon its Fourth avenue subway south of Forty-second street for an equivalent lease upon the new Seventh avenue subway, in point of fact it leaves a loophole through which

the company may escape compliance with this essential part of its contract.

The company's offer, section 6, reads in part as follows: so that the "city if it so elect may obtain possession "of either a complete east side or a complete west side sub- "way line, the Interborough Company will consent, in the "event of the necessary legislation having been secured, "in the securing of which it will co-operate, *and provided "the lien of any duly authorized mortgage be not disturbed* "to a modification of contracts numbers 1 and 2 • • • so "that that portion of the existing subway system extending "southward from 42nd street in Manhattan to Atlantic ave- "nue in Brooklyn • • • shall be held under a lease termin- "able at any time after ten years. • • •"

The condition named by the Company—"*provided the lien of any duly authorized mortgage be not disturbed*"—affords an opportunity for avoiding compliance with this part of the offer. As already twice pointed out in this board, there are two mortgages effecting the present leases of the existing subway.

The first is a mortgage made by the Interborough Rapid Transit Company and is a direct lien upon these leases. This is an ordinary railroad mortgage and contains a release clause such as to enable the Interborough Rapid Transit Company to effect the exchange desired.

The stock of the Interborough Rapid Transit Company is held and owned by the Interborough-Metropolitan Company. The other mortgage is one made by the Interborough-Metropolitan Company, pledging this Interborough Rapid Transit Company stock as security for the Interborough-Metropolitan Company's bonds. One clause of this mortgage reads as follows:

> "And the Interborough (Rapid Transit) Company "shall do all other things necessary or proper to pre- "serve its rights in said rapid transit railways under "and pursuant to said leases."

Quite obviously, when the Interborough Rapid Transit Company is called upon to comply with the terms of its offer it may answer that, the lien of the above described duly authorized mortgage would be disturbed by compliance and that, therefore, under the terms of its offer, it need not comply. In order that the city may be in a position to compel an exchange of these leases, the Interborough-Metropolitan Company, the mortgage trustee and the bondholders should join in the agreement for exchange.

As it stands, this clause of the offer is calculated to mislead the city's authorities into the belief that they are about to obtain control over a continuous east side trunk line which, in point of fact, they will never get.

(b) The recapture provision becomes inoperative when read in the light of subd. 7, sec. (a) of the offer, which reads in part as follows:

> "The right of recapture provided for in this para-
> "graph shall nevertheless be exercised by the city with
> "respect to the whole of any one or more of the follow-
> "ing groups of lines (a) the Seventh Avenue line in-
> "cluding the extension under the East River to Bor-
> "ough Hall, Brooklyn; the Lexington Avenue line to-
> "gether with the extension to Pelham Bay Park and on
> "Jerome Avenue to the extension of the latter avenue
> "with Woodlawn Road adjoining Woodlawn Ceme-
> "tery."

The provision just quoted makes it encumbent upon the city to take both the Seventh avenue and Lexington avenue lines or neither. It thus nullifies that part of the offer relating to the exchange of the present Fourth avenue for the Seventh avenue or Broadway for Lexington avenue divisions. If the exchange were effected then this provision for the taking of both or neither the Seventh and Lexington avenue divisions becomes both impracticable and impossible.

(c) In failing to provide for a segregation of city capital to trunk lines or for the taking by the city of trunk lines up to the aggregate of its total investment without additional payment to the company, the proposed contract places serious difficulties in the way of recapture by the city of any material portions of the new subways.

If the city capital were segregated to trunk lines, then in exercising its right to recapture such trunk lines, the city would not be compelled to make a large capital payment to the company. The same is true, if the city were permitted to take over a specified group, or groups, of lines up to a total value equal to its capital investment, either without payment of any additional capital sum to the company or if the value of the lines recaptured were found to exceed the total of the city's investment, then on payment of such excess only. Under the present terms of the offer, to take over any group or groups of lines, the city will be compelled to pay to the company a capital sum equal to the company's investment in such lines which, as the offer now stands, will be upwards of 50% of the cost of construction. The improbability of the city's ever being in a position financially to pay over so large a lump sum has been pointed out sufficiently heretofore.

(d) The provision for the recapture of the present subway at the end of thirty-five years "upon payment to the "company of a sum equal to the then present worth of the "existing subway leases estimated upon the basis of the "annual net profits of the five year period immediately "preceding recapture," is absurd and impossible of performance.

As receipts of old and new divisions are to be pooled from 1917 forward, it will manifestly be impossible to determine the net profits of the old portion for any five year period subsequent to 1917, and therefore impossible to compute the then present worth of the lease of that portion of the system. This provision sounds well, but is wholly val-

ueless to the city, not only for the reason stated, but also because, even were it possible to compute the then present worth of the lease, recapture would entail a lump sum paymnt far beyond the city's means.

V.

Because, by Insuring that the City Will Never Receive Interest and Sinking Fund Upon Its Bonds Issued for Construction, for all of the Reasons Stated Under Point I, it Prevents the Exemption of These Bonds from the Debt Limit and Thereby Impairs the City's Subway Building Capacity for the Future.

VI.

Because, in Providing that Future Extensions as Soon as they Become Profitable Be Included Under the Operating Terms of the General Unprofitable Contract, it Makes Certain that the City Will Never Receive Interest and Sinking Fund Upon Bonds Issued for Future Extensions.

This will work two harmful results: first, it will prevent such bonds from exemption from the debt limit; second, it will greatly discourage the building of future extensions because of the necessity for the inclusion of the bonds issued for their construction in the general city debt.

On Plain Business Grounds.

VII.

Because an Indefensible Failure to Provide for Depreciation and Obsolescence in the Present Subways in the Past Is Made the Basis of a Gift to Private Capital of Over $1,000,000 a Year for Forty-Nine Years.

On account of the company's alleged capital now invested in the present subway, the preference to be paid to the company is $6,335,000, which is said to be the average of the net profits of the last two years of operation. In

point of fact it is no such thing, but, approximately, $1,000,000 higher than the actual average of net profits of the last two years. During these two years of operation when the net profits of the Interborough Company from the subway were claimed to be respectively $6,769,577 and $5,900,423, the company, as already stated, was not providing for depreciation or obsolescence. A reasonable allowance for depreciation and obsolescence during those two years would have been $2,128,002. This figure is based upon the following:

Depreciation during year ending June 30, 1910, at 1.5 cents per car mile	$746,339
Obsolescene at ¾ of 1% on $35,000,000	262,500
Total	$1,008,839
Depreciation during year ending June 30, 1911, at 1.5 cents per car mile	856,663
Obsolescence at ¾ of 1% on $35,000,000	262,500
Total	$1,119,163

The rate of depreciation per car mile is taken from the report rendered by Bion J. Arnold upon the "Return on the Investment in the Subway" to the Public Service Commission, and is his estimate of the amount that ought to be set aside annually for that purpose. The rate for obsolescence is that suggested in the conference committee's report of last June and is ¾ of 1% of the cost of equipment. It follows therefore that the preferential sum to be paid the company, including as it does one million dollars of deferred depreciation and obsolescence, is more than a million dollars higher than the average net earnings of the last two years. The city will therefore pay to the company every year during the life of the proposed contract, as part of this preferential, one million dollars more than the average net earnings of the Interborough subway during the past two years.

VIII.

Because from $40,000,000 to $50,000,000 Is Needlessly Given to Private Capital by Sacrificing Terms in Existing Contracts as to Readjustments.

This result has been fully explained already in memoranda which I have filed with this board heretofore and is clearly and fully restated in the memoranda of the City Club and of the People's Institute. It will be sufficient to refer here to the fact that the initial terms of contracts 1 and 2 expire respectively in the years 1954 and 1943; that under the existing contracts there will be on those dates readjustments of terms and that, if agreement cannot be reached between the city and the company, arbitration may be had.

A 49 year flat term without readjustment would extend the period of the company's enjoyment of its present lucrative terms of operation for 12 years, in the case of the longer lease, and for 23 years in the case of the shorter lease.

The estimate of forty to fifty million dollars which the company will gain and the city lose by extending the terms of both leases to 49 years without readjustment, is based upon the reasonable assumption that neither through agreement nor abritration would the company get better terms that an even division of profits with the city over and above expenses of operation.

Assuming that the present subway would be carrying no more than 300,000,000 passengers at the time of the expiration of the initial term of leases 1 and 2 and operating at the same cost ratio as now, the net profits per year would be $4,368,100 for contract No. 1 and $1,681,900 for contract No. 2.

Assuming that agreement or abritration would then result in an even division between city and company, the city, by waiving the readjustment at the end of initial terms, gives up $2,184,050 per year for 12 years in the case of

contract No. 1 and $840,950 for 23 years in the case of contract No. 2 or $45,549,450 in all.

IX.

Because the Company Is to Be Given Back the Value of the Equipment of the Present Subway Three Times Over and the Value of New Equipment Twice Over.

As to old equipment:

Once, as a part of operating expenses under the name of depreciation and obsolescence funds, as per sec. 12, subdivision (a) of the offer. The amounts which the company may annually write into the depreciation and absolescence funds are not limited. The conference committee's report of last June calls for an annual sum sufficient fully to amortize equipment by the end of the contract. These funds will, therefore, undoubtedly equal the cost of equipment at the end of the 49 year period.

A second time: through the preferential payment of $6,335,000, which, as has already been pointed out, includes sums for depreciation and obsolescence which should have been, but were not, deducted in the past.

A third time: through the operation of sec. 17 of the offer, which compels the city to take over the existing equipment on the expiration of the contract term at its then appraised value. As the funds above named, established under sec. 12, subdivision (a) of the offer undoubtedly will be sufficient to amortize the value of the equipment on the expiration of the contract term, any sum which the city pays the company for the then value of the equipment will be pro tanto a third payment.

As to new equipment:

Once, as a part of operating expenses under subdivision (a) of sec. 12 of the offer.

A second time, through the sinking fund presumably to be provided for as a part of the six per cent. preference upon new capital payable to the company under subdivision (c) of sec. 12 of the offer, I say presumably, because the

offer contemplates that the company shall get a flat six per cent. on its new capital investment, without the segregation of this sum into interest on the bonds and sinking fund.

X.

Because the Sinking Funds Established are Grossly Excessive, Without any Provision That the City Shall Share in the Surplus Created.

With all of the guaranties included in this proposition, the company's bonds cannot conceivably fail to sell at par or better, if offered as five per cent. bonds, and if sold by public letting or auction, as they should be, as ordered by the Public Service Commission in the cases of the Bronx Gas and Electric Co., and Kings County Lighting Co., in New York; and as in the case of the Consumers' Gas Co. of Toronto, and all gas and water companies in Great Britain. This will leave a sinking fund of one per cent. to amortize the cost of construction. In point of fact, at the end of the contract term, the sinking fund which is the result of accumulations of annual payments of one per cent. upon the new capital, if invested at four and one-half per cent. will equal the amount of the company's capital investment plus a surplus of $60,000,000. In other words, an annual payment of one per cent. on $77,000,000, if invested at four and one-half per cent. throughout a term of 49 years and one per cent. on $10,000,000 for 44 years will amount to the sum of $147,000,000. This exceeds the company's total investment of $87,000,000 by $60,000,000. If invested at four per cent. it will amount at the end of the lease term to $126,404,086. This exceeds the company's total investment of $87,000,000 by $39,404,086.

The offer does not provide that such surplus of $60,000,000, or $39,404,086, as the case may be, shall revert to the city. As the offer now stands the company may, and will, appropriate this enormous bonus. Any fair contract should provide either that all surplus in such funds shall revert to the city until all the accumulated deficits are wiped out, and

that the remainder of any surplus in such funds shall be shared by the city and company equally, or that the allowance to the company upon new capital shall be divided into interest and sinking fund, which latter should not exceed .588722%, an annual increment sufficient, if invested at four and one-half per cent., compounded annually, to wipe out the principle in 49 years.

This objection applies alike to the offer of the Interborough Company and to the proposed contract with the Brooklyn Transit Company.

XI.

Because the Offer Denies the City a Share of Any Advantage That May be Reaped by the Company Through the Sale of Its Bonds at a Premium.

This also applies to both companies.

In view of the city's extraordinary guaranties against all and any conceivable loss, the company's bonds would undoubtedly sell considerably above par if sold at public auction or letting, as they should be. As the price realized will be wholly the result of the city's guaranties, some share of the premium should be reserved to the city or at least credited toward amortization of principal.

JOHN PURROY MITCHEL,
President, Board of Aldermen.

Action was deferred until Friday, May 24, 1912.

On motion of the Comptroller, the Board adjourned to meet Thursday, May 23, 1912, at 10.30 o'clock a. m.

CC. At a meeting of the Board of Estimate and Apportionment held on May 24, 1912, the following proceedings were had and taken:

Present—William J. Gaynor, Mayor; Douglas Mathewson, Deputy and Acting Comptroller; John Purroy Mitchel, President, Board of Alderman; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President,

Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Dennis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

RAPID TRANSIT RAILWAYS.

In the matter of the communication from the Public Service Commission for the First District, relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of May 22, 1912, a report was received from the Committee on Pending Transit Proposals, and also a communication from the President of the Board of Alderman in opposition to such report and the matter was laid over until this day.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, offered the following:

Whereas, Under provisions of the Rapid Transit Act and of the city charter, all contracts for the construction, equipment or operation of rapid transit railways, and all routes established as a basis for the operation of such railways, require the approval of the Board of Estimate and Apportionment before becoming effective; and

Whereas, The Public Service Commission for the First District, in order to expedite the preparation of proper contracts, and to promote harmonious action, has from time to time referred for the advance consideration of the Board proposals it has received for operation of new rapid transit lines and extensions of the present lines of existing operating companies; and

Whereas, A Committee of this Board, appointed to confer with the Commission upon the several plans from time to time presented, has submitted a final report recommending that the Board inform the Public Service Commission

that it will approve contracts for the equipment and operation, and for contributions in part toward the cost of construction of certain lines by the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, or a company to be organized in its interest, upon certain terms and conditions as set forth; and

Whereas, The said Committee informs the Board that the respective operating companies have signified their willingness to enter into contracts under the terms proposed; and

Whereas, In the judgment of the Board, the execution of such contracts will enure to the Public interest; therefore be it

Resolved:

(1) That the Board inform the Public Service Commission that if a contract be executed with the Interborough Rapid Transit Company for the equipment and operation of new rapid transit lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, and the company's communication to the Public Service Commission dated February 27, 1912, such contracts, when presented to your Board will have its approval.

(2) That the Board inform the Public Service Commission that if a contract be executed with the Brooklyn Rapid Transit Company, or with a company organized in its interest, for the equipment and operation of new rapid transit lines, and for the operation of the existing elevated lines of the Brooklyn Rapid Transit Company in conjunction with such new lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, such contract, presented to your Board simultaneously with the presentation of the contract for the Interborough Rapid Transit Company, will have its approval.

(3) That the Board inform the Public Service Commission that if application be made to it by the Interborough Rapid Transit Company for certificates for the extension and third tracking of its Manhattan elevated lines, and for the cession of the Steinway Tunnel to the City and the immediate operation thereof, in accordance with the terms herein set forth, and in advance of the execution of the general contract for the operation of new rapid transit lines, such certificates, when presented, will have your approval.

(4) That the resolutions adopted by your Board dated July 21, 1911, and such other resolutions heretofore adopted that may be inconsistent with the present recommendations, be rescinded; and

(5) That the Board's Special Committee on pending Transit Proposals be continued for the purpose of further conferences with the Public Service Commission with relation to any questions of detail that may arise between the two bodies affecting the contracts to be prepared.

Discussion then ensued between the President of the Borough of Manhattan and the President of the Board of Aldermen.

The following appeared in favor of the report: Hon. Seth Low, Ernest Gilmore Gardner, James J. O'Brien, Dr. George W. Brush, Chairman, Brooklyn Transit Conference, and on behalf of the Flatbush Association and the Brooklyn League; Thomas E. Clark, on behalf of the Allied Boards of Trade of South Brooklyn, and R. E. Simon.

A. Henschel appeared in favor of more transverse routes and connections for intercommunication across the City.

Hon. Francis P. Bent appeared on behalf of the United Boards of Trade and Twenty-eighth Ward Taxpayers' Association of Brooklyn in favor of the subway continuing as a subway instead of an elevated structure from the old Bushwick station to East New York or Manhattan Junction.

Henry S. Wood appeared in support of his offer to construct subways.

Frederic C. Howe, representing the People's Institute, suggested that action be deferred.

Cornelius M. Sheehan on behalf of the Allied Boards of Trade, Brooklyn, appeared in opposition.

Dr. William H. Allen, Director, Bureau of Municipal Research, who requested action be deferred.

Arnon L. Squiers protested the proposition for an elevated road across Brooklyn.

The resolutions offered by the President of the Borough of Manhattan were then adopted by the following vote:

Affirmative—The Mayor, the Deputy and Acting Comptroller, the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens, and the President of the Borough of Richmond—13.

Negative—The President of the Board of Aldermen—3.

In explaining his vote in the negative the President of the Board of Aldermen made the following statement:

> "If the resolutions were to be divided I would be willing to vote for a continuance of the Committee cheerfully, for the certifying of the third tracking of the elevated railroad; for the Steinway Tunnel, the operation of which I suppose includes Queens, and the approval of the contract with the B. R. T. with one modification as to the Sinking Fund. As to the others I can not vote for, for the reasons stated in my memorandum the other day."

DD. At a meeting of the Board of Estimate and Apportionment held on March 6, 1913, the following proceedings were had and taken:

Rapid Transit Railways—Additional Tracks on the Existing Elevated Railroads, Extensions Thereto, and the Construction, Maintenance, Equipment and Operation of Additional Rapid Transit Railroads and Future Extensions of the Same in the Several Boroughs of the City (Cal. No. 4).

The Secretary presented the following:

State of New York, Public Service Commission for the First District, Tribune Building, New York, March 4, 1913.

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District herewith transmits for appropriate action under the Rapid Transit Act the following documents which it proposes to execute:

1. Contract between The City of New York, acting by the Commission, and New York Municipal Railway Corporation for additional rapid transit railroads.

2. Certificate to be granted by the Commission to New York Municipal Railway Corporation for Broadway, Fulton street and Myrtle avenue additional tracks.

3. Certificate to be granted by the Commission to the New York Municipal Railway Corporation for Jamaica and Liberty avenue extensions.

4. Contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads.

5. Certificate to be granted by the Commission to Interborough Rapid Transit Company for Webster avenue extension, 8th avenue and 162d street connection, Queensboro Bridge extension and West Farms subway connection.

There are also transmitted two supplemental agreements which the Commission proposes to enter into upon the execution of the two main contracts. Those supplemental agreements are:

1. Agreements between The City of New York, acting by the Commission, Interborough Rapid Transit Company and New York Municipal Railway Corporation, covering trackage rights to be exercised by the latter company.

2. Agreement between The City of New York, acting by the Commission, Interborough Rapid Transit Company as lessee, under the contract with the City, and Interborough Rapid Transit Company as lessee of the Manhattan Railway Company, covering trackage rights to be exercised by the Interborough Company as lessee of the Manhattan Railway Company.

The contracts and agreements to become effective will require the aproval and consent of the Board of Estimate and Apportionment; the certificates will require the approval of your Board and in addition the consent of your Board and of the Mayor, as the local authorities, to the construction and operation of the railroads therein described.

In view of the extended conferences with your Committee on Pending Transit Proposals and of the widespread discussion of these matters, it is unnecessary here to recite the various provisions of these documents or to declare the public policy that underlies them. The documents are the result of nearly five years of negotiation, actively participated in by your committee since its appointment two years ago. In transmitting them, the Commission desires to record its high appreciation of the work of your committee and especially the work of its chairman, the President of the Borough of Manhattan.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT.
By Edward E. McCall, Chairman.

Attest: Travis H. Whitney, Secretary.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, offered the following:

Whereas, The Public Service Commission for the First District has forwarded a communication dated March 4, 1913, to the Board of Estimate and Apportionment transmitting for approval proposed certificates, contracts and supplementary agreements for the construction, maintenance and operation of certain elevated railroad extensions, additional tracks and the construction, maintenance equipment and operation of additional rapid transit railroads and future extensions to the same in the several boroughs of the City, as follows:

Proposed Certificates:

Company.	Line.
Interborough Rapid Transit Company (Railroad extensions)	Webster Avenue. Eighth Avenue and One Hundred and Sixty-Second Street connection. Queensboro Bridge. West Farms Subway Connection.
New York Municipal Railway Corporation (Additional tracks)	Broadway. Fulton Street. Myrtle Avenue.
New York Municipal Railway Corporation (Railroad extensions)	Jamaica. Liberty Avenue.
Proposed Contracts:	
New York Municipal Railway Corporation	Rapid Transit Railways and Future Extensions of same.
Interborough Rapid Transit Company	Rapid Transit Railways and Future Extensions of same.

Proposed Supplementary Agreements:

City of New York (acting by Public Service Commission for the First District), Interborough Rapid Transit Company, New York Municipal Railway Corporation, for joint use of tracks over certain sections of the Steinway Tunnel Line, and any extensions thereof.

City of New York (acting by Public Service Commission for the First District), Interborough Rapid Transit Company (as lessee and as grantee) for joint use of tracks for through service.

Now, therefore, be it

Resolved, That the communication and the proposed certificates, contracts and supplementary agreements be received and referred to the Corporation Counsel for his examination, and to the Committee on Pending Transit Proposals for report; and be it further

Resolved, That Tuesday, March 11, 1913, at 10:30 a. m., be and is hereby fixed as the date for consideration of the proposed certificates, contracts and supplementary agreements; and be it further

Resolved, That the Secretary of this Board be and is hereby directed to publish notice of said date for consideration in the CITY RECORD.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

EE. At a meeting of the Board of Estimate and Apportionment held on March 11, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present—William J. Gayner, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens; and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways.

The Board proceeded with the consideration of the communication dated March 4, 1913, from the Public Service Commission for the First District submitting for approval

of this Board proposed certificates, proposed contracts and proposed supplementary agreements as follows:

1. Proposed certificate to be issued to Interborough Rapid Transit Company to construct, maintain and operate certain elevated railroad extensions as follows: (a) Webster avenue line, (b) 8th avenue and 162d street connection, (c) Queensboro Bridge line, (d) West Farms subway connection, in the Boroughs of Manhattan, The Bronx and Queens.

2. Proposed certificate to be issued to New York Municipal Railway Corporation to lay, maintain and operate certain additional tracks on its (a) Broadway elevated line, (b) Fulton street line, (c) Myrtle avenue elevated line, in the Borough of Brooklyn.

3. Proposed certificate to be issued to New York Municipal Railway Corporation to construct, maintain and operate certain elevated railroad extensions known as (a) Jamaica line, (b) Liberty avenue line, in the Boroughs of Brooklyn and Queens.

4. Proposed form of contract to be entered into with New York Municipal Railway Corporation for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Broadway-Fourth avenue line, (b) Culver line, (c) Fourteenth-Eastern line, and future extensions in the several boroughs of the City.

5. Proposed form of contract to be entered into with Interborough Rapid Transit Company for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Seventh avenue-Lexington avenue line, (b) Eastern parkway line, (c) Steinway Tunnel line, (d) White Plains road line, and future extensions in the several boroughs of the city.

6. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the

First District) and Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

7. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company, as lessee under the preceding subway contract and as grantee under the certificate granted for additional elevated railroad extensions, for joint use of tracks for through service.

This communication was presented to the Board at the meeting of March 6, 1913, when, by resolution duly adopted, this day was fixed as the date for consideration, and the communication and accompanying instruments referred to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

The following appeared in opposition: Henry S. Wood, Fred C. Leubuscher, L. S. Bedford, J. B. Allee and Miss C. P. Fincher.

Thomas E. Clark, on behalf of Brooklyn civic associations, appeared in favor.

Communications were received from the 10th Assembly District Republican Club and the 18th Assembly District Republican Club in favor.

No one else desiring to be heard, the Chair declared the consideration concluded. Action was then deferred until Monday, March 17, 1913, at 2 P. M.

On motion, the Board adjourned to meet Thursday, March 13, 1913, at 10:30 o'clock A. M.

FF. At a meeting of the Board of Estimate and Apportionment held on March 17, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present—William J. Gaynor, Mayor; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways.

In the matter of the communication dated March 4, 1913, from the Public Service Commission for the First District, submitting for approval and consent of this Board proposed certificates, proposed contracts and proposed supplementary agreements as follows:

1. Proposed certificate to be issued to Interborough Rapid Transit Company to construct, maintain and operate certain elevated railroad extensions as follows: (a) Webster Avenue Line, (b) 8th avenue and 162d street connection, (c) Queensboro Bridge Line, (d) West Farms Subway Connection, in the Boroughs of Manhattan, The Bronx and Queens.

2. Proposed certificate to be issued to New York Municipal Railway Corporation to lay, maintain and operate certain additional tracks on its (a) Broadway Elevated Line, (b) Fulton Street Elevated Line, (c) Myrtle Avenue Elevated Line, in the Borough of Brooklyn.

3. Proposed certificate to be issued to New York Municipal Railway Corporation to construct, maintain and operate certain elevated railroad extensions known as (a) Jamaica Line, (b) Liberty Avenue Line, in the Boroughs of Brooklyn and Queens.

4. Proposed form of contract to be entered into with New York Municipal Railway Corporation for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be

known, respectively, as (a) Broadway-Fourth Avenue Line, (b) Culver Line, (c) Fourteenth Street-Eastern Line, and future extensions in the several Boroughs of the City.

5. Proposed form of contract to be entered into with Interborough Rapid Transit Company for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Seventh Avenue-Lexington Avenue Line (b) Eastern Parkway Line, (c) Steinway Tunnel Line, (d) White Plains Road Line, and future extensions in the several Boroughs of the City.

6. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

7. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company, as lessee under the preceding subway contract and as grantee under the certificate granted for additional elevated railroad extensions, for joint use of tracks for through service.

This communication was presented to the Board at the meeting of March 6, 1913, when by resolution duly adopted March 11 was fixed as the date for consideration and the communication and accompanying instruments referred to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

At the meeting of March 11, 1913, action was deferred until this day.

On motion, the Board adjourned to meet Tuesday, March 18, 1913, at 3 p. m.

GG. At a meeting of the Board of Estimate and Apportionment held on March 18, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present—William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Maurice E. Connolly, President Borough of Queens; and George Cromwell, President of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways.

In the matter of the communication dated March 4, 1913, from the Public Service Commission for the First District, submitting for the approval and consent of this Board proposed certificates, proposed contracts and proposed agreements.

At the meeting of March 17, 1913, action was deferred until this day.

The Secretary presented the following:

City of New York, Law Department, Office of the Corporation Counsel, New York, March 10, 1913.

Board of Estimate and Apportionment, 277 Broadway, New York City:

Sirs—A communication from the Secretary of your Board, dated March 6, 1913, has been received. It reads as follows:

> "I transmit herewith certified copy of resolution this day adopted by the Board of Estimate and Apportionment, fixing Tuesday, March 11, 1913, at 10:30 o'clock a. m., as the date for consideration of the communication dated March 4, 1913, from the Public Service Com-

mission for the First District to this Board, transmitting for approval proposed certificates, contracts and supplementary agreements for the construction, maintenance and operation of certain elevated railroad extensions, additional tracks and the construction, maintenance, equipment and operation of additional rapid transit railroads and future extensions to the same in the several Boroughs of the City; and referring said communication and the accompanying instruments to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

"I transmit herewith a copy of the communication and accompanying instruments.

"I would request that you endorse your approval on each of the contracts, certificates, and supplementary agreements and return same to this office as speedily as possible so that they may be ready for action by the Board at the meeting of March 11, 1913."

I return said contracts endorsed approved as to form.

Yours truly,
JOHN L. O'BRIEN,
Acting Corporation Counsel.

The President of the Borough of Manahttan, Chairman of the Committee on Pending Transit Proposals, on behalf of said Committee, made the following statement:

When, on May 24 last, the Board of Estimate adopted the report of the Conference Committee setting forth the terms upon which contracts for the operating companies would be approved, the committee was continued "for the purpose of further conference with the Public Service Commission with relation to any questions of detail that may arise between two bodies affecting the forms of contracts to be prepared." Under this authority, the committee con-

tinued to confer with the Public Service Commission upon various questions of policy, and of construction of the terms of the report that arose during the summer. When the first drafts of the contracts were presented for public hearing, on December 31, 1912, they were carefully examined by the committee, and various questions raised with relation to details in which they did not appear to conform to the report of May. Some of these questions upon which the Commission had been unable to agree with the companies had been held deliberately by the Commission until the conferees of the two bodies might pass upon them. The result of the further negotiations that followed was that every proposed clause that did not conform to the report of May was either eliminated or properly modified. The contracts as now presented for approval are little more, therefore, than the expression in exact contractual terms of the general transit plan to which the Board has already subscribed. The Conference Committee does not deem it necessary to rehearse the various terms which were stated in detail in its previous reports, and it now recommends the adoption of the several contracts, certificates and agreements as they stand.

The formal resolutions of approval that the committee now submits incorporate the express reservation of borrowing capacity sufficient to cover the city's share in the construction of all the lines embraced within the Dual Plan. The estimates submitted in May covering the contributions of both the city and the companies, whether for construction or equipment, and including also the item of real estate, reached a total of $301,860,000. The third tracking and extensions of the Manhattan elevated system adds approximately $25,000,000 more. The estimates as they have since been carefully revised, and as now re-submitted, are but $67,000 beneath this figure. They are distributed as follows:

Interborough System—	
City funds	$ 63,335,637 00
Company, for construction	56,260,000 00
Company, for equipment	21,000,000 00
	$140,595,637 00
Brooklyn System—	
City funds for new work	$ 72,005,991 00
City funds for Fourth avenue and Centre street loop lines	28,496,000 00
Company funds for the construction of city-owned lines	13,695,000 00
Company funds for improvements to its existing system	21,000,000 00
Company funds for equipment	26,000,000 00
	$161,196,991 00
Interborough System	$140,595,637 00
Brooklyn System	161,196,991 00
Grand total	$301,792,628 00

The sum total of the required investment of the City is, therefore, $163,837,628. Deducting the cost of the Fourth avenue and Centre Street Loop lines, the City's share for the new work will be $135,341,628. This is $1,030,572 less than the estimates of the City's share on account of both systems presented in last May.

Since the adoption of the first report of the conferees, in June, 1911, contracts have been let and work has proceeded upon certain of the trunk lines, embraced within the Dual Plan; and more recently upon the extension of the Fourth avenue line in Brooklyn. These contracts which, having been duly registered, are already charges against the debt limit, amount to $48,259,847. The contracts let within the past three or four years for the Fourth avenue and Centre street loop lines amount to $24,453,450; and the contracts for the elevated lines to Corona and Astoria in northern Queens, which were registered today, add $2,924,331 to the City's present commitment, bringing the total to $75,637,628. Deducting this from the estimated total of the City's share in the entire work, there remains in round numbers $88,200,000 still to be appropriated.

The committee presents resolutions covering the appropriation of this amount, carrying $60,000,000 still to be devoted to the construction of the Brooklyn company's lines and $28,200,000 for the Interborough Company.

The constitutional margin of the city's borrowing capacity on March 1, after allowing for outstanding authorizations of every description, was $114,813,445. Deducting from this the amount of all commitments for subway purposes today, including those that will be authorized upon the adoption of the resolutions now presented, there will remain for general purposes $23,689,114. To this sum there may be added outstanding authorizations for subway and other purposes that are no longer required and which may immediately be rescinded, amounting to $7,200,000. The margin of borrowing capacity for other than transit purposes that may readily be realized within the next several weeks is, therefore, in round numbers, $31,000,000.

(FRANCHISE.)

March 18, 1913.

Interborough Rapid Transit Company.

Proposed certificate to construct, maintain and operate elevated railroad extensions known as Webster Avenue Line, Eighth Avenue and One undred and Sixty-second Street Connection, Queensboro Bridge Line, West Farms Subway Connection in the Borough of Manhattan, The Bronx and Queens.

The Secretary presented the following:

Public Service Commission for the First District, New York, March 4, 1913.

To the Board of Estimate and Apportionment of The City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is transmitted herewith a copy of the proposed certificate to

be granted by the Commission to the Interborough Transit Company for the Webster Avenue Extension, the 8th Avenue and 162d Street Connection, the Queensboro Bridge Extension and the West Farms Subway Connection.

I also transmit herewith a certified copy of a motion amending the said certificate, together with a certified copy of the resolution approving and adopting such contract as amended. Yours very truly,

TRAVIS H. WHITNEY, Secretary.

Commissioner Eustis moved to amend the certificate to the Interborough Rapid Transit Company for elevated extensions in the following respect:

Page 22, line 9: omit "and" and insert "or".

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this fourth day of March, 1913.

TRAVIS H. WHITNEY,
(Seal) Secretary.

Whereas, Counsel to the Commission has presented a form of proposed certificate to Interborough Rapid Transit Company for the construction, maintenance and operation of certain railroads therein referred to as the Webster avenue line, the 8th avenue and 162d street connection, the Queensboro Bridge line and the West Farms subway connection;

Resolved, That the form of the proposed certificate now submitted by Counsel, as amended, be and the same hereby is approved and adopted and that the Secretary be and hereby is authorized and directed to transmit the same to

the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said certificate has been approved by said Board of Estimate and Apportionment and the construction and operation of the railroads therein described have been consented to by said Board of Estimate and Apportionment and by the Mayor, the Chairman be and hereby is authorized and directed to execute said certificate for the Commission in five identical originals and that the Secretary be and hereby is authorized and directed to attest the said certificate and to affix thereto the seal of the Commission.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission this 4th day of March, 1913.

(Seal) TRAVIS H. WHITNEY,
Secretary.

Public Service Commission for the First District, New York, March 15, 1913.

To the Board of Estimate and Apportionment of The City of New York:

This Commission at its meeting today adopted a resolution amending in certain respects the proposed certificate to the Interborough Rapid Transit Company for elevated line extensions.

In accordance with this resolution, a certified copy of the same is transmitted herewith with the request that the Board of Estimate and Apportionment make the amend-

ments described therein in the copy of the proposed certificate heretofore transmitted to it. Respectfully submitted.

TRAVIS H. WHITNEY,
Secretary.

Resolved, That the proposed certificate to Interborough Rapid Transit Company for Webster avenue line, 8th avenue and 162d street connection, Queensboro Bridge line and West Farms subway connection, approved and adopted by the Commission on the 4th day of March, 1913, be and the same hereby is amended in the following respects:

Page 16, line 6, by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway".

Page 32, line 3, by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway".

Page 35, sixth line of paragraph (7), by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway".

Page 54, first line of paragraph (1), by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway".

Page 54, first line of paragraph (1), by inserting after "Company" the words "being the lessor of the Interborough Company".

Page 54, ninth line from bottom of page, by striking out the word "Interborough" and inserting in the place and stead thereof the words "said Manhattan Railway".

Page 54, sixth line from bottom of page, by striking out the word "Interborough" and inserting in the place and stead thereof the words "said Manhattan Railway".

Further resolved, That the Secretary be and hereby is authorized and directed to transmit a certified copy of this resolution to the Board of Estimate and Apportionment and to request the said Board to make the above amend-

ments in the proposed certificate heretofore transmitted to it.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 15, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission this 15th day of March, 1913.

(Seal) TRAVIS H. WHITNEY,
Secretary.

Note—The pages and lines referred to above relate to the printed copy of the certificate as presented to the Board on March 6, 1913, and such corrections have been made.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District has fixed and determined the routes designated as Webster avenue line, 8th avenue and 162d street connection, Queensboro Bridge line, West Farms subway connection, with in City of New York, by which the Interborough Rapid Transit Company may extend its elevated lines, and the location and plans of construction of the railroads upon such routes, and the times within which they shall be respectively constructed and the compensation to be made therefor to the City by the said company; and

Whereas, The Public Service Commission for the First District has transmitted to the Board of Estimate and Apportionment a proposed certificate in respect thereof, to be issued to the Interborough Rapid Transit Company, subject to certain terms, conditions and requirements, all set forth in said proposed certificate; and

Whereas, Said proposed certificate was received by the Board of Estimate and Apportionment on the 6th day of

March, 1913, at a meeting of said Board of Estimate and Apportionment, duly held on said day; and

Whereas, The Public Service Commission for the First District did, by resolution adopted March 15, 1913, amend in certain respects the proposed certificate to the Interborough Rapid Transit Company for elevated line extensions; and

Whereas, The proposed certificate as amended, and the terms, conditions and requirements therein contained, are as follows:

PUBLIC SERVICE COMMISSION FOR THE DISTRICT TO INTERBOROUGH RAPID TRANSIT COMPANY.

CERTIFICATE.

(Here follows Certificate to I. R. T.)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of the City of New York, by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves the foregoing proposed certificate to the Interborough Rapid Transit Company, and hereby consents to the construction, maintenance and operation of the railroad extensions in accordance therewith.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Manhattan Railway Company.

Proposed certificate to construct, maintain and operate certain additional tracks on its Second Avenue line, Third Avenue line and Ninth Avenue line, in the Boroughs of Manhattan and The Bronx.

The Secretary presented the following:

Public Service Commission, for the First District, New York, March 15, 1913.

To the Board of Estimate and Apportionment of the City of New York:

Referring to the Commission's communication of March 4, 1913, transmitting contracts, agreements and certificates for the so-called "Dual System", the Commission now transmits a proposed certificate to Manhattan Railway Company for the construction and operation of additional tracks on the Second, Third and Ninth avenue lines. This certificate will require the approval of the Board of Estimate and Apportionment, and in addition there will be necessary the consent of the Board of Estimate and Apportionment and the Mayor to the construction and operation of the railroads authorized by such certificate.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,
By EDWARD E. MCCALL, *Chairman*.

(SEAL)

Attest:
TRAVIS H. WHITNEY, Secretary.

Whereas, On or about the 27th day of February, 1912, Interborough Rapid Transit Company, as Lessee of Manhattan Railway Company, duly made application to the Public Service Commission for the First District for the grant of a certificate to Manhattan Railway Company, authorizing the construction and operation of additional tracks on the Second, Third and Ninth Avenue Elevated Lines of Manhattan Railway Company; and

Whereas, On the 15th day of March, 1913, Manhattan Railway Company has duly made application to the Public Service Commission for the First District for the grant of such certificate; and

Whereas, Counsel to the Commission has presented a form of proposed certificate to Manhattan Railway Company for laying additional tracks upon its Second, Third and Ninth Avenue lines;

Resolved, That the form of the proposed certificate now submitted by Counsel be, and the same hereby is, approved and adopted, and that the Secretary be, and hereby is, authorized and directed, to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That if and when said certificate has been approved by said Board of Estimate and Apportionment, and the construction and operation of the railroads therein described have been consented to by said Board of Estimate and Apportionment, and by the Mayor, the Chairman be, and hereby is, authorized and directed to execute said certificate for the Commission in five identical originals and that the Secretary be and hereby is authorized and directed to attest the said certificate and to affix thereto the seal of the Commission.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission on March 15, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 15th day of March, 1913.

TRAVIS H. WHITNEY, *Secretary.*

(SEAL.)

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District has fixed and determined the location and plans of construction and proposes to authorize the Manhattan Railway Company to lay an additional track or tracks on, above or contiguous to portions of the route or routes of its Second Avenue line, Third Avenue line, Ninth Avenue line within the City of New York, and has fixed the times within

which they shall be respectively constructed and the compensation to be made therefor to the City and by the railroad company; and

Whereas, The Public Service Commission for the First District has transmitted to the Board of Estimate and Apportionment a proposed certificate to be issued to the Manhattan Railway Company, subject to certain terms, conditions and requirements, all as set forth in said proposed certificates; and

Whereas, Said proposed certificate was received by the Board of Estimate and Apportionment on the 17th day of March, 1913, at a meeting of said Board of Estimate and Apportionment duly held on said day; and

Whereas, The proposed certificate and the terms, conditions and requirements therein contained, are as follows:

(Here follows Certificate for Additional Tracks)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of The City of New York by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves the foregoing proposed certificate to the Manhattan Railway Company and hereby consents to the construction and operation of the additional track or tracks in accordance therewith.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Interborough Rapid Transit Company.

Proposed form of contract for the construction, maintenance, equipment and operation of additional rapid transit railroads to be known as Seventh Avenue-Lexington Avenue line, Eastern Parkway line, Steinway Tunnel line, White Plains Road line and future extensions in the several boroughs of the City.

The Secretary presented the following:

Public Service Commission for the First District, New York, March 4, 1913.

To the Board of Estimate and Apportionment of the City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is transmitted herewith a copy of the proposed contract between The City of New York, acting by the Commission, and the Interborough Rapid Transit Company, for additional rapid transit railroads.

I also transmit herewith a certified copy of a motion amending the contract, together with a certified copy of the resolution approving and adopting such contract as amended.

Yours very truly,
TRAVIS H. WHITNEY, Secretary.

Commissioner Eustis moved to amend the contract with the Interborough Rapid Transit Company in the following respect:

Page 90, line 3, Article XXIII; omit first "and" and insert "or".

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this fourth day of March, 1913.

[SEAL.] TRAVIS H. WHITNEY, Secretary.

Whereas, The Commission has determined that the public interests require the entering into a contract with Interborough Rapid Transit Company for additional rapid transit railroads; and,

Whereas, Counsel to the Commission has presented a form of proposed contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads;

Resolved, That the form of the proposed contract now submitted by Counsel as amended be and the same hereby is approved and adopted and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said contract has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said contract for the Commission in four identical originals and that the Secretary be and hereby is authorized and directed to attest the said contract and to affix thereto the seal of the Commission.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

[SEAL.] TRAVIS H. WHITNEY, Secretary.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed contract to be entered ito with the Interborough Rapid Transit Company, for additional rapid transit railroads; and,

Whereas, Said communication and proposed contract were received by the Board of Estimate and Apportionment at a meeting of said Board duly held on the 6th day of March, 1913; and,

Whereas, The contract proposed to be entered into with the Interborough Rapid Transit Company and submitted to this Board for approval and consent, is as follows:

(Here follows Contract No. 3.)

Now, therefore, it is

Resolved, That the Board of Estimate and Apportionment of The City of New York, by a majority vote according to the number of votes by law pertaining to each member of the Board, hereby approves and consents to the proposed contract to be entered into with the Interborough Rapid Transit Company.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission, with the request that it be amended by reducing the sum of $6,335,000, the preferential deduction from gross earnings allowed the Company on account of its old capital invested in the present subway, by a sum equal to the annual deferred depreciation and obsolescence upon its plant and equipment during the two years ending June 30, 1911, which said sum shall be fixed at not less than $580,000.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that a readjustment of operating terms under existing contracts Nos. 1 and 2 be required at the expiration of the present initial leasehold periods.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that in case of recapture of any division or divisions of the new subways to be constructed thereunder, the same may be had by the City without payment of any sum by the City to the Company on account of construction cost, when the amount of the construction cost of such division or divisions so recaptured does not exceed the total amount contributed by the City to construction under this contract.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presi-

dents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that the Company shall not capitalize three points of discount upon the sale price which it is to receive from the Steinway tunnel.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by reducing the preferential deduction from gross earnings allowed the Company, from 6 per cent. to an amount sufficient to pay interest upon the actual cash investment of the Company in construction and equipment, and to amortize the investment within the period of the lease.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by

providing that The City of New York shall have a share in any premiums above par realized in the sale of the bonds issued for construction and equipment, and to that end, that the Company be required to sell its bonds at public sale and upon competitive bidding.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The resolution as offered by the President of the Borough of Manhattan was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

The President of the Board of Aldermen then presented the following:

March 11, 1913.

To the Board of Estimate and Apportionment:

Gentlemen—The contracts to carry into effect the plan of the Transit Conference Committee, approved by the Board of Estimate on the 24th day of May, 1912, have been prepared by the Public Service Commission, and are now presented to this Board for adoption. These contracts are designed to carry into effect the so-called dual subway plan. To the physical features of that plan I have no objection, such as to lead me to refuse to acquiesce with the majority members of this Board in its adoption, although I believe now, as heretofore, that a wholly new and independent transit system, constructed entirely with City money, and abso-

lutely controlled by the City in its own interests, would be preferable to the dual plan.

Being prepared to accept the dual plan upon proper terms, I desire once more, and probably for the last time to point out to this Board that the contracts proposed are ruinously unfair and disadvantageous to the City, will lock the rapid transit facilities of New York fast in the grip of the two great operating companies for the full span of two generations, will put an end to further rapid transit expansion and development for many years, will deprive the municipality at the same time of its legitimate share of the profits of the enterprise which its capital creates, and of the control of that enterprise which alone would insure to the public adequate service.

The contracts now presented, like the agreement of last May, are based upon terms fundamentally wrong. These I shall enumerate, together with the conclusive proof of the facts which I shall allege. These terms are all matters of negotiation and agreement between the City and the companies. They all represent merely the selfish and excessive demands of the operating companies and of their banking backers. All of them might be changed without losing the routing advantages which are claimed for the dual plan. Since the provisions of the contract in these respects are now grossly unjust to the City, and a revision of them in accordance with the suggestions herein made would be but common justice, and in accordance with sound business principles, I maintain, as I have in the past, that with these facts thoroughly before the public, a revision of these terms would be not only possible but inevitable, and the dual system still preserved.

In addition to the objection which run to the basis of the financial features of the agreement of last May, the present forms of contract are grossly defective in many respects, wherein they fail adequately to protect the City, or to carry out even the plan of last May, as reported by the Transit

Conference Committee of this Board. It was my understanding that the Transit Conference Committee proposed to insist upon a revision of the contracts in these respects.

Whatever revision has been made is now reflected in the contracts submitted to this Board. On an examination of these documents, it appears that of the sixteen objections against the form of the Interborough contract submitted by me to the Transit Conference Committee, and which I was informed that Committee would insist be pressed for amendment, but eight have been met by the revision which has taken place. Eight remain as in the draft upon which the public hearings were recently accorded. Of the eighteen objections to the form of the proposed contract with the Brooklyn Rapid Transit Company, all of which I likewise submitted to the Transit Conference Committee, but seven have been met by the recent revision. Eleven remain as in the forms considered at the recent public hearing.

Some of the changes made in these forms are of considerable moment to the City. Chief among them is the elimination from the contract of the obstructive proviso clause in the section dealing with the exchange of branches in case of recapture by the City. As I have always contended, this clause was inserted for the purpose of enabling the company to avoid its obligation in the future, and its excision alone, by securing a practical as well as a theoretic power of recapture, has been worth all of the efforts directed to compelling an amendment of the terms of last May. Other changes, including the designation of the Chief Justice of the Court of Appeals as the nominator of the third member of arbitration and depreciation boards; the provision for adequate depreciation and obsolescence reserves in the future; the elimination of double payment for equipment of the old subway; the assumption by the company of taxes and liens upon the Steinway tunnel; the provision that the City shall have a credit for past depreciation on items other than rolling stock in case of recapture or at the end of the contract; the limitation of subsidiary contracts to periods

of five years; the submission of Interborough payrolls, including those prior to December 1, 1912, for audit by the Public Service Commission; the requirement for the approval of the Board of Estimate and Apportionment to future changes in the contract; the five-cent fare to Coney Island made operative immediately instead of five years hence; and many other minor amendments securing a better control and better safeguards for the administration of these contracts, have been made since the public hearing. In these respects the contracts have been materially improved as to form and substance. There still remain, however, many serious and radical defects in form and substance in these instruments, in addition to those fundamental vices of the agreement of last May, which are still reflected in these contracts. The contracts, upon all of those fundamentals, except the matter of recapture, still remain unchanged, and as instruments designed to carry out the plan of last May, they are still grossly defective, and fail to protect the City.

I shall state first the objections to the financial terms approved by a majority of this Board last May, and later the defects of the contracts as instruments designed to effectuate the plan approved last May.

As to the Interborough Contract.

I.

The practical guaranty to the company of $6,335,000, in the preferential payment allowed on account of old capital invested in the present system, is based upon earnings from inadequate service and indecent congestion, is predicated upon false accounting and indefensibly padded to the extent of a vast sum, which is thereby donated each year by the City to the Company.

In my brief filed with this Board on the 24th day of May, 1912, at page 18, under the heading of Point VII, I submitted proof of the fact that the Interborough Company

has never provided for depreciation or obsolescence in the past, but has paid out in dividends to its stockholders and in interest to its bondholders sums of money which sound and honest railroad practice demanded that the company pay into depreciation and obsolescence funds. That proof has never been contradicted, much less successfully attacked. It stands upon the authority of Bion J. Arnold, recognized as probably the foremost expert on railroad costs and operation in the United States, and is found in his report rendered to the Public Service Commission upon this very question. The figure representing the annual depreciation and obsolescence which the Interborough should have provided for, and failed to provide for, upon the basis of Mr. Arnold's report, is approximately $1,000,000. This means that the preferential payment of $6,335,000, which is claimed to be the average of net profits of the two years prior to last May, instead of being the average of actual net profits, is approximately $1,000,000 more than the average of the true net profits of those two years. The preferential of $6,335,000 really contains approximately $1,000,000 of deferred depreciation and obsolescence, wrongfully paid out to bondholders and stockholders in place of being paid into depreciation and obsolescence reserves. To that extent it is padded.

Since the filing of my brief with this Board, new evidence of the accuracy of the claim which I then made has come to hand. The Public Service Commission requested a special Board of Consulting Engineers, consisting of Mr. Alfred Craven, the Chief Engineer of the Commission; Mr. George Gibbs, Chief Electrical Engineer of the Pennsylvania Railroad; Mr. E. R. Hill, Assistant Electrical Engineer of the Pennsylvania Railroad, and Mr. C. W. Wilder, Electrical Engineer of the Public Service Commission, to report to it upon the deferred depreciation and obsolescence of the present Interborough plant. This Board of Consulting Engineers reported that in their estimation de-

ferred depreciation and obsolescence up to January 30, 1916, would equal $6,000,000. The period covered is twelve years. This means that they estimate that deferred depreciation and obsolescence in the past has been at the rate of upwards of $500,000 per year. This estimate of the Board of Consulting Engineers does not cover rails, third rail, cables, feeders, electric lines and signal equipment.

The contracts themselves supply the proof that the Interborough admits the failure to provide for depreciation and obsolescence in the past, and the resultant padding of this preferential to approximately 120 per cent. of existing net profits. The revised contract provides that the company shall make good in future years past depreciation upon rolling stock to the extent of $2,759,000. It also provides in another section that in case of recapture by the City, or when, at the expiration of the contract period, the City takes over the Company's equipment of the present subway, there shall be a credit to the City on the part of the Company on account of depreciation of plant, other than rolling stock, to an amount of $3,239,000. It will be observed that these two sums together equal $6,000,000, the amount of deferred depreciation which the Board of Consulting Engineers recently reported that the Interborough has failed to provide for. These facts establish beyond attack the minimum figure of $500,000 per annum by which I have contended that the preferential payment on account of old capital is indefensibly padded and increased above the Company's present net earnings.

Another provision in the contract constitutes additional proof upon this head. The amount of gross earnings which the Interborough Company has consumed for purposes of maintenance in the past has equaled approximately 14 per cent. The first revised draft of the Interborough contract provided for an allowance of 12 per cent. for maintenance and 2 per cent. for depreciation, the total being about equal to what the Interborough had provided for maintenance alone in the past. The new or revised form provides that

the Company shall be limited to 12 per cent. for maintenance in the future, and shall have an additional 6 per cent. of gross receipts for depreciation and obsolescence. This increases the total for maintenance, depreciation and obsolescence to 18 per cent. of gross receipts, 4 per cent. more than the Company has set aside in the past. The additional 4 per cent. about equals what I have always contended the Company should have set aside in the past for depreciation and obsolescence, and constitutes a conclusive admission of the propriety of this deduction, and of the failure on the part of the Company in the past to provide therefor.

On the basis, therefore, of the recent report of the Board of Consulting Engineers rendered to the Public Service Commission, the preferential payment of $6,335,000 is wrongfully and unjustifiably padded to the extent of something more than $500,000. Upon the basis of the Arnold report, it is padded to the extent of $1,000,000. It follows, therefore, that The City of New York will be permitting the Interborough to deduct from the gross earnings a preferred payment to it each year, a sum greater than all of the present net profits of the Interborough from its existing subway by an amount ranging from $500,000 to $1,000,000. In the life of the contract, therefore, the Company will pocket from $27,000,000 to $54,000,000, representing a profit in excess of 100 per cent. of the Company's present net profits, continued throughout the life of the proposed lease. Whatever justification there might be for allowing to the company 100 per cent. of the present net profits of its existing subways, as the price of the pooling of the present tubes with the new divisions, a proposition which I deny, no justification can be found for the allowance of a sum on account of old capital in excess of 100 per cent. of present profits.

The preferential payment on account of old capital should be reduced by at least $1,000,000, as a condition to the execution of the proposed contracts.

II.

The provision for the leveling of existing leases to a flat forty-nine year term, by extending the present unduly favorable operating terms for the company for long periods of years, resulting in a gift to the Company of approximately $45,000,000.

In my brief filed with this Board on the 24th day of May, 1912, at page 19, under the heading of point VIII, I submitted the facts which demonstrated that the above gift is needlessly made to the existing companies through the leveling of present leases. The fact that readjustment of operating terms is provided for in the existing contracts Nos. 1 and 2 at the time of the expiration of initial leasehold terms is undeniable. That the leveling of the leases to a flat forty-nine year term results in an extension of the present operating terms eleven years in the case of the longer lease, and twenty-two years in the case of the shorter lease, is equally undeniable. The only question open to debate is the percentage of profits from the existing subways which a board of arbitration would award to the City upon any readjustment of terms.

In view of the trend of public opinion in these matters, and the establishment of the principle of municipal profit sharing which is becoming more and more widely recognized, it is scarcely reasonable to suppose that the City, whose money has created the present subway, upon a readjustment of these terms, would be awarded less than 50 per cent. of the profits. Such an award would bring to the City, upon the basis of existing traffic, a gross total of approximately $45,000,000 during the two periods of years for which the present operating terms under the respective leases are now proposed to be extended.

The above argument was made to this Board by the Comptroller and myself in our joint report submitted to this Board on the 5th day of January, 1911. It was sound then; it is sound now.

The contracts should be amended by retaining the provision for readjustment of operating terms, at the expiration of initial periods, such readjustment to be based on present day traffic.

III.

The above leveling of terms of existing leases to forty-nine years is virtually and in effect a guarantee to the company by the City for forty-nine years of all operating expenses, taxes, etc., a lump sum of $6,335,000 on account of old capital, and at least 6 per cent. upon all new money provided by the company.

Even in case of default on the part of the company such that the City becomes entitled to eject the company as an operator, the contract makes the City still liable to pay the preferential on account of old capital and the 6 per cent. on new capital which sums are to be applied, first to the payment of interest and sinking fund upon the bonds; then to any damages which the City may have suffered, and the surplus, if any, to the company.

IV.

It makes certain the loss of interest and sinking fund upon the City investment in the new subway, or insures and perpetuates indecent congestion as a condition of earning a return on City money.

In my memorandum of May 24, 1912, under Point I at page 4, I have already furnished evidence which establishes the fact that the gross income from the amalgamated system of subways to be operated by the Interborough Company will not be sufficient to pay the preferentials to the company and leave a balance sufficient to wipe out the cumulative deficit in the City's interest and sinking fund. Since the filing of the above memorandum, the investment of the company in the enterprise has been increased. It, therefore, becomes less likely that the City will ever realize its interest and sinking fund. The Board is referred

to the facts and calculations contained in the memorandum of May 24 in this connection.

It is a significant fact that most of the technical advisers of the Public Service Commission who have examined the offer of the Interborough Company have concluded that the City will never be able to earn out under the Interborough contract, and have so advised such members of the Public Service Commission as have seen fit to seek their advice. It is curious that with these technical advisers in its employ receiving high salaries for the purpose of guiding it in just such matters as this, the Public Service Commission has disregarded their conclusions and accepted those of the interested companies and of their equally interested engineers. Mr. Connette, Traffic Engineer of the Interborough Company, demonstrated that the proposed contract will be a ruinous bargain for the City, and that without congestion equal to or greater than that now experienced in the existing subways, the City will never be able to get back interest and sinking fund upon its investment. The most recent tables prepared in the Bureau of Statistics of the Public Service Commission, upon the basis of the Interborough's own estimates of traffic and of operating expenses, show a cumulative deficit in the year 1927 of approximately $43,000,000, and at the end of the contract period of approximately $85,000,000. These losses will have to be carried by the City through taxation.

Both preferentials should be reduced to fair and adequate sums on account of old and new capital respectively, as indicated under points 1 and 8 herein. The City might then hope to get back interest and sinking fund on its investment.

V.

The Interborough contract offers no incentive or reward for efficient or economical operation, but does offer every incentive for chicancery and political manipulation.

After several years, the company will earn operating

expenses, the preferential of $6,335,000 and 6 per cent. upon new money. But the company will receive nothing further until the City has been paid 8.76 per cent. upon its money for each and every year, the interest upon the deficit being compounded semi-annually. For all of the reasons already stated, it is absolutely certain that the company will receive no further sum after the payment of the preferential. Such being the case, it is evident that once the company has earned enough to pay its preferentials, the incentive to operate the railroad economically and efficiently will be gone. The company's share will not be increased by economy or efficiency, and it will not be decreased by waste and inefficiency. Wasteful expenditure or unnecessary payrolls will be met out of the money which would otherwise go to liquidate in part the City's deficits. The only way in which profits may be increased for those in control of the company at that time will be through the payment of large salaries to officers and directors, or through the purchase of supplies, etc., from controlled companies at high prices. Political demands may be granted. Unnecessary officers and employees may be put upon the payroll. Every such increase and expense will come out of the City's interest and sinking fund, and, therefore, out of the pockets of the taxpayers. With this condition, what is to prevent manipulation of supply contracts, or the gradual creation of a political machine within the organization of the operating company?

The only cure for this condition, if there be one under the peculiar partnership plan proposed, lies in a reduction of the preferential to fair and adequate figures, leaving to the City the expectation of its interest and sinking fund, and to the company the hope, though remote, of an ultimate divisible surplus profit.

VI.

The plan sought to be effectuated by this contract contains none of the advantages of private management, but

practically all of the disadvantageous features of municipal operation.

First: It makes the City underwriter of all losses and guarantor of the enterprise.

Second: It depletes the City's treasury and impairs its borrowing capacity without securing the objects of municipal construction.

Third: By making the company's profits independent of efficiency and economy it tends to make the company disregardful of public comfort and convenience.

Fourth: It gives to the company all of the profits of the enterprise.

Fifth: It deprives the City of control by making recapture impracticable and impossible.

VII.

By insuring that the City will never receive interest and sinking fund upon its bonds issued for construction, it prevents the exempton of these bonds from the debt limit, and thereby impairs the City's subway building capacity for the future.

If the City is never to receive interest and sinking fund upon its capital investment, of course the bonds will not become self-sustaining, and can, therefore, never be exempted from the provisions of the constitutional debt limitation. Under the constitutional amendment and the enabling act, however, the City's investment must not only produce interest and sinking fund, but some margin of profit in excess of carrying charges, in order to become exempt.

It is manifest, therefore, that with the ruinous preferentials in the way, no exemption of the City's investment can ever take place, except under conditions of congestion so intolerable as to be even more undesirable than the loss of the exemption of these bonds.

VIII.

The excessive sinking fund of one per cent. allowed upon the company's new capital will produce a surplus in the sinking fund of from $39,000,000 to $60,000,000, which the company is permitted to appropriate to its own exclusive use.

The company is to receive as a second preferential, ahead of all returns on City money, 6 per cent. of the company's new money invested in construction and equipment.

The company's bonds are to be 5 per cent. bonds. It will, therefore, have to pay out only 5 per cent. in interest. After paying interest to the bondholders, therefore, there will be 1 per cent. left as an annual sinking fund increment. One per cent. upon the company's proposed investment, if paid into a sinking fund annually and invested at 4½ per cent. compounded semi-annually, will produce, at the time of the expiration of these contracts, an amount $60,000,000 greater than the company's investment. This surplus of $60,000,000 over and above the sum required to amortize the company's investment, will be retained by the company under the present provisions of the contract. The company may do what it pleases with all of the funds in this sinking fund.

There can be no justification for paying to the company more than enough to meet interest and sinking fund upon its capital investment. Any sum in excess of that requirement constitutes profit upon new capital invested. This provision for the payment of 6 per cent. upon new capital invested, therefore, is tantamount to allowing the company a profit of $60,000,000 upon new capital.

I have always contended that the interest rate allowable upon new capital as a preferred payment to the company should be calculated so that it would equal precisely the interest on the bonds, an amount just sufficient to sink the company's investment. This, upon an actual basis, would be 5.588722 per cent. The interest rate upon new money should be reduced accordingly.

IX.

It permits the inordinate and unnecessary profits of the bankers who underwrite the bonds to be made the apparent excuse for the excessive sinking fund surplus awarded the company as stated above.

In a communication already addressed to the Public Service Commission, the Company proposes to sell its bonds to the amount of $170,000,000 to an underwriting syndicate of bankers at 93½. In the same communication, it proposes to make these bonds retirable at 110. The funds realized upon this bond sale are to be used in part to retire the company's existing bond issue, amounting to $35,000,000. The company's existing bonds are retirable at 105, and the latest sale price upon the Stock Exchange recorded on March 8th, 1913, was 103⅝. Here is a new bond which, for its interest and sinking fund, comes ahead of $70,000,000 contributed by the city to the upbuilding of the enterprise. $70,000,000 of City money is to work night and day in the Interborough's subway to earn interest and sinking fund first upon the Interborough Company's bonds, and yet the company proposes to sell these bonds to its bankers at 93½. The bond is better than the existing bonds of the Interborough Company which are selling at 103⅝, are retirable at only 105. It is better because the interest and sinking fund, by virtue of the preferential payments are in all respects, other than as matter of technical law, guaranteed upon the faith and credit of the City of New York. If this bond was offered at public sale, beyond any question it would sell at par or higher. No one doubts for a moment that it is the intention and expectation of the banking syndicate to sell these bonds to the public at par or higher. The evidence of that fact is found in the retirement rate of 110 proposed in this agreement, and yet the public is excluded from any opportunity to buy these bonds at first hand at a fair price.

The importance of this enormous profit which is being needlessly donated to the underwriting bankers is found

in the fact that the sale price of the bonds at 93½ is urged as a reason for paying the company 6 per cent. upon new capital, and thereby creating the vast surplus in sinking fund noted in the preceding point. It is argued that because the bonds sell at 93½, the company's money is going to cost not 5 per cent., but 5.347 per cent., and that the remaining fraction of a per cent. is only about enough to create a sinking fund equal to the company's investment by the end of the contract period.

The effect of the transaction here is merely to transfer from the sinking fund of the operating company into the pockets of the bankers the surplus in sinking fund which would, if the bonds were sold at par, remain in the pockets of the owners of the Interborough Company. By this means the City is actually compelled to return to the Interborough Company, in the form of a surplus in sinking fund, all that that company now pays to the bankers in the form of discount by selling its bond below par.

The sale price of these bonds becomes, therefore, a matter of great moment to the City, since it is asked, through the excessive rate allowed on new money to make up to the company what is now proposed to turn over to the banking syndicate. If the bonds were sold at par, as they should be, there would be no excuse, either apparent or real, for the allowance of 6 per cent. on new capital. I have always argued that it makes little difference whether $60,000,000 be handed to the Interborough Company at the end of the lease in the form of a surplus in sinking fund, or its present worth be now handed to J. P. Morgan & Co., in the form of brokerage and discounts, and the company later reimbursed therefor through the surplus in sinking fund, if the unfortunate City, as is here proposed, is compelled to bear the cost.

It is interesting to observe that the total discount which the company proposes to pay its banking syndicate on the entire issue of $170,000,000 is $11,050,000, assuming that the bonds are worth only 100, which nobody believes. This

discount represents a capital outlay which the company proposes to make now as the price of getting $158,950,000 in cash to refinance itself, build in part our subways, and in whole its elevated extensions. The cost of carrying this capital outlay of $11,050,000 at 5 per cent. interest with a sinking fund instalment to amortize it in the life of the contract is $30,260,391. In other words, the surplus created in the sinking fund on the $90,000,000 invested in the City's subway by the City's allowance of 6 per cent. on that sum, namely, $60,000,000, more than carries and balances in the life of the contract the cost to the company of the bankers' discounts on its entire bond issue of $170,000,000. Why should the City bear this cost?

Another demonstration is even more convincing. The net discount which the company is to pay its bankers on its entire bond issue of $170,000,000 may be regarded as a capital expenditure which the company is compelled to make, or a capital debt which it is compelled to contract, as the price of getting the money which it needs for construction and refinancing. The City is to pay the company 6 per cent. on all money invested in construction and equipment of new subways. It is also to pay the company 6 per cent. on all moneys invested by the company in elevated construction and improvement. The surplus in this 6 per cent. preferential over and above what is required to pay interest and to amortize the investment, is sufficient to pay interest and sinking fund on the entire net discount regarded as a capital expenditure, which the company proposes to pay its bankers on its total bond issue of $170,000,000.

Calculated upon the basis of a yearly cost to the company of carrying this discount which it pays its bankers on its entire bond issue of $170,000,000, we find also that the surplus or excessive portion of the interest allowance of 6 per cent. upon the cash investment of the Interborough Company in the subways and elevated lines just about equals interest and sinking fund upon the capital outlay

represented by this discount upon the total issue of $170,000,000. This appears from the following: The total cash investment of the Interborough Company in subways and elevated lines upon which it is to be allowed 6 per cent. is $104,624,000. The company, however, is to be permitted to capitalize and amortize out of earnings three points of any discount paid. This makes the sum upon which it will receive 6 per cent. equal $107,859,000. The remaining 3½ per cent. discount on $104,624,000 involved in the sale of the bonds at 93½, which the company apparently will have to assume itself, equals a gross sum of $4,039,000. The remainder of the capital raised by the issue of $170,000,000 is for refinancing of the Interborough's present bonds and notes. The bonds, if retired at 105, will require $34,668,900. The notes will require $15,000,000 to retire them. This makes the cash capital necessary for refinancing $49,668,900. Selling the bonds at 93½, the company apparently bears a discount of 6½ points upon bonds sold to produce the above sum. This discount equals $3,452,918. The company will retain a reserve sum of $8,327,000 upon which it apparently is to bear a discount of 6½ points, or $578,000. The net discount, therefore, on the entire transaction, which the company appears to bear, equals $8,069,918. Considering this as a capital debt which the company is compelled to undertake as the price of getting the money necessary for the entire transaction involved in the proposed contracts, including its own refinancing, and assuming that that company must pay interest on that debt, and set aside annually sufficient to amortize the amount thereof during the life of the contract, this capital debt of $8,069,918 will cost the company annually in interest and sinknig fund $451,005. The company is to get 6 per cent. on $107,859,000 on account of both subway and elevated. To sink and amortize $107,859,000 in forty-nine years, and to pay interest thereon at 5 per cent., requires 5.588722 per cent. annually. This leaves a surplus of .411278 annually. This fractional percentage on $107,859,000 will produce annually

$443,600. It will be observed that this practically equals the cost of carrying and sinking the company's debt or outlay made on account of banker's discount. In other words, the surplus percentage received annually by the company over and above the amount necessary to pay interest upon and amortize the company's total capacity outlay, plus the three points of discount which it is allowed to capitalize, upon all of which it will receive 6 per cent. as a preferential, is almost exactly enough to pay interest upon the entire net bankers' discount upon the total bond issue of $170,000,000, and in addition, repay to the company through a sinking fund that total capital sum paid as discount within the life of the contract. This means that the City of New York, through the preferential payment, is bearing for the company the entire cost of the bankers' discounts which it now pays not only to raise the money for construction and equipment of subway and elevated lines, but also for the refinancing of its own bonds and notes.

The interest on new capital to be allowed the company as a perferential should be reduced to 5.588722, a rate sufficient to pay interest on the company's bonds and amortize its investment.

X.

A failure to provide for competitive public bidding on the sale of the company's bonds causes these bonds to sell below their real value and excludes the enjoyment of the premiums that the City's own guaranty would bring upon such a public competitive sale.

The company's bonds should be sold at public auction or by public letting, to the highest bidders. If this were done, in view of the unusual value of the bonds by reason of the preferential, they would sell at par or higher, and in that event, the City should participate in any premium realized. It is only necessary to recollect some of the many instances when public service corporation bonds of a value

far less than those here involved, have been sold at public letting well above par, to prove that the private sale here proposed is merely a means of diverting into the pockets of the banking syndicate an extraordinary and unconscionable profit. That the City is not wholly at the mercy of the banking syndicate in this matter, the experience of the United States Government, when dealing with these same bankers at the time of the $100,000,000 bond sale under President Cleveland, fully demonstrates.

It is pertinent, too, to recollect that the Interborough's present 5 per cent. bonds, less valuable than the new bonds, were put on the market at 104½, and are selling now at 104⅜.

It is submitted that the proposed contract, as an attempt to carry out the plan of the Conference Committee, is vitally defective in the following respects:

I. Recaption provisions of the contract have been devitalized.

(a) The reception provisions as to the new lines are of little value. The 7th avenue-Lexington avenue line is not an operable unit, the two parts being disconnected. To connect the two lines would mean the reconstruction of parts of both branches, the loss of millions of dollars through the impossibility of utilizing certain stations, and the construction of a crosstown line to connect the two branches. Furthermore, the two lines would terminate in Brooklyn at the Borough Hall, as tracks in Fulton street, which are to be used to connect with these lines, are part of the present subway and could not be taken over under any provision of the old or new contracts.

(b) It has been frequently suggested that, in view of the City's financial condition, the only means of effecting recaption will be to provide that the City's total contribution to the construction cost of the subways may be applied to such sections or lines as the City may desire to take over at the time of the exercise of its election. This would

mean that the City might retake any or all new divisions up to a total construction cost equal to the City's total contribution without the payment to the Interborough of any capital sum. As the contract stands, whenever the City may elect to recapture a leg or division, it must pay to the Interborough Company the amount of the company's proportionate contribution to the construction cost of such leg or section. As it is generally recognized that the City will be taxed to its utmost, and perhaps beyond its financial ability for the primary construction of these lines, and that all funds available for rapid transit purposes in the years to come for a considerable time will have to be devoted to the cost of construction of extensions, it is obvious that recaption, under the existing provisions, though it be theoretically possible, will be practically out of the question. No reason has been advanced for the failure to provide for the application of the City's contribution to recaptured divisions. The suggestion has been wholly ignored with the result that the City, as far as recapture is concerned, will be entirely in the hands of the company.

(c) There are a number of other points throughout the paragraphs relating to recaption which will render recaption of the whole line, or any part of it, extremely difficult. For example, the Lexington avenue line is to be connected with the present subway for a diagonal branch and station, extending through the tunnel of the New York Central Railroad and private property at the corner of 42nd street and Park avenue. The construction of the line will be enormously expensive and will be of no use whatever if the Lexington avenue line should be recaptured and made a part of an independent system. The amount spent in constructing this station would be thrown away, for it would need to be abandoned and a new station constructed in Lexington avenue or upon some other site, the proposed station being connected with the present subway upon the same grade and in such a way that the Lexington avenue line could

not be connected with any other line without reconstruction. The same objection is largely true of the express station at Times Square, and it is evident that if recaption were proposed the waste of several millions of dollars and the necessity of issuing bonds to build new stations and new connections would be of such importance that it would deter the City from exercising the power of recaption even if it had the money or credit. A station could be built in Lexington avenue which would be as convenient to the public as the proposed diagonal station, and if recaption were exercised the station in Lexington avenue north of 42d street would be as useful to the new line as it would be to the present line, and it would cost from $1,500,000 to $2,000,000 less.

(d) The grouping of the lines for recaption purposes combines the Astoria, Woodside-Flushing and Steinway tunnel lines into one group. The Steinway tunnel line is distinctly an Interborough line, but the Astoria and the Woodside-Flushing lines are to be operated jointly by the New York Municipal Railway Corporation (B. R. T.) and the Interborough Company, the latter running two sets of cars over these lines, one to connect with the Steinway tunnel, the other with the 2nd avenue elevated line in Manhattan. In order that the City may treat this joint operation advantageously to the public interest it is necessary that the Astoria and the Woodside-Flushing lines be placed in a separate group so that they may be recaptured separately from the Steinway tunnel line.

(e) Recaption will also be prevented by the lack of funds with which to pay for the lines. It is pertinent to recollect that the constitution and enabling act make it necessary that all new investments for rapid transit purposes to become exempt must pay more than interest and sinking fund. If, therefore, the City earns only a portion of the interest and sinking fund, it will not suffice to exempt the part of the bonds issued for such construction. The most favorable estimates which have been made by the most

ardent advocates of the present contract show that there will be no income sufficient to exempt the entire investment for a long period of years to come.

II. Steinway tunnel. Notwithstanding all previous reports, opinions and resolutions adopted by the Public Service Commission and the Board of Estimate and Apportionment, the contract provides that the City shall pay for the Steinway tunnel $90,000 more than has been heretofore agreed upon.

The company is allowed a 3 per cent. discount on the amount to be paid, which discount is $90,000. As this amount was paid by the company years ago and forms no part of the present bond issue, but is merely a credit to the company in the transaction, there is no excuse for allowing a bankers' discount on this sum.

III. No limit is provided as to the amount of discount which hereafter may be included in the cost of construction in the case of additions to the property after initiation of operation, the date of which is fixed as January 1, 1917.

If the company were to sell its bonds at a 10 per cent. discount and then to call them at a 10 per cent. premium, the City would be virtually paying it a 20 per cent. profit on money cost of construction in case the additions were taken over.

IV. The contract permits the Interborough Company to charge 6 per cent. interest during the construction period upon all funds provided, according to annual estimates, whether actually in use or not, and requires only a credit of 2½ per cent. upon funds in bank.

As a matter of fact, the bonds of the company are 5 per cent. bonds, and it is probable that with such large sums of money as the company will have, it could secure 3 or 3½ per cent. from bankers for amounts on deposit. This provision would enable the company to make from 1 to 1½ per cent. clear profit on funds during the period of construction.

V. The contract at present provides for a bond of $1,000,000 to secure the faithful performance of the company's covenants. This may be the bond of a surety company.

Such a bond requires litigation in order that the City may collect. In place of a bond of a surety company the contract should call for the deposit of cash or securities in the sum of $1,000,000, of which the City might take possession in case of a default by the company. The construction contract requires such a deposit of cash or securities to secure its faithful performance, and there appears to be no good reason why the operating contract should not call for a similar security.

VI. The contract relieves the Interborough Company from providing for past depreciation upon any of the subway property except rolling stock, except through a credit in case of recapture, or on termination of contracts I and II.

According to the Board's Consulting Engineers, the total accrued depreciation to January 1, 1917—the beginning of the contract—is practically $6,000,000. The contract merely requires that at certain dates fixed therein, running from 1939 to 1957, the company shall pay into depreciation fund $2,908,150. The Engineers advise that this is the amount of depreciation accrued to July 1, 1916, on rolling stock only. The contract, therefore, relieves the Interborough Company from making any provision whatever for depreciation upon power equipment, buildings and structures, and all other equipment subject to accruing depreciation, except rolling stock. In a separate section the contract provides that in case of recapture, or on termination of contracts I and II, the City shall have a credit against the amount payable by it to the company for equipment, of $3,000,000, as an allowance for deferred depreciation on equipment other than rolling stock. All of these figures have been based upon assumptions most favorable

to the company. The total life of the buildings and structures has been assumed to be seventy-five years, all power equipment thirty years, and all rolling stock an average of forty-five years. The composite cars of an inflammable structure have been given a life of thirty years, when, as a matter of fact, these cars will probably or should be removed from service within a few years and modern steel cars substituted therefor. It is also inconceivable that the steel cars will have a life of fifty years in view of past experience, where improvements in car construction and railway operation have caused rolling stock to be scrapped within a much shorter period.

VII. The contract is not to take effect until the "Seventh Avenue Branch" shall have been completed. As this includes a tunnel under the river, and as the tunnel cannot be built within the same period as the remainder of the line, this clause will virtually extend the contract for a considerable time.

VIII. The contract provides that even in the event of the lessee's default resulting in the termination of the contract and further operation either by the City or by a new lessee, that nevertheless the preferential payment of $6,335,000 and the interest on new capital furnished by the company shall first be applied to discharging the interest on construction and equipment bonds of the Interborugh Rapid Transit Company. This means that the bondholders are protected in the receipt of their interest as a prior lien upon the income before the City can recover damages for breach of the contract.

If the company chooses to refer any alleged default to arbitration, it may do so and pay the arbitrated damages instead of making good the default. In other words, the company might refuse to carry out any particular provision of this contract, and the City's only remedy would be money damages.

Brooklyn Rapid Transit Company Contract.

The following objections, which have already been stated as lying against the proposed contract with the Interborough Company, apply with equal force to the proposed contract with the Brooklyn Rapid Transit Company.

I.

The excessive sinking fund of 1 per cent. allowed upon the company's new capital will produce a surplus in the sinking fund which the company is permitted to appropriate to its own exclusive use.

II.

It permits the inordinate and unnecessary profits of the bankers who underwrite the bonds to be made the apparent excuse for the unnecessary sinking fund surplus awarded the company as stated above.

The company proposes, in a communication already addressed to the Public Service Commission, to sell its bonds to the underwriting syndicate of bankers at 97. The contract provides that the company shall be permitted to capitalize all of these bankers' discounts at 3 per cent. Here, as in the case of the Interborough Company, the bonds are practically guaranteed upon the faith and credit of the City. Here, as in the case of the Interborough Company, some $80,000,000 of City money will be earning interest and sinking fund for private capital in advance of any return for the City. With all of these advantages the bankers propose to buy, and the company proposes to sell, these bonds at less than par; and yet in the same application the company requests to be permitted to retire the bonds at 107½, demonstrating, as does the Interborough Company, a confidence that the bonds will sell to the public far above par.

III.

A failure to provide for competitive public bidding on the sale of the company's bonds causes these bonds to sell below their real value and excludes the public from the enjoyment of the premium that the City's own guaranty would bring upon such a public competitive sale.

In the following additional respects the proposed contract with the Brooklyn Rapid Transit Company is, in the opinion of the undersigned, defective in that it fails to give effect to the plan reported by the Transit Conferees and to safeguard the City thereunder.

IV.

As in the Interborough contract, no limit is provided as to the amount of discount which hereafter might be included in the cost of construction in the case of additions to the property after initial operation.

V.

Here, as in the case of the Interborough contract, a surety bond of $1,000,000 to secure faithful performance is permitted. The surety should be restricted to cash or approved securities.

VI.

As in the case of the Interborough Company contract, it is provided that in the event of default the preferential payment and interest on new capital shall first be applied to discharging the interest on construction and equipment bonds of the company.

This means that bondholders are protected in receipt of their interest and sinking fund increment by lien prior to that of the City for damages for breach of contract.

VII.

As in the case of the Interborough Company, if the company chooses to refer any alleged default to arbitra-

tion, it may do so and pay the arbitrated damages in place of making good the default.

VIII.

Recapture provisions of the contract do not protect public interests.

The contract does not provide for adequate terminals for the New Utrecht Avenue line, the Culver line and the Eastern District line. The terminals are to be owned by the company, and there is no provision for the purchase or recapture of such terminals or any part thereof in case the City should take over the lines. Consequently, the City would either be without terminals or would be obliged to spend large sums to construct them.

IX.

The preferential allowed to the company has been increased $80,000, or a total of $4,000,000 during the period of the contract, not including interest thereon.

In the reports adopted by the Commission and the Board of Estimate, the company was to pay rentals on leased property out of its preferential. The contract now permits such rentals, now amounting to $80,000 annually, to be added to the preferential.

X.

The cost of certain property and the reconstruction of existing lines is to be amortized prior to payment of the City's interest and sinking fund, and the company is to retain ownership of the property.

This violates the fundamental provision of the conference agreement, namely, that the company shall receive no profit upon its new investment until the City's fixed charges have been paid. Its constitutionality may also be questioned. Upon the argument of the case taken to the Court of Appeal, it was repeatedly stated by the counsel for the Commission that neither company was to receive any

amount in excess of the necessary fixed charges on new capital, and that the property to be amortized in advance of the City's interest and sinking fund would be the property of the City, or would revert to the City free and clear of all encumbrance. The amount involved in this item probably ranges from $15,000,000 to $20,000,000.

XI.

The contract permits the formation of subsidiary companies not under public regulation.

The company insists that the Transit Development Company is not subject to the provisions of the Public Service Commission Law. The contract should not permit the continued existence or formation of new companies controlled by the company and beyond any control of the Commission.

XII.

The contract relieves the company from making adequate provision for depreciation.

According to the Board's Consulting Engineers, the total depreciation, upon rolling stock alone, to January 1, 1917, is over $3,600,000. The contract merely provides that at certain dates fixed therein, running from 1924 to 1946, the company shall provide approximately $2,500,000. The contract thus relieves the company from any provision for depreciation upon the elevated lines, and foists upon the City a charge of approximately $70,000 per year for depreciation on rolling stock which the company should have provided for. These figures are based on the assumption that the present rolling stock, which consists of wooden cars, may be operated underground upon the new subway lines. If it is decided that such operation is dangerous, and that the present B. R. T. equipment should not be so operated, new equipment must be purchased. Thus the City will be burdened with additional depreciation and interest

and sinking fund payments upon new capital for duplicate equipment.

XIII.

The contract permits the company to capitalize about $1,500,000 in "interest", representing unused funds on deposit with the bankers.

This interest runs from October 1, 1912, several months prior to the signing of the contract, and will increase the cost of recapture and annual charges for interest and amortization.

XIV.

Contract should provide that supplementary agreement for joint operation of Queens lines by Brooklyn Rapid Transit Company and Interborough Rapid Transit Company shall be executed by the City and companies simultaneously with the main operating contracts.

Any other course will lead to discussion, differences, possible litigation and certain delay.

Again, and for the last time, let me direct the attention of the Board to the fact that no advantage, collateral or otherwise, involved in the adoption of the dual plan justifies the unconscionable financial terms upon which it is proposed to award these contracts to the respective companies. Not only public opinion, but common business principles would insure an acceptance by either company of contracts for the operation of the dual system upon terms modified as I have indicated herein. If the companies, through shortsighted policy, or in the hope of advantaging themselves through the City's pressing need for transit, should refuse to accept contracts if modified as here indicated, then the City is still by no means helpless. Construction of the new subways can go on as it is now proceeding. A new system, wholly independent of the Interborough, and equal to the dual plan save only in connection with the upper west side of Manhattan, can be carried to completion as rapidly almost as with the contri-

bution of private capital proposed in these contracts. An upper west side connection can be added as funds become available. When completed, the new system, lucrative as everyone must admit that it will be, will not lack an operator, upon terms fair to both the operator and the City. But if the City should find itself lacking an operator, it has ample powers, under the Rapid Transit Act, to undertake operation directly, and to employ for that purpose at least as competent a manager as either the Interborough Company or the Brooklyn Rapid Transit Company now finds in its employ.

Because I do not believe that the City should be deprived of a fair return from this tremendous public utility which will be created chiefly on City credit; because I believe that strict municipal control should be maintained over all the future subways of the City; and because the proposed contracts secure neither, but surrender both, I vote against the adoption of these contracts as now presented. Respectfully submitted,

JOHN PURROY MITCHEL,
President of the Board of Aldermen.

Interborough Rapid Transit Company; New York Municipal Railway Corporation.

Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District), Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

The Secretary presented the following:

Public Service Commission for the First District, New York, March 4, 1913.

To the Board of Estimate and Apportionment of The City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is

transmitted herewith a copy of a proposed supplemental agreement between The City of New York, acting by the Commission, the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, covering trackage rights to be exercised by the latter company.

I also transmit herewith a certified copy of the resolution approving and adopting such agreement. Yours very truly,

TRAVIS H. WHITNEY,
Secretary.

Whereas, A proposed contract between The City of New York and Interborough Rapid Transit Company, and a proposed contract between The City of New York and New York Municipal Railway Corporation, for additional rapid transit railroads have been approved and adopted by the Commission; and

Whereas, Counsel to the Commission has presented a form of proposed agreement, supplementary to said contracts, between The City of New York, Interborough Rapid Transit Company and New York Municipal Railway Corporation for trackage rights over the Steinway Tunnel Line described in said proposed contract with Interborough Rapid Transit Company;

Resolved, That the form of the proposed supplementary agreement now submitted by Counsel be and the same hereby is approved and adopted, and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said agreement has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said agreement for the Commission in four identical originals, and that the Secretary be and hereby is authorized and directed to attest the said agreement and to affix thereto the seal of the Commission.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

(Seal) TRAVIS H. WHITNEY,
Secretary.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District, forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed supplementary agreement, to be entered into by and between The City of New York acting by the Public Service Commission for the First District, the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, for a joint use of tracks over certain sections of the Steinway Tunnel Line; and

Whereas, Said communication and proposed supplementary agreement were received by the Board of Estimate and Apportionment, at a meeting of said Board, duly held on the 6th day of March, 1913; and

Whereas, The supplementary agreement proposed to be entered into by and between The City of New York (acting by the Public Service Commission for the First District) the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, and submitted to this Board for approval and consent, is as follows:

The City of New York, by the Public Service Commission for the First District, Interborough Rapid Transit

Company and New York Municipal Railway Corporation.

(Here follows Supplementary Agreement)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of The City of New York by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves of and consents to the proposed supplementary agreement to be entered into by and between The City of New York (acting by the Public Service Commission for the First District), the Interborough Rapid Transit Company and the New York Municipal Railway Corporation.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Interborough Rapid Transit Company.

Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and the Interborough Rapid Transit Company as lessee under the preceding proposed subway contract and as grantee under the proposed certificate for additional elevated extensions, or joint use of tracks for through service.

The Secretary presented the following:

March 4, 1913.

To the Board of Estimate and Apportionment of The City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is transmitted herewith a copy of a proposed supplemental

agreement between The City of New York, acting by the Commission, the Interborough Rapid Transit Company as lessee under the contract with the City, and the Interborough Rapid Transit Company as lessee of the Manhattan Railway Company, covering trackage rights to be exercised by the Interborough Company as lessee of the Manhattan Railway Company.

I also transmit herewith a certified copy of the resolution approving and adopting such agreement. Yours very truly,

TRAVIS H. WHITNEY, Secretary.

Whereas, A proposed contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads, and a proposed certificate to Interborough Rapid Transit Company for certain railroads, have been approved and adopted by the Commission; and

Whereas, Counsel to the Commission has presented a form of proposed agreement, supplementary to said contract, between The City of New York and Interborough Rapid Transit Company, as lessee under said contract and as grantee under said certificate, for trackage rights over the Lexington avenue branch of the Seventh Avenue-Lexington Avenue Line, the White Plains Road Line and the Steinway Tunnel Line described in said proposed contract;

Resolved, That the form of the proposed supplementary agreement now submitted by counsel be and the same hereby is approved and adopted, and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That if and when said agreement has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said agreement for the Commission in four identical originals, and that the Secretary be

and hereby is authorized and directed to attest the said agreement and to affix thereto the seal of the Commission.
State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the first District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

[SEAL] TRAVIS H. WHITNEY, Secretary.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed supplementary agreement to be entered into with the Interborough Rapid Transit Company as lessee under a certain subway contract this day approved by the Board of Estimate and Apportionment, and as grantee under a proposed certificate likewise approved, to be issued to said company for railroad extensions, for joint use of tracks for through service; and,

Whereas, Said communication and proposed supplementary agreement were received by the Board of Estimate and Apportionment at a meeting of said Board duly held on the sixth day of March, 1913; and,

Whereas, The supplementary agreement proposed to be entered into with the Interborough Rapid Transit Company and submitted to this Board for approval and consent, is as follows:

The City of New York, by the Public Service Commission for the First District, with Interborough Rapid Transit Company.

(Here follows Supplementary Agreement.)

Supplementary Agreement.

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of The City of New York by a majority vote according to the number of votes by law pertaining to each member of the Board, hereby approves of and consents to the proposed supplementary agreement to be entered into with the Interborough Rapid Transit Company, as lessee under a certain subway contract, and as grantee under a proposed certificate for additional elevated railroad extensions, for joint use of tracks for through service.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

His Honor the Mayor then approved the certificates to be issued to the New York Municipal Corporation, the Interborough Rapid Transit Company and the Manhattan Railway Company for additional tracks and elevated railroad extensions.

The President of the Borough of Queens offered the following:

Resolved, That it is the sense of this Board that the Public Service Commission take such steps as are necessary under the agreement with the Interborough Rapid Transit Company for the operation of the Steinway Tunnel, to provide temporary operation thereof as speedily as possible.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, and the Presidents of the Bor-

oughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

By the Comptroller—I cannot conceive of a more seemly appropriate thing for this Board to do at this particular moment than to express its official voice in appreciation of the very distinguished services to The City of New York by the Hon. William R. Willcox, and I have the very great pleasure of moving that a minute to that effect be placed on the minutes of this meeting.

Which motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

By the Comptroller—Mr. Mayor, Mr. Willcox is no longer a public official, and I felt that to offer a separate resolution in his honor would be proper. While we thoroughly appreciate all his services and know what they represent to the City, that will not in the slightest degree affect our appreciation of the co-operation of the other members who labored with him so long a time, and more especially are we appreciative of the services of the new Chairman of the Public Service Commission, Hon. Edward E. McCall, and I would like to move that the thanks of this Board be extended to Chairman McCall and his associates for the manner in which they performed their services with reference to the improvement of the transit situation in this city.

By the President of the Board of Aldermen—This resolution calls upon us to vote in approval of the policy of the majority of the Public Service Commission, for that Commission did act by a majority. Of course, I am not in accord with that. For that reason, and for that reason only, I am unable to vote in the affirmative on this resolution, as I would like to do on personal grounds, but cannot do.

By the Comptroller—In making this motion, I was fully aware that the action of the Commission was not unanimous, and that Messrs. Maltbie and Cram did not agree with their associates, still, I believe at this time the cloak of charity and good will should cover all. Consequently, I made it to the whole Public Service Commission.

The motion of the Comptroller was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

By the President of the Borough of Manhattan—I wish to move that, in the name of the City, the thanks of this Board be extended to a distinguished private citizen who has aided us greatly in the course of our negotiations. I mean former Mayor Low. Mr. Low has been with us from the beginning. He gave to the Committee not only his personal aid and counsel, but the results of his experience as a member of the first Rapid Transit Board, as former Mayor of the City of Brooklyn, and of the greater City, and as Chairman of the Joint Transit Committee of the Chamber of Commerce and the Merchants' Association. He has been an important factor in bringing about the solution of the transit problem that the Board to-day has confirmed, and his services to the City should be gratefully remembered. I move, therefore, the adoption of this motion.

Which motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

Public Service Commission—Relative to Issues of Corporate Stock for Subways.

The President of the Borough of The Bronx offered the following resolution:

Resolved, That any authorization or issue of corporate stock of The City of New York authorized and directed to be issued by this Board for the purposes specified in the requisitions made by the Public Service Commission for the First District in respect to contract No. 3, between The City of New York, acting by the Public Service Commission for the First District and the Interborough Rapid Transit Company, and in respect to contract No. 4, between The City of New York, acting by the Public Service Commission for the First District, and the New York Municipal Railway Corporation, be authorized and charged against the debt limit and the borrowing capacity of The City of New York in the following manner, apportioned between and for the purposes of said two contracts, according to the amount necessary for the purposes of each, viz.:

Against the power of The City of New York to become indebted by virtue of the exemption from the debt limit of corporate stock issued for rapid transit purposes, pursuant to section 10 of article 8 of the Constitution, and chapter 276 of the Laws of 1910, and the determinations of the Appellate Division of the Supreme Court, First Department, at any time made, the entire amount available from that source.

Against the power of The City of New York to become indebted by virtue of the exemption from the debt limit of corporate stock issued for dock investment, pursuant to section 10 of article 8 of the Constitution, and chapter 276 of the Laws of 1910, and the determination of the Appellate Division of the Supreme Court, First Department, as

embodied in the order of that Court, dated January 31, 1913, in the amount of fifty-four million, nine hundred and forty-three thousand, fifty-three dollars and fifty-five cents ($54,943,053.55).

Against the general borrowing capacity and borrowing power of The City of New York, whatever additional amount of such corporate stock it may be necessary to authorize and issue for the purposes of such contracts.

By the Comptroller—

Mr. Mayor: I am not prepared to vote for this segregation of $15,000,000 for dock purposes. I do not believe it is a wise thing to do at this time. My reason for not thinking so is I do not believe we should tie ourselves up to the extent this $15,000,000 represents. I believe to segregate $7,500,000 for dock purposes at this time represents all that the City should obligate itself to for this particular purpose, and represents all that the City should contract to spend during this year.

We must consider that there are other purposes for which we will require money during the year which come as near to our homes as even rapid transit and docks.

Our legal debt limit at the present time is $162,743,000. There are already appropriations or authorization against that debt limit of $40,164,000, which, deducted from the amount of the debt limit, leaves a balance of $122,579,000.

There are authorizations for rapid transit purposes upon the pending contracts; that is, contracts 1 and 2, amounting to $4,104,000; deducting which leaves an available net balance of $118,475,000.

The amount required to certify the contracts now before us will represent $91,000,000, leaving a balance at present available for all purposes of $27,475,000.

After looking over all of these existing authorizations, we are of the opinion that, as may have been in existence for a long time and no work has been done by the departments on them, it may be possible to rescind authorizations amounting to $10,000,000 already voted for general pur-

poses, and $4,200,000 of the existing rapid transit authorization; a total of $14,200,000. You add that $14,200,000 to the balance available for all purposes, namely, $27,475,000, and it gives you a total of $41,675,000. You can add to that possibly $5,000,000 which will become available during the balance of the present year, and you have at the outside $46,675,000 available for all character of purposes during 1913 for which the City of New York must obligate itself.

My proposition is we should appropriate $7,500,000 for purposes at this time. Looking over the general field of the City's requirements, I believe they represent necessary authorizations of at least $28,000,000. A part of this is represented by the amount which must charged against the debt limit as soon as title is vested in the City to the site for the new County Court House in the Borough of Manhattan. In addition to that we must appropriate at least $7,000,000 for school purposes, and for all other general purposes I have put down $4,000,000. For repaving I am assured by the Borough authorities we should appropriate at least $3,000,000 more for this year, or a total of two millions less than the authorization last year for that purpose. In addition there then are other requirements which must be taken care of.

When you add this $28,000,000 to the $7,500,000 I believe we should appropriate for dock purposes, you have a total of $35,500,000. You deduct that from the amount apparently available this year, and you have a balance of $11,175,000. And that $11,175,000 represents all that the City will have at its disposal for every character of purpose, no matter how urgent it may be, during the balance of the year.

If you appropriate $15,000,000 for docks, you still have to make every other appropriation I have referred to, and you cut down the City's available borrowing capacity for all purposes of an urgent character, after making such appropriations as are necessary, to $3,675,000.

I believe that is too close to the mark. We have tried during this administration to keep the City's borrowing capacity so that we would never have to go below a $20,000,000 reserve, and we should never have to contemplate going as low as this outlook, which is a conservative one, suggests we should go.

If I thought we ought to spend $15,000,000 for docks, it might to some extent modify my opinion. I do not think we can. I think a very good beginning can be made on the west side for long piers and for the South Brooklyn terminal for at least $7,500,000. A beginning in these matters represents all we can possibly do this year.

Why tie ourselves up to this extent? Why go so near the danger mark of financial limitation? We have not done it before, and there is no pressing necessity of doing it now. By the President of the Board of Aldermen—

Just a word on the dock situation. The reason for reserving $15,000,000 is this: The $69,000,000 exempted by the Appellate Division was for dock purposes; no other; merely dock investments. For three years we have been holding down authorizations of corporate stock for the Dock Department to bare living requirements. Now, in point of fact, the Dock Department is in a condition to contract against a much larger sum than $15,000,000. Immediate requirements for the South Brooklyn terminal; the construction necessary to join the upper and the lower divisions together and for construction in the intervening section, demand upwards of $7,000,000 alone. An appropriation of $15,000,000 then will mean that that comprehensive improvement will have to be indefinitely postponed because money is appropriated for other purposes that ought to go to docks. For the construction of one and one-half long piers in the Forty-fourth street region of Manhattan and for other improvements more than $13,000,000 will be required. Then you have not done a single thing for the west side of Manhattan and for the east side, where

new piers and the reconstruction of existing piers are both urgently required. It seems to me it would be extremely injudicious for this Board to curtail port development and port improvement because a situation has been created here which results in a very narrow margin of borrowing capacity for the City. I do not believe port development should be made to suffer.

I am going to vote for the resolution because my vote for this resolution is necessary to reserve $15,000,000 for the purposes of port development, which I regard as absolutely vital.

By the President of the Borough of The Bronx—

I think this Board is committed to the development of the Port of New York. For three years it has not been possible to dispose of this definitely because we have been busy with subway matters. Maritime and commercial interests have requested us many times to proceed with this work, but we have been unable to do it. Now we have come to a place where we can do it, and I think it more important to devote a considerable sum to the development of the port in profit bearing securities rather than in some things which might be very desirable, but are not so necessary. For that reason I offer and support the resolution.

By the President of the Borough of Manhattan—

I would like to call the attention of the Board to this fact: That last May, when we proceeded to adopt the subway plans, it was definitely understood and stated in the report of the committee that we were then depending on a margin of $100,000,000 to take care of the start of the work. It was stated also that we would rely on increases in the borrowing capacity, accruing in the year 1913 and the following years, to make up the additional $35,000,000 required to realize the subway plans. We have been informed since the date of that report that it is necessary to charge against the debt limit at once the entire amount of the City's commitment, and we are drawing from the dock funds to

make that possible. We are committing ourselves and our successors to the use of that sum of money for dock purposes instead of drawing it out for the next three or four years for subways. It seems to me absolutely unnecessary to commit ourselves to a figure that will impair our borrowing capacity for other municipal purposes. The Commissioner of Docks could not put under contract for this year anything like $15,000,000. We do not agree as to the exigencies of the situation. In beginning the work in South Brooklyn and in some work around the Desbrosses street section, it would be difficult to put more than $10,000,000 under contract this year. Following that we will have other resources to draw upon.

I think, as I have stated, that $7,500,000 is perhaps low. But I think to vote more than $10,000,000 spells poor business and will embarrass the City in ways that are absolutely unnecessary. If I cannot vote for $10,000,000 I will vote against the resolution.

The resolution offered by the President of the Borough of The Bronx was adopted by the following vote:

Affirmative—The Mayor, the President of the Board of Aldermen and the Presidents of the Boroughs of Brooklyn, The Bronx and Queens—10.

Negative—The Comptroller and the Presidents of the Boroughs of Manhattan and Richmond—6.

Public Service Commission—Issue of $60,000000 Corporate Stock for Construction of Rapid Transit Railroad Under Contract No. 4.

The Secretary presented the following:

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York, March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District in pursuance of a resolution duly adopted by the said Commission transmits to you herewith a requisition for the authorization by you of corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000), which with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 4 between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by issue of corporate stock, of executing said contract No. 4.

This requisition covers the estimated expense of executing such contract so far as the City's obligations to be defrayed by the issue of corporate stock are concerned. There are not included in the above amount the expenses of the Commission for administration, superintendence, legal expenses and engineering. The Board of Estimate and Apportionment has already appropriated an amount for such expenses for the current year and such expenses have always been met by the issuance of special revenue bonds under the provisions of section 10 of the Rapid Transit Act. In conformity with such practice the Commission purposes to make requisitions from time to time for appropriations of such sum or sums of money as may be requisite and necessary to meet these expenses. These appropriations under said section 10 are met by the sale of special revenue bonds, and they therefore are not included in a requisition for the issue of corporate stock.

From the amount of corporate stock so requisitioned the Commission from time to time will make sub-requisitions

for the City's share of any contracts or obligations necessary to execute the main contract.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,
By Edward E. McCall, Chairman.

[SEAL]

Attest: Travis H. Whitney, Secretary.

State of New York, Public Commission for the First District, 154 Nassau Street, New York, March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

In pursuance of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, the Public Service Commission for the First District hereby makes requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to be issued and sold by the Comptroller to the amount of sixty million dollars ($60,000,000) which, with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 4, between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 4.

In witness whereof the Public Service Commission for the First District has caused this requisition to be subscribed by its Chairman and its seal to be hereto affixed and attested by its Secretary this 18th day of March, 1913.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,
By Edward E. McCall, Chairman.

[SEAL]

Attest: Travis H. Whitney, Secretary.

Resolved, That the Public Service Commission for the First District make requisition upon the Board of Estimate and apportionment of The City of New York for the authorization of corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000) which, with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 4 between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 4, and that the Chairman and Secretary be authorized to execute and transmit under the seal of the Commission said requisition and a communication both in the form herewith presented.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 18, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 18th day of March, 1913.

TRAVIS H. WHITNEY, Secretary.

[SEAL.]

The following resolution was offered:

Resolved, That pursuant to the provisions of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, and section 45 of the Greater New York Charter and the requisition of the Public Service Commission for the First District duly made under the seal of the

said Commission by the Chairman and Secretary thereof on March 18, 1913, the Comptroller be and hereby is authorized and directed to issue corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000), at such rate of interest as the Commissioners of the Sinking Fund shall prescribe, the proceeds thereof to be applied to the purposes specified in said requisition, as explained by the communication of the said Commission transmitting the same, in respect of the contract known as contract No. 4 between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and and Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Public Service Commission—Issue of $28,200,000 Corporate *Stock for Construction of Rapid Transit Railroad Under Contract No.* 3.

The Secretary presented the following:

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York, March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District in pursuance of a resolution duly adopted by the said Commission transmits to you herewith a requisition for the authorization by you of corporate stock of The City of New York to the amount of twenty-eight million two hundred thousand dollars ($28,200,000) which, with the sum of thirty-five million one hundred thirty-five thousand six hundred thirty-seven and 84/100 dollars ($35,135,637.84) heretofore registered on account of the railroads to be con-

structed under the contract known as contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 3.

This requisition covers the estimated expense of executing such contract so far as the City's obligations to be defrayed by the issue of corporate stock are concerned. There are not included in the above amount the expense of the Commission for administration, superintendence, legal expenses and engineering. The Board of Estimate and Apportionment has already appropriated an amount for such expenses for the current year and such expenses have always been met by the issuance of special revenue bonds under the provisions of section 10 of the Rapid Transit Act. In conformity with such practice the Commission purposes to make requisitions from time to time for appropriations for such sums of money as may be requisite and necessary to meet these expenses. These appropriations under said section 10 are met by the sale of special revenue bonds and they, therefore, are not included in a requisition for the issue of corporate stock.

From the amount of corporate stock so requisitioned the Commission from time to time will make sub-requisitions for the City's share of any contracts or obligations necessary to execute the main contract.

PUBLIC SERVICE COMMISSION FOR THE
FIRST DISTRICT,
By Edward E. McCall, Chairman.

[SEAL]

Attest: Travis H. Whitney, Secretary.

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York, March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

In pursuance of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, the Public Service Commission for the First District hereby makes requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to be issued and sold by the Comptroller to the amount of twenty-eight million two hundred thousand dollars ($28,200,000) which, with the sum of thirty-five million one hundred thirty-five thousand six hundred thirty-seven and 84/100 dollars ($35,135,637.84), heretofore registered on account of the railroads to be constructed under the contract known as contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 3.

In witness whereof the Public Service Commission for the First District has caused this requisition to be subscribed by its Chairman and its seal to be hereto affixed and attested by its Secretary this 18th day of March, 1913.

PUBLIC SERVICE COMMISSION FOR THE
FIRST DISTRICT,
By Edward E. McCall, Chairman.

[SEAL]

Attest: Travis H. Whitney, Secretary.

Resolved, That the Public Service Commission for the First District make requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to the amount of twenty-eight million two hundred thousand dollars ($28,200,000), which, with the sum of thirty-

five million one hundred and thirty-five thousand six hundred and thirty-seven and 84/100 dollars ($35,135,637.84), heretofore registered on account of the railroads to be constructed under the contract known as Contract No. 3, between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said Contract No. 3, and that the Chairman and Secretary be authorized to execute and transmit under the seal of the Commission said requisition and a communication both in the form herewith presented.

State of New York, County of New York, ss.:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above resolution with the original adopted by the said Commission on March 8, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof I have hereunto subscribed my hand and affixed the seal of the said Commission this 18th day of March, 1913.

[SEAL] TRAVIS H. WHITNEY, Secretary.

The following resolution was offered:

Resolved, That pursuant to the provisions of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, and section 45 of the Greater New York Charter and the requisition of the Public Service Commission for the First District, duly made under the seal of the said Commission by the Chairman and Secretary thereof on March 18, 1913, the Comptroller be and hereby is authorized and directed to issue corporate stock of The City of New York to the amount of twenty-eight million, two hundred thousand dollars ($28,200,000), at such rate of inter-

est as the Commissioners of the Sinking Fund shall prescribe, the proceeds thereof to be applied to the purposes specified in said requisition, as explained by the communication of the said Commission transmitting the same, in respect of the contract known as contract No. 3, between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

HH. Thereafter, on March 19, 1913, the said Certificate so authorized for additional tracks of the elevated railroads was executed by Public Service Commission, for the First District, and on the same date accepted by the Manhattan Railway Company; which said Certificate is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "C" and made a part hereof.

II. Thereafter, on March 19, 1913, the said Certificate so authorized for elevated railroad extensions was executed by Public Service Commission, for the First District, and on the same date accepted by Interborough Rapid Transit Company; which said Certificate is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "D" and made a part hereof.

JJ. Thereafter, on March 19, 1913, the supplementary agreement so authorized for trackage rights, Seventh Avenue-Lexington Avenue Line, White Plains Road and Steinway Tunnel, was duly executed by The City of New York, acting by the Public Service Commission for the First District and Interborough Rapid Transit Company (plain-

tiff herein); which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "E" and made a part hereof.

KK. Thereafter, on March 19, 1913, the supplementary agreement so authorized for trackage rights over Steinway Tunnel was duly executed by The City of New York, acting by the Public Service Commission for the First District, Interborough Rapid Transit Company (plaintiff herein) and New York Municipal Railway Corporation; which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "F" and made a part hereof.

LL. Thereafter, on March 19, 1913, said Contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, so authorized as aforesaid was duly executed; which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "G" and made a part hereof.

MM. In pursuance of its obligations under the aforesaid contract #1, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of Fifty-four million five hundred thirty-four thousand five hundred ninety-four and 89/100 dollars ($54,534,594.89), prior to the commencement of this action.

In pursuance of its obligations under the aforesaid contract #2, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of Six million six hundred sixty-seven thousand five hundred seventeen and 14/100

dollars ($6,667,517.14), prior to the commencement of this action.

In pursuance of its obligations under the aforesaid contract #3, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of One hundred thirty-nine million three hundred seventy-seven thousand seven and 33/100 dollars ($139,377,007.33) prior to the commencement of this action.

NN. Under and in pursuance of its obligations under contract #3 Interborough Rapid Transit Company, the plaintiff herein, prior to the commencement of this action, contributed toward the cost of construction of the Railroad, the sum of Fifty-seven million eight hundred fifty-seven thousand seven hundred sixty-one and 96/100 dollars ($57,857,761.96); for the cost of additions to the construction it has contributed One hundred eighty-nine thousand one hundred thirty-eight and 39/100 dollars ($139,138.39).

It provided equipment for initial operation costing Twenty-two million dollars ($22,000,000.00); and it provided equipment for initial operation which cost in excess of the said $22,000,000.00, to the extent of Twenty-seven million nine hundred fifty-three thousand one hundred sixty-six and 62/100 dollars ($27,953,166.62); it provided additions for equipment, after the commencement of initial operation, costing twelve million nine hundred thirty-seven thousand eight hundred six any 32/100 dollars ($12,937,806.32).

OO. From January 1, 1919, to January 31, 1928, Interborough Rapid Transit Company, plaintiff herein, received operating revenues under Contract #3 amounting to

$343,036,399.50. From the foregoing it deducted for rentals, taxes, operating expenses (exclusive of maintenance), maintenance, and depreciation (being the matter specified in subdivisions 1-(a), (b), 2, 3, 4 and 5 of Article XLIX of Contract #3), $223,386,817.70. It has also deducted from the foregoing revenues for its preferential of $6,335,000 per year (subdv. 6 of Article XLIX) $57,542,916.67; for six per cent. per annum on its contribution to cost of construction of railroad, $30,465,732.22; for six per cent. per annum on its cost of equipment of railroad (subdv. 7 of Article XLIX) $11,990,000; for its interest on cost of additional equipment, $15,872,405.32; for one per cent. per annum on its cost of additional equipment to provide for sinking fund (subdv. 8 of Article XLIX), $2,382,526.57; for its interest on cost of additions to construction $37,874.21; for one per cent. per annum on its cost of additions to construction to private sinking fund $7,574.81.

Included in the deductions made by the plaintiff from the revenues as aforesaid are items which, with the interest thereon from the time of deduction to December 31, 1927, aggregate $7,519,741.03; as a consequence of which the plaintiff has unjustly deducted from the revenues for its own purposes, and withheld from this defendant, the sum of at least $3,682,980.12, more than it is entitled to claim or receive under the terms of such Contract #3.

PP. This defendant alleges that plaintiff has breached, violated and failed to fulfill, comply with and live up to the terms, conditions, obligations and requirements of said Contracts Nos. 1, 2 and 3 in many respects including the following: it has on many occasions and for a number of years last past failed and is now failing and neglecting to

provide cars, motors and other equipment adequate for the requirements of the traveling public and sufficient for the traffic requirements of the railroads operated pursuant to said contracts and has failed and neglected and is now failing and neglecting to provide such cars, motors and other equipment necessary to permit the operation of said railroads at their full attainable capacity; it has operated and is now operating trains on said railroads even during the non-rush hours of the day with excessive overloading; it has failed and neglected to keep and maintain is signaling system according to the highest standards of railway operation and with due regard to the safety of the passengers and employees of said plaintiff and of other persons and it has failed and neglected and is now failing and neglecting to keep and maintain its cars properly painted both inside and outside and to keep said cars and the stations of said railroads in a clean and sanitary condition and adequately heated and lighted and in other respects in thoroughly good order and condition.

That the plaintiff has withheld from the defendant, The City of New York, revenues which it is entitled to have and receive under the terms of said Contract #3; that the plaintiff has made improper and illegal charges against the said revenues for the purpose of withholding from this defendant the sums to which it is entitled under said contract, and has applied such revenues to its own uses and purposes in contravention of the uses of said contract; that the plaintiff has in the operation of the railroads of this defendant caused expenditures to be made for material and supplies at an excessive cost, and without competitive bidding; and has thereby swollen the charges against such revenues and deferred and withheld from this defendant participations

in such revenues to which it is lawfully entitled under said Contract #3. The precise amount of the sums so illegally charged and withheld by the plaintiff is unknown to this defendant, but upon information and belief the defendant alleges that it is at least and may exceed Five million dollars ($5,000,000).

The plaintiff delayed the provision of equipment that it was obligated to provide under Contract #3, for approximately three years; such delay was deliberate and intentional and intended to postpone the time when, pursuant to the provisions of said contract, operations under such lease should begin and pooling of the revenues should take place; and by reason of which postponement the plaintiff, Interborough Rapid Transit Company, was enabled to retain for itself all of such revenues.

Under the provisions of said Contract #3, the lease was to begin on January 1, 1917. At that time, Interborough Rapid Transit Company, the plaintiff herein, had scarcely begun the provision of material parts of its equipment. The conduits connecting the power house at 59th Street & 12th Avenue with Lexington Avenue at 57th Street & Lexington Avenue, were laid in the late winter of 1918, under conditions of weather and ice at greatly increased cost. Much of the work done in laying such conduits was the cutting away of the solid ice overlaying the surface of the streets, as the result of intermittent snow, sleet and rainstorms, which were frozen solid.

Interborough Rapid Transit Company, plaintiff herein, not having furnished such equipment so that the operations under such lease could begin on January 1, 1917, it was necessary to postpone the effective date thereof, which was done pursuant to action of the Board of Estimate and Ap-

portionment taken August 2, 1918, by which the said lease became effective on January 1, 1919, and its expiration was extended to December 31, 1967.

It was the duty of the plaintiff, among other things, to furnish track alignment plans, in conformity with which the construction of certain parts of the new subways was to be done. The plaintiff deliberately delayed the furnishing of such plans for the purpose of deferring the time when operations under the lease were to begin. It did this for the purpose of unjustly and unlawfully enriching itself, at the expense of the City of New York.

In 1916 the plaintiff's revenue from the old lines was $19,357,252, of which the sum of $6,852,646 was available for dividends. This latter sum would have been reduced by $2,850,000 had the lease of the new lines been then in effect.

In 1917 the plaintiff's revenue from the old subway lines was $21,454,892, of which the sum of $7,255,691 was available for dividends. Had the lease been then in effect this sum would have been reduced by $3,260,000.

In 1918 the plaintiff's revenue from the old subway lines was $21,840,447, of which the sum of $4,939,045 was available for dividends. Had the lease been then in effect such sum would have been reduced by the sum of $940,000.

In 1919, the first year in which the lease actually was in effect, the plaintiff's revenue was $24,632,207, but nothing was available for dividends. Had the lease not gone into effect there would have been available to the plaintiff in that year for the payment of dividends, $4,200,000.

Besides the unjust enrichment that the plaintiff obtained for itself by its default in delaying construction and equipment of the new subways, it subjected the City of New York

to liabilities for damages for delay to construction contractors, aggregating several millions of dollars, which delays were caused by the plaintiff herein withholding and delaying track alignment plans, indispensable for the progress of construction work, and by other breaches of its obligations in the construction and equipment of new lines.

By reason of such conduct on the part of the plaintiff, the cost of equipment for the initial operation was increased by the sum of upwards of $20,000,000.

For a Separate and Further Defense, the Defendant Alleges:

QQ. On or about the 23rd day of February, 1912, an action was duly commenced in the Supreme Court of the State of New York (a court of general jurisdiction in law and equity), Kings County, in the name of Admiral Realty Company, as plaintiff, against this defendant, The City of New York, William J. Gaynor, William A. Prendergast, John Purroy Mitchel, George McAneny, Alfred A. Steers, George Cromwell, Cyrus C. Miller and Maurice E. Connolly, as members of and constituting the Board of Estimate and Apportionment of the City of New York; William R. Willcox, William McCarroll, Milo R. Maltbie, John E. Eustis and J. Sergeant Cram, as members of and constituting the Public Service Commission for the First District, and other defendants, in which it was alleged, among other things, that the said agreement then proposed to be executed, and afterwards executed between this defendant, The City of New York, acting by the Public Service Commission for the First District, and plaintiff herein, Interborough Rapid Transit Company, and containing the provisions therein for the construction, equipment and

operation by the plaintiff herein of the new Rapid Transit Railroad Lines, described therein, upon the terms expressed in such contract, all of such subway lines to be operated by the said Company in connection with the lines then under operation by it, for a single fare of five cents, for a period of forty-nine years, and other provisions for the pooling of receipts, the recapture of said lines, exchange of legs of existing and new subway lines, and other provisions to provide such service at the rate of fares prescribed in such contract, was illegal and that the entering into of such contract by The City of New York would be a waste of the funds and property thereof; and in which such action judgment was demanded that the defendant named in such action be restrained from entering into such agreements or taking any steps for the executing, delivering or consummating any such contract or contracts.

In such action, the defendants, The City of New York and William J. Gaynor and others, constituting the Board of Estimate and Apportionment, interposed a demurrer to the said complaint, in which demurrer they set forth that the said complaint did not state facts sufficient to constitute a cause of action; and in said action a like demurrer was interposed by the defendants therein William R. Willcox and others, constituting the Public Service Commission of the First District.

Thereafter the issues of law arising upon the said demurrers to the complaint in such action duly came on for trial before Hon. Abel E. Blackmar, one of the Justices of said Court, on March 4th and March 7th, 1912, at a Special Term thereof held in and for the County of Kings, and the said Justice having duly heard the parties, and after due deliberation having made and filed his decision in writing,

directing final judgment in favor of all the defendants in such action, sustaining their demurrers to such complaint and dismissing the said complaint, it was ordered, adjudged and decreed that the separate demurrers of the defendants in said action to the complaint therein be and the same thereby and severally were sustained and that the complaint be and the same was thereby dismissed.

Thereafter the said Admiral Realty Company, as plaintiff in such action, appealed to the Appellate Division of the Supreme Court, Second Department, from such judgment, and said appeal having been argued by counsel for the appellant, and counsel for The City of New York (defendant therein and herein), William J. Gaynor and others, constituting the Board of Estimate and Apportionment of The City of New York, and William R. Willcox, William McCarroll, Milo R. Maltbie, John E. Eustis and J. Sergeant Cram, constituting the Public Serivce Commission; and due deliberation having been had thereon, it was ordered and adjudged that the said judgment so appealed from be and the same thereby was affirmed, and that the respondents recover of the appellant costs of said appeal; and thereupon, on such order of affirmance, judgment was duly entered in the office of the clerk of the Supreme Court, Kings County, on the 20th day of May, 1912, in and by which it was ordered and adjudged that the said judgment so appealed from be and the same thereby was in all respects affirmed and that the defendants recover of the plaintiff the costs of said appeal.

Thereafter, on the 21st day of May, 1912, a notice of appeal to the Court of Appeals of the State of New York was served and filed by and in the name of the said Admiral Realty Company, plaintiff, as appellant, whereby it ap-

pealed by the Court of Appeals of the State of New York from the judgment entered as aforesaid; and thereafter said appeal duly came on to be heard the Court of Appeals of the State of New York, at the Capitol in Albany, and was argued by counsel for the plaintiff and counsel for the aforesaid defendants, and was fully considered and due deliberation had thereon by the said Court; and thereafter on or about the 29th day of June, 1912, the said Court of Appeals rendered its decision, in and by which it was adjudged and decreed that the judgment so appealed from should be and thereby was in all things affirmed and that the record thereof be remitted to the Supreme Court in Kings County for appropriate action, in accordance therewith; and thereupon an order was duly made on or about the 16th day of July, 1912, in and by which the said order and judgment of the Court of Appeals was made the judgment of the Supreme Court, and thereupon judgment was entered upon such order that the aforesaid judgment so appealed from be and the same thereby was in respects affirmed, with costs to the respondents against the appellant therein.

That the plaintiff, Interborough Rapid Transit Company, procured the institution of the foregoing action by and in the name of Admiral Realty Company, plaintiff, entered into arrangements for the procurement of counsel for the said plaintiff for the prosecution of such action, and furnished the moneys whereby the expenses of such litigation so conducted in the name of the said Admiral Realty Company, as plaintiff, were paid by the said Interborough Rapid Transit Company, plaintiff herein; and the said Interborough Rapid Transit Company took other steps in and by which it controlled the conduct of said litigation in the

name of said Admiral Realty Company as the plaintiff therein, and the said Interborough Rapid Transit Company was the real party in interest therein.

That the said judgment so rendered as aforesaid in favor of this defendant, The City of New York, in said action brought in the name of Admiral Realty Company, plaintiff, at the instance and by the procurement of and in the interest of the said Interborough Rapid Transit Company, plaintiff herein, is *res adjudicata* that the defendant, The City of New York, under the terms of said contract, is entitled to have the Interborough Rapid Transit Company, plaintiff herein, provide the service in such contract agreed, and at the rate of fare therein specified, for the period of forty-nine years as in said agreement provided; and that the obligation is upon said Interborough Rapid Transit Company, plaintiff herein, under the terms of said contract, to provide the service in such contract agreed, and at the rate of fare therein specified, to-wit, five cents, and no more, for the period of forty-nine years, as in said agreement provided; and that the said judgment is a bar to the maintenance of this action by the plaintiff.

As and for a Counterclaim:

RR. This defendant repeats and realleges each and every of the allegations set forth in paragraphs "A" to "QQ" inclusive, with the same force and effect as if here set out in full.

SS. That the matters involved herein arise out of the same transaction as the matters set up in the plaintiff's complaint, to-wit, the execution and performance of the aforesaid contracts #1, #2 and #3, and the plaintiff's violation of the terms thereof.

TT. The value of the interest and property of this defendant, The City of New York, involved in this counterclaim is as hereinbefore more fully shown, greatly in excess of $3,000.

WHEREFORE, this defendant demands judgment dismissing the complaint herein, with costs and disbursements of this action, and that the said Contracts #1, #2 and #3 be declared to and be rescinded, abandoned and annulled; that the plaintiff be adjudged and decreed to surrender each and every of the properties of this defendant held, occupied or used by the plaintiff as lessee thereof under and by virtue of said contracts, and that the defendant be entitled to repossess itself of each and every and all of the railroads operated by the plaintiff under and pursuant to said Contracts #1, #2, #3, and of the tunnels, tracks, rolling stock, equipment and other appurtenances of said railroads, title to or ownership of which is in the said defendant, and that the plaintiff shall upon the demand of said defendant discontinue the operation of said railroads and quit, surrender and give up possession of the same to this defendant, and that this defendant shall have such other and further relief as to the Court may seem just and proper.

GEORGE P. NICHOLSON,
Corporation Counsel,
Solicitor for Defendant
The City of New York,
Office and Post Office Adddress,
Municipal Building,
Borough of Manhattan,
City of New York.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE AND COUNTY OF NEW YORK,

JAMES J. WALKER, being duly sworn, says: That he is the Mayor of THE CITY OF NEW YORK, the defendant named in the foregoing ANSWER; that he has read and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by defendant The City of New York is because said defendant is a municipal corporation and deponent is one of its officers, to wit: the Mayor thereof; that the said verification was authorized by resolution of the Board of Estimate and Apportionment of The City of New York.

JAMES J. WALKER.

Sworn to before me this 2d day of April, 1928.

JOHN J. GLENNON
Notary Public, New York County
N. Y. Co. Clk's. #131 Reg. No. 9089
Term Expires March 30, 1929

(33,468)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 159

JOHN F. GILCHRIST, LEON G. GODLEY, AND CHARLES C. LOCKWOOD, CONSTITUTING THE TRANSIT COMMISSION, ETC., ET AL., APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

VOL. II

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[fols. 566 & 567] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY OF THE PLAINTIFF TO THE COUNTERCLAIM OF DEFENDANT THE CITY OF NEW YORK—April 12, 1928

The plaintiff herein, for its reply to the counterclaim alleged in the answer of defendant, The City of New York, and reserving any objections to the sufficiency of the same, or to the relevancy and materiality of the allegations therein contained, respectfully shows:

1. Replying to "B," it is without knowledge as to the allegations of this paragraph, except that it admits that an action was brought by the Sun Printing and Publishing [fol. 568] Company, and others, as taxpayers, involving the constitutionality of certain provisions of the Rapid Transit Act, and that the final judgment rendered therein was in favor of the defendants and against the plaintiff in that action.

2. Replying to "C," it is without knowledge as to the allegations of this paragraph, except that it admits that by Chapter 378 of the Laws of 1897 of the State of New York provision was made to unite in one municipality under the corporate name of The City of New York the various counties lying in and about New York Harbor, including the City and County of New York, the City of Brooklyn and County of Kings, the County of Richmond, and part of the County of Queens, and to provide for the government thereof; and it also admits that the Legislature caused to be submitted to the People an amendment to the State Constitution relating to the city debt limit, which was affirmed at the election held in 1899.

3. Replying to "D," it is without knowledge as to the allegations of this paragraph, except that it admits that the Board of Rapid Transit Railroad Commissioners published an invitation to contractors for bids for the construction, equipment and operation of the first municipality constructed rapid transit railway, and that a bill amending the

Greater New York Charter in the respect to rapid transit bonds became a law February 8, 1900.

4. Replying to "E," it is without knowledge as to the allegation that the making of Contract No. 1 was a consequence of the action referred to in paragraph "D." Fur- [fol. 569] ther replying to "E," and also replying to "F," it alleges that, in addition to the several modifying and supplementing agreements as specified in said paragraphs, each Contract No. 1 and Contract No. 2 were also modified and amended in certain respects by Contract No. 3, and, in particular, that the provisions relating to the rate of fare per passenger contained in said Contract No. 1 and Contract No. 2 were superseded by the provision as to rate of fare contained in Contract No. 3.

5. Replying to "G," it is without knowledge as to the interest in the plaintiff and the Metropolitan Street Railway Company of the persons who procured the organization of the Interborough-Metropolitan Company. It denies that the Interborough-Metropolitan Company ended its career in receivership and dissolution, and it denies that the investment of the public in the securities of the Interborough-Metropolitan Company was completely wiped out. It denies that a receiver was appointed of the Interborough-Metropolitan Company in 1907, and, upon information and belief, it denies that said company prior to 1907 depleted its assets by the payment of dividends which were never earned, which payments were made the basis of marketing its securities. It avers that the allegations of this paragraph are irrelevant and immaterial.

6. Replying to "H," it denies each and every allegation contained in said paragraph.

7. Replying to "J" to "GG," inclusive, plaintiff admits that certain proceedings were had before the Board of Estimate and Apportionment of The City of New York on or about the respective dates indicated in said several paragraphs of the answer of the defendant, The City of [fol. 570] New York; but this plaintiff is without knowledge as to the correctness of the purported extracts from minutes of transactions of such proceedings as set forth in paragraphs "J" to "GG," inclusive, of said answer. Plain-

tiff alleges that, in so far as the proceedings by or before the Board of Estimate and Apportionment set forth in said paragraphs relate to the terms of the contract subsequently entered into between The City of New York and this plaintiff, dated March 19, 1913, known as Contract No. 3, or, in so far as they relate to the terms of the Certificate for additional tracks granted to defendant, Manhattan Railway Company, on March 19, 1913, or, of the Certificate granted on the same day to plaintiff for certain extensions of and additions to the system of elevated lines owned by the defendant Manhattan Railway Company, the same are incompetent, irrelevant and immaterial, except such records of the defendant The City of New York, and of the Public Service Commission for the First District, as show the execution and delivery of the said Contract and Certificates and the authorization of the municipal and corporate officers to make, execute and deliver them, and that all of said proceedings have been merged in said Contract and in said Certificates. Plaintiff further alleges that the matters set forth in paragraphs "J" to "GG," inclusive, of said answer of defendant, The City of New York, constitute only a statement of evidence contrary to the provisions of Equity Rule 30, and for that reason also such matters are irrelevant and redundant.

8. Replying to "M," it is without knowledge as to the allegations that the expenditures made by the defendant The City of New York, paid under Contract No. 3 prior to [fol. 571] the commencement of this action, were in the amounts stated in this paragraph of the answer.

9. Replying to "NN," it denies the allegation in said paragraph contained as to the amounts of the costs of construction and equipment, and additions thereto, under Contract No. 3 (other than the cost of equipment for initial operation), contributed or provided by plaintiff prior to the commencement of this action, and alleges that the correct amounts, as of December 31, 1927, so contributed or provided by plaintiff, were as follows: Toward the cost of Construction of the Railroad, the sum of $57,905,779.72; for the cost of Additions to Construction, the sum of $190,247.75; for the cost of Equipment for Initial Operation, in excess of $22,000,000, the sum of $28,187,685.57; for Additions to Equipment, the sum of $13,538,554.61.

10. Replying to "OO," it alleges that as of December 31, 1927, certain adjustments and correcting entries were made in the plaintiff's books of accounts for the period from January 1, 1919, to December 31, 1927, which had the effect of decreasing the aggregate of the operating revenues alleged to have been received by plaintiff under Contract No. 3 from January 1, 1913, to January 31, 1928, by $720,284.89. It admits that included in the deductions made by plaintiff from the revenues under Contract No. 3 since January 1, 1919, are items which with interest thereon from the time of deduction to December 31, 1927, aggregate $7,519,741.03; but it denies that by reason thereof plaintiff has unjustly deducted from the revenues for its own purposes and withheld from the defendant The City of New York the sum of $3,682,980.12, or any other sum [fol. 572] more than it is, or was, entitled to claim or receive under the terms of Contract No. 3, up to December 31, 1927. Plaintiff further alleges that, under the terms of said Contract No. 3, The City of New York, acting by the Transit Commission or its predecessors, had the right, at all times since January 1, 1919, to object to any expenditure as unreasonable or improper, made or to be made by the plaintiff in connection with maintaining and operating the Railroad, for good cause, and said contract provides for the manner and method of filing said objections and of the determination thereof by arbitration or by the court; that belatedly, and on January 4, 1928, and, as this plaintiff is informed and believes, as a part of the campaign to harass and intimidate this plaintiff as alleged in its complaint, the Transit Commission arbitrarily and without due consideration, filed with plaintiff formal objections to certain expenditures made by plaintiff in connection with the maintenance and operation of the Railroads under Contract No. 3, from the date of the beginning of operation under said contract down to June 30, 1927, and also to certain other items in plaintiff's accounts for such period, the aggregate of the sums so objected to, with interest thereon to June 30, 1927, being $7,734,270.77; that the items objected to are comprised in the sum of $7,519,741.03 specified in the answer, and the plaintiff, as required by Contract No. 3, is now carrying in a suspense account pending determination of the controversy created by the filing of such objections,

with interest up to December 31, 1927, the said sum of $7,519,741.03; that there has been and was no justification for the delay in filing said objections, many items of which revert to the beginning of operation, viz., January 1, 1919, [fol. 573] and others to the period of "temporary operation" preceding said date; that The City of New York, by and through the Transit Commission, at all times had full knowledge and notice of such expenditures; that The City of New York through its accredited representatives was continually examining the books of accounts of this plaintiff; that the filing of said objections and the claim of the defendant The City of New York, with respect thereto, is unconscionable and unreasonable and the said defendant, either directly or through its agent, the Transit Commission, is barred by its laches and acquiescence from now asserting that said expenditures, and other items objected to, were and are improper and unreasonable.

11. Replying to "PP":

(a) It denies that it has breached, violated and failed to fullfill, comply with and live up to the terms, conditions, obligations and requirements of Contract No. 1, Contract No. 2 and Contract No. 3 in any respect whatsoever.

(b) It denies that it has failed and is now failing and neglecting to provide cars, motors and other equipment adequate for the requirements of the traveling public and sufficient for the traffic requirements of the railroads operated pursuant to said contracts. It alleges that it has fully complied with each and every condition and requirement of said contracts with respect to the provision of cars, motors and other equipment, and that it has likewise complied with each and every order, direction or regulation of the Transit Commission of the State of New York (or its predecessors) with respect to the provision of cars, motors and other equipment on said railroads, whether said orders, directions or regulations were issued by such Commission under and pursuant to any of the terms of said contracts, [fol. 574] or of any of them, or under and pursuant to the general powers conferred upon said Commission by the Public Service Commission Law of the State of New York.

(c) It denies that it has operated and is now operating trains on said railroads even during the non-rush hours of the day with excessive over-loading.

(d) It denies that it has failed and neglected to keep and maintain its signaling system according to the highest standards of railway operation and with due regard to the safety of its passengers and employees and of other persons, and alleges that it has developed and now has in operation the most up-to-date and best equipped signal system in use on any railroad in the world.

(e) It denies that it has failed and neglected and/or is now failing and neglecting to keep and maintain its cars properly painted inside and outside, and to keep said cars and the stations of said railroads in a clean and sanitary condition, and adequately heated and lighted, and in other respects in thoroughly good order and condition.

(f) It denies that it has withheld from the defendant, The City of New York, revenues which it is entitled to have and receive under the terms of Contract No. 3, and it denies that it has made illegal and improer charges against the said revenues for the purpose of withholding from the defendant, The City of New York, sums to which it is entitled under Contract No. 3, and it denies that it has applied such revenues to its own uses and purposes in contravention of the provision of said contract.

[fol. 575] (g) It denies that it has caused expenditures to be made for materials and supplies at an excessive cost and has thereby swollen the charges against revenues under Contract No. 3, and deferred and withheld from defendant, The City of New York, participations in such revenues to which it is lawfully entitled under said contract. It alleges that more than three-quarters of plaintiff's total annual expenditures for materials and supplies used in the operation of its railroad are made after competitive bidding and after the submission to and approval of contracts for such materials and supplies by the Transit Commission; and it further alleges that at all times since January 1, 1919, in accordance with the terms of Contract No. 3, the defendant, The City of New York, acting by the Transit Commission, or its predecessors, had the right for good cause to object to any expenditures made by plaintiff for material and supplies as excessive, and that, after full knowledge and notice of said expenditures, no objections have been made or filed with respect thereto; and that defendant The City of New York is barred by laches and acquiescence in now claiming that any of said expenditures were improper or excessive.

(h) It denies that it delayed the provision of Equipment under Contract No. 3 for the purpose of postponing the time when, pursuant to said contract, operations thereunder should begin and pooling of the revenues should take place.

(i) It denies that on January 1, 1917, it had scarcely begun the provision of material parts of Equipment under Contract No. 3. It alleges that it was in no way responsible for any delay in the construction of the duct line, known as the 57th Street duct line, and alleges that the same was fully completed prior to the commencement of operation under Contract No. 3.

[fol. 576] (j) It admits that by resolution of the Board of Estimate and Apportionment of The City of New York, adopted August 2, 1918, the lease under Contract No. 3 became effective on January 1, 1919; but it denies that such action was in any way or manner occasioned by delay of the plaintiff in furnishing equipment or by any other action on its part. It alleges that said resolution so referred to specifically states that the delay was in no respect the fault or failure of the plaintiff; and it further alleges that the plaintiff, at the special instance and request of The City of New York, undertook and agreed that said lease should be effective on January 1, 1919, and, in reliance upon the action of The City of New York, thereby waived its right under the contract to have said lease go into effect at a later date.

(k) It denies that it was its duty under said contract to furnish track alignments plans, and it denies that it delayed the furnishing of such plans for the purpose of deferring the time when operations under the lease would begin.

(l) It admits the allegations as to the amount available to plaintiff for dividends in the years 1916, 1917 and 1918; but it is without knowledge as to the amount by which said respective sums would have been reduced, if at all, if the lease under contract No. 3 had been in effect in those years.

(m) It denies that it subjected The City of New York to liabilitites for damages for delay to construction contractors. It alleges that the defendant The City of New York, acting through it agents and servants, failed and neglected to advertise and let contracts for the construction of said railroads in time so they could be completed by January 1,

[fol. 577] 1917, and further failed and neglected to furnish contractors engaged in the construction of various portions of said rapid transit railroads built under Contract No. 3 with plans, rights-of-way, directions and other necessary information in time to permit the individual contractors to complete their portions of said railroads within the time provided in their several contracts, and by said acts and failures and neglects as aforesaid delayed the date of completion of the Seventh Avenue line and subdivisions 1 and 2 of the Lexington Avenue line provided in said Contract No. 3 to be constructed and ready for operation January 1, 1917, and failed to have said rapid transit railroads constructed to a point susceptible of operation on January 1, 1917. It further alleges that defendant The City of New York by said acts, neglects, failures and delays as aforesaid caused said railroads to be constructed at a greatly increased cost, and failed to have said railroads ready to receive the equipment provided by plaintiff, and by said delays caused the equipment supplied by plaintiff in said railroads to be purchased and installed at a greatly increased cost to plaintiff; that said defendant, The City of New York, has determined and admitted that the plaintiff was not responsible for and did not cause any delays in the construction of said rapid transit railroads, and did not cause the date of commencement of operation of the lease to be extended from January 1, 1917, to January 1, 1919, and said admission and determination is contained in a resolution of the Board of Estimate and Apportionment of the defendant, The City of New York, adopted, August 2, 1918, herein elsewhere referred to.

(n) It denies that by reason of any act or conduct on its part the cost of equipment for initial operation under [fol. 578] Contract No. 3 increased by any sum whatsoever.

(o) It is without knowledge as to each and every allegation of paragraph "PP," except as hereinbefore specifically admitted or denied.

12. Replying to "QQ," it denies that it controlled the conduct of the litigation in which Admiral Realty Company was plaintiff and The City of New York was defendant, and it denies that it was the real party in interest therein.

It denies the allegation that the agreement referred to in the said action as proposed to be executed was the same

as the agreement which was subsequently executed between The City of New York, acting by the Public Service Commission for the First District, and this plaintiff, Interborough Rapid Transit Company, on March 19, 1913, and denies that the answer correctly or fairly describes the scope and purpose of the said action. It denies that the judgment rendered in the said action brought by the Admiral Realty Company, plaintiff, against The City of New York, defendant, is *res adjudicata* with respect to the issues raised in this action, or with respect to the other matters as to the rights and obligations of the plaintiff or the defendant, The City of New York, alleged in said paragraph QQ, and denies that said judgment is a bar to the maintenance of this action by the plaintiff.

13. It denies each and every allegation contained in paragraph "SS."

[fol. 579] For a first separate defense to the counterclaim herein,

14. The plaintiff alleges that the defendant, The City of New York, is barred by its own negligence, laches and acquiescence, and by the lapse of time from maintaining the cause or causes of action, or any of them, alleged in the said counterclaim.

For a second separate defense to the counterclaim herein,

15. The plaintiff alleges that the alleged cause or causes of action stated in the counterclaim did not accrue within six years before the commencement of this action, and that said counterclaim is barred by the Statute of Limitations.

For a third separate defense to the counterclaim herein,

16. The plaintiff alleges that the defendant, The City of New York, has slept on its rights and has been guilty of laches in not asserting its alleged rights in a timely manner and that it is estopped by such delay from now having or claiming to have the relief demanded in said counterclaim.

For a fourth separate defense to the counterclaim herein,

17. The plaintiff alleges that said Contract No. 3, in Article XXIX thereof, provides that the cost of Construction of the Railroad and the cost of the Equipment and of

Additional Equipment shall be determined each quarter year by the Engineer, meaning the Chief Engineer of the Commission and any successor or successors duly appointed, as defined in said Contract, in the manner as in [fol. 580] said Article set forth, and that the determination of the Engineer made in accordance with the provisions of said Article shall be final and conclusive; that the costs of Construction, Equipment and of Additional Equipment have been determined by the Engineer, as provided in said Article, up to June 30, 1926, and that said determinations as to costs are final and conclusive and are binding upon the defendant, The City of New York, and said defendant is estopped thereby from claiming or asserting that such costs were excessive, improper or illegal.

For a fifth separate defense to the counterclaim herein,

18. The plaintiff alleges that Article XLVII of said Contract No. 3 provides that the lease of the railroad and equipment to the lessee, the plaintiff herein, shall be for a term beginning on the 1st day of January, 1917, and expiring on the 31st day of December, 1965, provided, however, that if the completion of certain portions of the lines of said railroad, including the Seventh Avenue Branch as defined in said Contract, shall be delayed beyond the 1st day of January, 1917, the said lessee, the plaintiff herein, shall be entitled to an extension of time for the commencement of operation and for the expiration of the lease equal to the period between the 1st day of January, 1917, and the date when said portions of the railroad are actually ready for operation; that the completion of the Seventh Avenue Branch of the railroad, particularly that portion thereof known as the Clark Street Tunnel, was delayed without fault of the plaintiff herein; that the contract for the construction of the portion of the Seventh Avenue Branch known as the Clark Street Tunnel was delivered to the con- [fol. 581] tractor on August 6, 1914, and provided for the completion thereof within forty-two months, or on February 6, 1918, and that the same was not completed to a condition susceptible of operation until April 15, 1919; that because of said delay in completing the Seventh Avenue Branch to a condition susceptible of operation, which delay was be-

yond the control of the plaintiff, at the special instance and request of the Public Service Commission for the First District of New York, acting for the City of New York, the plaintiff agreed to and did put into effect on August 1, 1918, as temporary operation, through operation of those portions of the railroad known as the "H" without waiting for the completion of the Seventh Avenue Branch tunnel to Brooklyn; that, in accordance with the provisions of said Article XLVII of said Contract No. 3, the time for the commencement of the lease under said contract and for the expiration thereof were extended for respective times each equal to the period between the 1st day of January, 1917, and the 1st day of January, 1919, so that the term should be begun on the 1st day of January, 1919, and end on the 31st day of December, 1967, and the plaintiff waived any right for a further extension of the said lease and agreed that the revenue of the portions of the railroad in operation and the existing railroads should be combined as provided in Article XLIX of said contract as though all of the portions of the railroad referred to in Article XLVII were completed and put into operation as of that date; that thereupon and for the purpose and intent of carrying out and putting into effect said agreements, said Public Service Commission adopted on August 1, 1918, the following resolution:

"Whereas, The Interborough Rapid Transit Company, by letter dated July 31, 1918, has agreed to put into effect [fol. 582] on August 1, 1918, through operation of the so-called 'H' (that is, through operation on the east side via Lexington Avenue, and through operation on the west side via Seventh Avenue, with shuttle service through 42nd Street), provided that this Commission by resolution to be approved by the Board of Estimate and Apportionment, with the approval of the Corporation Counsel as to form, shall extend the time for the commencement and expiration of the term of the lease under Contract No. 3 for a period equal to a period from January 1, 1917, and January 1, 1919, as hereinafter provided; and

"Whereas, Article XLVII of Contract No. 3 provides for the commencement of the lease on January 1, 1917, and for the expiration thereof on January 1, 1965, provided,

however, that if certain portion of lines, including the portion of the Seventh Avenue branch to Brooklyn shall not be completed to a condition susceptible of operation by January 1, 1917, the lessee 'shall be entitled to an extension of time for the commencement of operation and for the expiration of the lease, equal to the period between the first day of January, 1917, and the date when such portions of the railroad are actually ready for operation'; and

"Whereas, It now appears that the Seventh Avenue Branch to a connection with the existing subway in Brooklyn will not be completed to a condition susceptible of operation before January 1, 1919, or possibly the early spring or summer of 1919, for which delay the Interborough Rapid Transit Company is not responsible; therefore, be it

"Resolved, That pursuant to the provisions of Article XLVII of Contract No. 3, and upon the condition that nothing herein contained shall be deemed or construed to be [fol. 583] a waiver by the City of any default, laches or neglect on the part of the lessee; or a waiver of any claim of any nature that the City may have against the lessee; or a waiver by the lessee or any default, laches or neglect on the part of the City; or a waiver of any claim of any nature that the lessee may have against the City arising from or out of Contract No. 3, this Commission hereby grants to the lessee under said contract an extension of time for the commencement of the term of the lease and for the expiration of the lease, equal to the period between the first day of January, 1917, and the first day of January, 1919, so that the term shall begin on the first day of January, 1919, and end on the 31st day of December, 1967, at midnight, subject to the provisions of the lease, and that upon the commencement of operation under the lease on the first day of January, 1919, the revenues of the portions of the railroad in operation shall be combined with the revenue of the existing railroad, as provided in Article XLIX, as if all of the portions of the railroad referred to in Article XLVII were completed and put in operation as of that date; and further

"Resolved, That if prior to December 1, 1918, the Public Service Commission, the City or the Interborough Rapid Transit Company, or either of them, shall desire

an agreement modifying said Contract No. 3 to carry out the purposes set forth in this resolution, an appropriate agreement shall be executed by the parties."

That thereafter and on the 2nd day of August 1918, the Board of Estimate and Apportionment of the City of New York, by resolution adopted on said date, duly approved the above resolution of the Public Service Commission, as appears in the minutes of proceedings of said Board of Estimate and Apportionment. That by reason of [fol. 584] the acts, matters and things hereinbefore set forth and alleged, said defendant, The City of New York, is and of right ought to be estopped from now claiming or asserting any act or delay or intention on the part of this plaintiff, to postpone the time when, pursuant to the provisions of said Contract No. 3, operation under said lease and the pooling of revenues should being.

For a sixth separate defense to the counterclaim herein,

19. The plaintiff alleges that by the provisions of the Rapid Transit Act, being Chapter 4 of the Laws of 1891 of the State of New York, and the Act supplementary thereto and amendatory thereof, and by the provisions of Article XXVII of said Contract No. 3, the right and authority to object to any expenditure, as unreasonable and improper, made by the plaintiff in connection with the maintaining and operating of the Railroad and the Existing Railroads as described in Contract No. 3, is vested solely in the Transit Commission, acting for and as agent of The City of New York; that on January 4, 1928, the Transit Commission exercised the authority so vested in it, by filing with the plaintiff formal objections to various expenditures made by the plaintiff in connection with the maintenance and operation of the Railroads under Contract No. 3 from the date of the beginning of plaintiff's operation under said contract down to June 30, 1927, and also to certain other items in plaintiff's accounts for such period; that the manner and method of determining such controversy and adjudicating the items in dispute is defined in Articles XXVII and XXX of said Contract No. 3; that such method is exclusive; that The City of New York, acting directly through [fol. 585] its Corporation Counsel, has no power, right or

authority, and is not competent to question or object to any expenditure made by the plaintiff in connection with its maintenance and operation of the Railroads under Contract No. 3 as unreasonable or improper, or to enforce any alleged rights of The City of New York under said contract with respect to such expenditures or accounts by way of counterclaim or otherwise, and that the defendant The City of New York, acting in such direct manner through its Corporation Counsel, has no standing in this Court under said Rapid Transit Act or under said Contract No. 3 to do so.

For a seventh separate defense to the counter-claim herein,

20. The plaintiff alleges that by the provisions of the Rapid Transit Act, being Chapter 4 of the Laws of 1891, of the State of New York, and the Acts supplementary thereto and amendatory thereof, and by the provisions of said Contract No. 3, the right and authority to institute any action or proceeding or to invoke or pursue any remedy affecting said Contract No. 3 or said Rapid Transit Act in its relation to said Contract No. 3, were and are vested solely in the Transit Commision acting for The City of New York and The City of New York acting directly through its Corporation Counsel has no power, right or authority, and is not competent to enforce its alleged rights or remedies under said contract by way of counterclaim or otherwise, and has no standing in this Court under said Rapid Transit Act or under said contract to do so.

[fol. 586] For an eighth separate defense to the counterclaim herein,

21. The plaintiff alleges that Contract No. 3 provides in and by the terms thereof specific remedies for any failure on the part of the lessee, the plaintiff herein, to observe the terms and requirements thereof and perform its obligations thereunder and for any default of the plaintiff under any of the conditions, obligations or requirements of the lease or of any portion of said contract; that such remedies are specifically set forth in said contract and are exclusive; that no notice of any failure, neglect or default under the contract or lease or any portion thereof has been given to the lessee, the plaintiff herein, as required by the terms of

said contract as a condition precedent to the enforcement of the remedy or remedies provided therein; that the remedy sought to be enforced herein by defendant, The City of New York, by way of counterclaim is not a remedy provided for in said contract, and said defendant, The City of New York, has no power, right or authority, and is not competent to seek to enforce its alleged rights in the premises, except in the manner and in accordance with the conditions prescribed therein.

For a ninth separate defense to the counterclaim herein,

22. The plaintiff denies that the deferment of the effective date of the lease under Contract No. 3 beyond January 1, 1917, was due to any delay, neglect or failure on its part to perform any of its obligations or duties under said contract, either in respect of its contribution to the cost of construction, or the provision of equipment of the railroad, or otherwise, and plaintiff alleges that in all respects it performed and fulfilled each and every of the terms, conditions [fol. 587] and requirements of said contract on its part to be performed, as and when required by said contract in respect of its contribution to the cost of construction, the provision of equipment and the operation of said railroad, and in all other respects. And plaintiff further alleges that the deferment of the effective date of the said lease beyond January 1, 1917, was solely due to the delays, acts and omissions of the defendant, The City of New York, acting by the Transit Commission, or its predecessors, and/or its Board of Estimate and Apportionment. Plaintiff further alleges that since the effective date of the lease, the defendant, The City of New York, has impeded and hampered the plaintiff in its operations thereunder in various and divers ways, and particularly by delaying the construction of yards, shops and inspection facilities necessary for the adequate and efficient operation of the railroad, all to the great loss, damage and expense of the plaintiff.

For a further separate and partial defense to the counterclaim herein,

23. The plaintiff alleges that the alleged cause or causes of action stated in said counterclaim, or some of them, did not accrue within ten years before the commencement of

this action, and that said counterclaim, or such part thereof, is barred by the Statute of Limitations.

For further and additional defenses to the counterclaim,

24. The plaintiff alleges:

1. That the alleged counterclaim is devoid of equity and fails to state facts sufficient to entitle it to any equitable relief.

[fol. 588] 2. That the alleged counterclaim fails to state facts sufficient to constitute a cause of action by way of counterclaim or otherwise.

Wherefore, plaintiff demands judgment dismissing the counterclaim of defendant, The City of New York herein, with costs and disbursements, and that this plaintiff may have herein such other and further relief as to the Court may seem just and proper.

Interborough Rapid Transit Company, by Earl E. Starbard, Vice-President. James L. Quackenbush, Solicitor for Plaintiff, 165 Broadway, Borough of Manhattan, New York City. William L. Ransom, Jacob H. Goetz, of Counsel.

[fol. 589] *Duly sworn to by Earl E. Starbard. Jurat omitted in printing.*

[fols. 590 & 591] In United States District Court

[Title omitted]

Order to Show Cause

The application of the plaintiff for the issuance of an interlocutory injunction in this action having been presented to me and the papers submitted in behalf of the application being filed herewith; it is

Ordered that the said application be heard before the Court constituted in the manner prescribed by Section 380 of the Code of Laws of the United States (formerly Ju-
[fol. 592] dicial Code, Sec. 266, as amended), on the 8th

day of March, 1928, at 3 o'clock in the afternoon of that date, at the Court House, in the United States Post Office Building, in the Borough of Manhattan, City and State of New York, and that the defendants, and each of them, at such time and place Show Cause:

I. Why an order should not be made herein, enjoining and restraining, pending the final judgment in this action and until the further order of this Court, the defendants constituting the said Transit Commission, and The City of New York, and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the Acts of the Legislature of the State of New York, orders, directions, tariff schedules, contracts or certificates, or of either of them, or of any other provision of law, referred to in the complaint herein.

(1) From in any way enforcing, or attempting to enforce, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division, of not more than five cents per passenger, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, tariff schedules, contracts or certificates, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each [fol. 593] the Manhattan Division and the Subway Division, a fare per passenger in excess of five cents;

(3) From in any way enforcing, or attempting to enforce, against the plaintiff the orders made by the said Transit Commission, relating to the construction of subway platform extensions;

(4) From making or in any way enforcing, or attempting to enforce, against the plaintiff any order by the Transit Commission requiring the plaintiff to provide 432 or other substantial number of additional cars for operation on the said subway lines;

(5) From in any way enforcing the order or direction of the said Transit Commission of February 10, 1928, relating to the payment of expenses of the rate suit, or any other order or direction by it or by the defendant The City of New York, or bringing or prosecuting any action or proceeding to seize or take possession of the properties used or operated by the plaintiff in or in connection with said rapid transit railroads, or to take over the operation of the same, or to prevent the application of the revenues therefrom, or otherwise preventing or deterring the plaintiff from testing the validity of said rates or fares and the acts, orders, regulations and provisions relative thereto;

(6) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, or the said Contracts Nos. 1, 2 and 3 and related certificates against the plaintiff; or [fol. 594] by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts or certificates or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven cents per passenger, or any rate in excess of five cents per passenger, upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division;

(7) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, any rate which it may lawfully charge or receive; any provisions of said acts, orders, regulations, contracts or certificates or any

regulations prescribed thereunder, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

II. Why an order should not be made herein temporarily restraining the defendants constituting the said Transit Commission and The City of New York, and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting, or attempting to act under and by virtue of the authority of the said acts, orders, directions, tariff schedules, contracts or certificates, or of either of them, or of any other provision of law, until the hearing and determination of the application for an interlocutory injunction herein, from doing all or any of the acts hereinabove described.

[fol. 595] III. And for such other and further relief as to the Court shall seem just and proper in the premises.

Further ordered that any answering affidavits of the defendants be served upon the solicitors for the plaintiff at least two days before the date hereinbefore specified as the return day of this application; and that the plaintiff have leave to serve upon the defendants further or additional affidavits or pleading in support of the application on or before the day of the argument of this application or at such time as may be fixed by the Court; and it is

Further ordered that a copy of this order be served at least five days before the date mentioned herein upon the Governor of the State of New York, upon the Attorney General of the State of New York, and upon the other defendants in this suit, or upon their respective solicitors.

Dated, New York City, in the Southern District of New York, February 28, 1928.

Wm. Bondy, U. S. D. J.

This order to show cause why an interlocutory injunction should not be granted is nothing other than a Notice of Motion which on the return day is to be heard by a Statutory Court consisting of three judges. It does not contain any temporary restraining order. The order does not deter-

mine any matter whatsoever on the merits. The application therefore is granted.

February 28, 1928.

Wm. Bondy, U. S. D. J.

[fol. 596] In United States District Court

[Title omitted]

Application for Preliminary Injunction and Temporary Stay

To the Honorable the District Court of the United States for the Southern District of New York:

Upon the complaint herein, verified February 14, 1928; the subpœna ad respondendum issued thereon; the annexed affidavits of Ralph Norton, Earl E. Starbard, Henry T. Berry, William E. Gorsuch, and Charles E. Williams, each verified February 25, 1928; any supplemental or amended complaint or further papers which may be filed herein, with the permission of this Court; and upon all the papers and proceedings filed or had herein and in connection herewith;

[fol. 597] The plaintiff above named hereby makes application

1. For an order enjoining and restraining, pending the final order in this action and until the further order of this Court, the defendants constituting the said Transit Commission, and The City of New York, and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the acts of the Legislature of the State of New York, orders directions, tariff schedules, contracts or certificates, or of either of them, or of any other provision of law, referred to in the complaint herein:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division, of not more than five cents per pas-

senger, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise;

(2) From in any way enforcing, or attempting to enforce against the plaintiff the provisions of the said acts, orders, directions, tariff schedules, contracts or certificates, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, a fare per passenger in excess of five cents;

[fol. 598] (3) From in any way enforcing, or attempting to enforce, against the plaintiff the orders made by the said Transit Commission, relating to the construction of subway platform extensions;

(4) From making or in any way enforcing, or attempting to enforce, against the plaintiff any order by the Transit Commission requiring the plaintiff to provide 432 or other substantial number of additional cars for operation on the said subway lines;

(5) From in any way enforcing the order or direction of the said Transit Commission of February 10, 1928, relating to the payment of expenses of the rate suit, or any other order or direction by it or by the defendant The City of New York, or bringing or prosecuting any action or proceeding to seize or take possession of the properties used or operated by the plaintiff in or in connection with said rapid transit railroads, or to take over the operation of the same, or to prevent the application of the revenues therefrom, or otherwise preventing or deterring the plaintiff from testing the validity of said rates or fares and the acts, orders, regulations and provisions relative thereto;

(6) From bringing and or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, or the said Contracts Nos. 1, 2 and 3 and related certificates, against the plaintiff; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of

the said acts, orders, tariff schedules, contracts or certifi-
[fol. 599] cates or any of them, in so far as they or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven cents per passenger, or any rate in excess of five cents per passenger, upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division;

(7) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, any rate which it may lawfully charge or receive; any provisions of said acts, orders, regulations, contracts or certificates or any regulations prescribed thereunder, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

II. And, in view of the fact that irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted herein, for a temporary restraining order against the said defendants and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions, tariff schedules, contracts or certificates, or either of them, or of any other provision of law, until the hearing and determination of the application for an interlocutory injunction herein, from doing all or any of the acts hereinabove described.

III. And for such other and further relief as to the Court shall seem just and proper in the premises.

[fol. 600] The plaintiff prays that the Judge to whom this application may be presented call to his assistance to hear and determine this application two other Judges or Justices, in accordance with the provisions of Section 380 of the Code of Laws of the United States (formerly Section 266 of the Judicial Code, as amended), and expedite the hearing of this application, and set the same for hearing at the earliest practicable time; and the plaintiff prays for

such other and further relief as to the Court may seem just and proper in the premises; for all of which no previous application has been made to any other Court or Judge.

New York City, February 25, 1928.

Interborough Rapid Transit Company, by Earl E. Starbard, Vice-President. James L. Quackenbush, Solicitor for Plaintiff, No. 165 Broadway, Borough of Manhattan, New York City. William L. Ransom, Jacob H. Goetz, of Counsel.

[fol. 601] *Duly sworn to by Earl E. Starbard. Jurat omitted in printing.*

[fol. 602] In United States District Court

[Title omitted]

Affidavits in Support of Application

State, City and County of New York,
Southern District of New York, ss:

Ralph Norton, being duly sworn, deposes and says:

1. I am of counsel for the plaintiff, Interborough Rapid Transit Company, and have been so employed for the past twenty years, and am associated with and assistant to James L. Quackenbush, the general counsel and solicitor for the plaintiff. I am conversant with the affairs of the Interborough Rapid Transit Company, and particularly with the matters involved in this suit.

2. This action was commenced on February 14, 1928, at 9:20 A. M., by the filing of the complaint herein in the office [fol. 603] of the Clerk of this Court, and thereafter a subpœna ad respondendum was duly issued out of the Court and served upon each of the defendants. Issue has not yet been joined by any of the defendants.

Scope of the Original Complaint and its Prayer for Relief

3. The present action is brought by the plaintiff, as more fully appears from the complaint, and the attached affidavits, for the purpose of restraining the defendant mem-

bers of the Transit Commission and the defendant The City of New York from enforcing various rate limitations, imposed by legislation or by acts legislative in character of the State of New York, restricting the rate of fare charged by the plaintiff, on each the Manhattan Division (elevated lines) and the Subway Division of the rapid transit railroads operated by the plaintiff within the City of New York, to five cents per passenger, which limitations have become confiscatory under the Fourteenth Amendment; from interfering with the right of the plaintiff to charge a fare of seven cents per passenger, or such other fare in excess of five cents per passenger as is not confiscatory, and from carrying out acts and threats of the Transit Commission, its special counsel and various city officials, designed to deny to the plaintiff its day in Court for an orderly adjudication of its rights as to rates, and to obstruct, defeat and overthrow the various steps which the plaintiff had from time to time taken, under clear statutory authorization, to obtain relief from the confiscatory five-cent fare.

4. In brief summary as to the matters dealt with, the original complaint of the plaintiff is as follows (fols. 28-33): [fol. 604] First Cause of Action: As to limitations imposed by legislative acts of the State of New York (particularly Chapter 743 of the Laws of 1894 of the State of New York) upon rates of fare chargeable by the plaintiff on certain elevated railroad lines (the so-called "Manhattan Division") of the rapid transit railroads operated by the plaintiff, the greater part of which is owned by the defendant Manhattan Railway Company and leased to the plaintiff and the other part of which is owned by the plaintiff.

Second Cause of Action: As to not only the subject-matter of the first cause of action, but, also, as to the rate provision in a certain Elevated Railroad Extension Certificate of March 19, 1913, granted by the Public Service Commission of the State of New York for the First District, acting in behalf of the defendant The City of New York, to the plaintiff, and admitted and construed by defendants to have the force and effect of law and statute; and the steps taken by the plaintiff, in conformity with and in pursuance of the Public Service Commission Law and the powers conferred

upon and delegated to it by the Legislature (including the plaintiff's tariff schedules), to establish an increase in the fare chargeable by the plaintiff on the said elevated lines (Manhattan Division) and to secure a determination by the regulatory authority of the State.

Third Cause of Action: As to the limitations imposed by legislation or acts legislative in character of the State of New York, including the plaintiff's tariff schedules, on the rates of fare chargeable on the Subway Division of the rapid transit railroads operated by the plaintiff, part of which is owned by the plaintiff and part of which is owned [fol. 605] by the defendant The City of New York, and, also, the rate provisions in a certain Contract No. 3 of March 19, 1913, made between the plaintiff and the Public Service Commission of the State of New York for the First District, acting in behalf of the defendant The City of New York, for rapid transit railroad extensions within the City of New York, and admitted and construed by defendants to have the force and effect of law and statute; and the steps taken by the plaintiff, in conformity with and in pursuance of the provisions of the Public Service Commission Law and the power and authority conferred upon and delegated to it by the Legislature, to establish an increase in the fare chargeable on the said Subway Division, and to secure a determination by the regulatory authority of the State.

Fourth Cause of Action: As to not only the subject-matter of the first three causes of action, but, also, as to the fare chargeable on the Subway Division and Manhattan Division of the rapid transit railroads operated by the plaintiff, considered as a unified operation, both under the said legislation or acts legislative in character and under the said Elevated Extension certificate and the said Contract No. 3 for rapid transit railroad extensions, of March 19, 1913.

Fifth Cause of Action: As to not only the matters alleged in the first four causes of action, but, also, as to various acts and threatened action of the defendant Transit Commission and the defendant The City of New York to enforce the continuance of a confiscatory five-cent fare and to prevent the plaintiff from resorting to Court to obtain an adju-

dication of its rights and to test the validity of any limitation to the five-cent fare.

[fol. 606] Allegations as to Orders of Commission to Compel Large Capital Expenditures

The original complaint also set forth and showed the various acts and proceedings of the Transit Commission which contemplated the expenditure by the plaintiff, for capital purposes, of approximately $40,000,000, for or in connection with the extension of subway station platforms and the providing of 432 or other substantial number of additional subway cars, for signals on subway local tracks to be installed after 1931. It set forth in extenso the facts as to the fiscal and operating conditions of the plaintiff as well as to the force of the legislative acts, orders, regulations, leases, contracts and certificates in anywise affecting the validity and enforceability of rate limitations on either or both the Manhattan Division (elevated lines) and the Subway Division of the rapid transit railroad lines operated by the plaintiff.

The pertinency of these allegations as to the various orders made, and one order very definitely threatened, by the Transit Commission, for capital expenditures which would substantially increase the plaintiff's operating expenses and required return, and decrease net earnings which are already inadequate under the present confiscatory fares, may be briefly indicated:

The making of these large capital expenditures would itself be confiscatory and unreasonable, under the present inadequate fares and earnings; and the plaintiff is entitled to equitable protection against all efforts to compel these expenditures. The original complaint asks relief against the enforcement of orders made or threatened as to platforms and new cars (pp. 88-90), and also set forth the unwarranted circumstances under which such orders and threat-
[fol. 607] ened orders are proposed (pp. 55-57; Par. XLV, subd. E). If the fares and net earnings of the plaintiff were permitted to be or become adequate, the propriety of these various orders for additional cars and facilities would be a question of reasonableness; but the defendants may not force them on the plaintiff, plan to compete with

the plaintiff, and still deny the plaintiff the right to an adequate fare (Original Complaint, pp. 55-57).

Broad Scope of Prayer for Relief in the Original Complaint

5. In the complaint in the original action, the plaintiff herein prayed this Honorable Court to grant relief not only as to all matters in controversy between the parties, but as to all matters of right or interest of the parties in the premises which could be declared by judgment (Prayer for Judgment, Original Complaint, pp. 88-91):

The Parties

6. The plaintiff is a railroad corporation incorporated May 1, 1902, pursuant to the provisions of the Railroad Law of the State of New York and Chapter 4 of the Laws of 1891, known as the Rapid Transit Act.

The defendant Manhattan Railway Company is also a domestic railroad corporation incorporated December 29, 1875, pursuant to the provisions of Chapter 606 of the Laws of 1875, then known as the Rapid Transit Act governing steam railroads.

The defendants Gilchrist, Godley and Lockwood constitute the Transit Commission which is the Metropolitan Division of the Department of Public Service of the State [fol. 608] of New York, of which the defendant Prendergast, as Chairman of the Department of Public Service, is the head; and are charged with the administration of the Public Service Commission Law, the Railroad Law, certain provisions of the Rapid Transit Act, and other laws, within their territorial jurisdiction.

The defendant The City of New York is a municipal corporation.

The Interborough Rapid Transit System

7. The plaintiff operates a system of rapid transit railroads, having an aggregate length of over 117 miles of route, and over 388 miles of single track, upon which there were transported during the year ended June 30, 1927, about 1,173,646,256 passengers, 359,019,660 passengers being carried on the Manhattan Division and 814,626,596 passengers being transported on the Subway Division.

The plaintiff's system is divided into two divisions, one known as the "Manhattan Division," and the other known as the "Subway Division." The Manhattan Division comprises the elevated lines, the greater part of which is owned by the Manhattan Railway Company and leased to the plaintiff, and other parts of which were constructed by the plaintiff. The Subway Division consists of the lines constructed under Contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902, and March 19, 1913, and leased to the plaintiff for operation.

The relative contributions to the property in the system operated by the plaintiff is indicated by the following summary of present value of the properties of the system for the year 1927, as shown in the attached affidavit of H. T. Berry, verified February 25, 1928:

[fol. 609] Property provided by Manhattan Railway Company	$142,894,000
Property owned by plaintiff	140,579,474
Other property provided by plaintiff	272,940,174
Property provided by City	342,380,000
Total present value as above, at least	$898,793,648

The company provided property, therefore, represents a present value of at least $556,413,648, out of a total present value of all the properties of $898,793,648.

Rate for Elevated Railroad Line Prescribed by Statute

8. As appears from the complaint, the first cause of action relates solely to statutes which prescribe definite rates for the elevated railroad lines operated by the plaintiff.

The Manhattan Railway Company is the successor of several other railway companies formed between 1867 and 1881 (Complaint, Pars. VI and X, pp. 4-5, 7-9). By Chapter 489 of the Laws of 1867, rates were fixed for the West Side & Yonkers Patented Railway Company, one of the plaintiff's predecessors, of five cents for the first two miles and one cent for each additional mile or fractional part of a mile (Complaint, Par. X, p. 7).

By Chapter 855 of the Laws of 1868, supplementary to Chapter 489 of the Laws of 1867, it was provided that the

payment of the compensation therein described for the use and occupancy of the streets "shall constitute an agreement in the nature of a contract between said City and Constructing Company, entitling the latter or its successors to [fol. 610] the privileges and rates of fare heretofore or herein legalized, which shall not be changed without the mutual consent of the parties thereto as aforesaid" (Complaint, Par. X, pp. 7-8).

By Chapter 595 of the Laws of 1875, The New York Elevated Company, one of the predecessors of the Manhattan Railway Company, was authorized to demand and receive from a passenger on its railroad not exceeding ten cents for any distance of five miles or less and two cents for each additional mile (Complaint, Par. X, p. 8).

By Chapter 885 of the Laws of 1872, the Gilbert Railroad Company was authorized to collect not exceeding ten cents for any distance less than four miles and two cents for each additional mile, except during "commission" hours (Complaint, Par. X, p. 8).

The articles of incorporation of the Manhattan Railway Company, pursuant to Chapter 606 of the Laws of 1875, authorized and provided for a rate of fare for any distance under five miles not to exceed ten cents and two cents for each additional mile, but not exceeding in the aggregate 15 cents for a through passage, with certain variations depending upon the distance and the period of travel (Complaint, Par. X, pp. 8-9).

The articles of association of the New York, Fordham & Bronx Railway Company also authorized and provided for a rate of ten cents, except during "commission" hours (Complaint, Par. X, p. 9).

The articles of association for the Suburban Rapid Transit Company, pursuant to the same act, authorized a rate of ten cents, except during "commission" hours (Complaint, Par. X, p. 9).

[fol. 611] Notwithstanding the foregoing statutory provisions which authorized the Manhattan Railway Company or its predecessors to charge more than five cents per passenger, and the assurance that the right of the West Side & Yonkers Patented Railway Company to charge rates in excess of five cents was to "constitute an agreement in the nature of a contract" between the City and the Company,

the Legislature of New York, by Chapter 743 of the Laws of 1894, prescribed a maximum rate of five cents per passenger upon the Manhattan Elevated Railway Company's lines (Complaint, Par. XI, pp. 10-11).

Other Statutory Provisions Regulating the Plaintiff's Fare

9. The former Rapid Transit Act of 1875 (now Article 6 of the Railroad Law) authorizes (in Section 229) corporations organized under it, as were a number of the predecessors of the Manhattan Railway Company, but subject to the provisions of the Public Service Commission Law, "to receive compensation for transportation of persons and property" (Complaint, Par. X, pp. 9-10).

The Public Service Commission Law, Section 26, provides that all charges made by a common carrier shall be just and reasonable. Section 28 of the law provides for the filing and publication of tariff schedules and the establishment of rates by a common carrier. Section 29 of the law provides the mode by which a common carrier is empowered to change rates set forth in its published schedule, and also empowers the Commission, upon the filing of changes in such schedule, to order hearings, suspend the rates and determine the rates to be charged. Section 49, subdivision 1, empowers the Commission, after a hearing and after forming an opinion as to whether the rates are [fol. 612] reasonable "or in anywise in violation of any provision of law," to determine the just and reasonable rates. Section 33, subdivision 1, prohibits a common carrier from operating until publication of a rate schedule, and prohibits any deviation from such schedule (Complaint, Par. XIII, pp. 12-17).

The Public Service Commission has prescribed regulations for the filing, posting and publishing of tariff schedules by common carriers and for making changes therein (Complaint, Par. XVI, pp. 19-21). In compliance with the Commission's orders, the plaintiff has filed tariff schedules showing its rates, the tariff schedules on file before February 1, 1928, showing an effective rate of five cents per passenger. Section 33, subdivision 1, of the Public Service Commission Law operates, therefore, to require the plaintiff to charge a rate of five cents per passenger, as set forth in its tariff schedule, until changed by the carrier or

the Commission, in the manner provided by law (Complaint, Par. VI, p. 22).

Confiscatory Effect of Statutory Rate Limitation on the Elevated Railroad Lines

10. The complaint and the moving papers show the confiscatory effect of the five-cent fare on the Manhattan Division operated by the plaintiff (Complaint, Pars. XVII to XIX, pp. 23-27). The complaint also shows the damage or injury threatened to the plaintiff, the lack of an adequate remedy except inequity, and the jurisdictional fact as to the value of the property involved (Complaint, Pars. XX to XXIV, pp. 27-31).

[fol. 613] Rate Limitation on Elevated Railroad Lines under the Certificate to the Plaintiff of March 19, 1913

11. The second cause of action covers the matters embraced in the first cause of action, and shows the certificate for elevated railroad additional tracks to the Manhattan Railway Company and the certificate for elevated railroad extensions to the plaintiff, both granted on March 19, 1913, by the Public Service Commission for the First District, acting in behalf of the City of New York (Complaint, Par. XXVI, p. 31). The certificate granted to the plaintiff for extensions to the elevated lines contained a provision fixing the rate of fare on the elevated lines at five cents per passenger (Complaint, Par. XXIX, p. 33).

The certificate to the Manhattan Railway Company for elevated railroad additional tracks contains no provision as to the rate of fare.

The provisions of the Rapid Transit Act as to the rate of fare on rapid transit railroads are set forth in paragraph XIV of the complaint (pp. 17-19).

The Rapid Transit Act, in its provisions relating to extensions of non-municipal railroads, contained no authorization or requirement for the fixing of a rate of fare.

Rate Limitation on Subway Division under Contracts Nos. 1, 2 and 3

12. The third cause of action relates more particularly to the construction and lease by the City to the plaintiff of

the subway rapid transit railroads, under Contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902 and March 19, 1913 (Complaint, Pars. 37 and 39, pp. 41-43). The complaint also sets forth the provisions in [fol. 614] the lease portion of the contracts as to the rate of fare (Complaint, Par. XLI, pp. 44-47).

Rate Limitation on Subway Division and Manhattan Division, Considered as a Unfied System

13. The fourth cause of action relates to the fare limitations upon the Subway Division and the Manhattan Division of the rapid transit railroads operated by the plaintiff considered as a whole, under all of the statutes and provisions referred to in the first three causes of action.

Fare Stipulation Subject to Regulatory Power of State, to be Exercised Directly or by Deelgation to the Commission or the Comomn Carrier

14. As to each the second, third and fourth causes of action, the complaint shows that the contracts and certificates made in behalf of the City of New York for rapid transit railroad construction, lease and operation, were subject to the regulatory power of the State to change the rates of fare, and that the rates of fare chargeable by the plaintiff were not in any case fixed as a condition of the Constitutional consent of the local authorities (Complaint, Pars. XXX and XLIII, pp. 33-35, 47-49).

The defendant Transit Commissioners and The City of New York have admitted and construed the rate provisions in the Certificate and Contracts to have the force and effect of "law" and "statute." (See affidavits of defendants in Ancillary Action herein.)

Confiscatory Effect of the Five-cent Fare Limitation Upon the Subway Division

15. The inadequacy and confiscatory effect of the five-cent fare on the subway line is shown by the complaint and [fol. 615] the annexed moving papers (Complaint, Par. L, pp. 64-70); as are also changes in conditions which have supervened to render the five-cent fare inadequate, unrea-

sonable and confiscatory (Complaint, Par. XLIV, p. 49), and the complete and uncontemplated change, since March of 1913, in many factors pertinent to the stipulations then deemed to be proper and in the public interest and vitally affecting the reasonableness and propriety of the continuance of the fare limitations inserted in the rapid transit railroad leases then consummated and in the elevated extension certificate then granted (Complaint, Pars. XLV, XLVI, pp. 50-57).

The complaint also shows that street railroad fares in other parts of the State of New York have been fixed by the Public Service Commission in excess of five cents (Complaint, Par. XLV, p. 51-52).

It sets forth the proceedings taken by the Public Service Commission which contemplate capital expenditures of nearly $40,000,000, and which would entail very substantial increased expenses and fixed charges, also the increased operating expenses of the plaintiff in prospect for additional wages, additional service, and additional maintenance (Complaint, Pars. XLVII, XLIX, LI, pp. 60-64, 67-71).

Prior Applications to Commission for the Fixing of an Increased Fare Denied by Commission, Resulting in Requirement for Continuance of Five-cent Fare

16. Two prior applications by the plaintiff to the Public Service Commission for the First District or the Transit [fol. 616] Commission, the predecessors of the present Transit Commission, under the provisions of the Public Service Commission Law, in 1920 and 1922, resulted in orders dismissing the applications (Complaint, Par. XLVI, pp. 58-59).

It is alleged (Complaint, Par. XLVI, subd. c, p. 59) that—

"The said Public Service Commission for the First District and the said Transit Commission each has construed and interpreted the provisions of the said Public Service Commission Law so as to require and compel the plaintiff, by the said orders of dismissal made by the said Commissions, respectively, to observe and charge upon each the Subway Division and the Elevated Division of the rapid transit

lines operated by it a rate of fare of five cents per passenger, and no more; and, by reason of the tariff schedules theretofore published, posted and filed by the plaintiff establishing a rate of fare of five cents per passenger on each of the said divisions of its rapid transit railroad lines, the provisions of the said Public Service Commission Law and the said orders made by the said Commissions, respectively, relative to tariff schedules from which the plaintiff may not deviate and to the dismissal of the said applications or complaint, operated to require and compel the plaintiff to observe such fare of five cents per passenger and to prohibit the plaintiff from charging any rate of fare in excess of such rate of five cents per passenger."

Steps Taken by Plaintiff, in Pursuance of Power Delegated to it by Statute, to Establish a Fare of Seven Cents

17. The complaint and moving papers show that, as a common carrier subject to the provisions of the Public [fol. 617] Service Commission Law, the plaintiff, by action duly taken by its directors and officers, in pursuance of the authority and powers conferred by law, fixed, determined and established a fare of seven cents per passenger as the rate hereafter to be charged and collected instead of a fare of five cents from each passenger, upon each the Manhattan Division and the Subway division of the rapid transit railroad lines operated by the plaintiff, and accordingly on February 1, 1928, filed, published and posted tariff sheets, changing the fare from five cents to seven cents, effective March 3, 1928; and that, by reason of Section 33, subdivision 1, of the Public Service Commission Law, the plaintiff is prohibited from charging any other rate than that prescribed in the tariff schedule (Complaint, Pars. XXXII-XXXIII, pp. 35-37).

Denial by the Transit Commission of Relief from Five-cent Fare and Prevention by it of a Compensatory Rate

18. The plaintiff also made application to the Transit Commission for special permission to put the new rate of seven cents into effect upon not more than five days' notice, and to approve the same, for reasons which were set forth at length in a petition filed with the Transit Commission,

and which showed continued daily confiscation of property under the five-cent rate (Complaint, Par. XXXIV, pp. 37-39).

The particular reason for filing such a verified petition, along with the schedules was to place before the Transit Commission a careful statement of the considerations of law and fact which had led the plaintiff to file the amendatory schedule leaves for a seven-cent fare and to hope for the favorable action of the Transit Commission.

[fol. 618] The Plaintiff's Application to the Transit Commission for a Hearing as Provided by Law

19. As stated above and as shown in the original complaint in this action, the plaintiff had already made two applications to the Transit Commission and its predecessor, under Section 49 of the Public Service Commission Law, for relief from the inadequate five-cent fare, with the result that in each instance the Commission had determined that, under Section 49, it had no jurisdiction or power to grant relief from the five-cent fare and had determined that this inadequate fare must be continued.

In my opinion this reiterated ruling was erroneous in law, and the plaintiff was not required to present such an application again to the Commission, before appealing to this Court for relief from the confiscatory effect, not only of the provisions of the statute which directly imposed upon the Interborough Company such a fare, but also of the orders and determinations of the Commission, under powers delegated to it by the Legislature, which operated to continue such limitations and which denied to the plaintiff that relief which the State's regulatory plan had vested it with the power and duty to grant.

Although the right of the plaintiff to resort to the Courts for relief from the determinations of the Commission, as well as from the statutory rate imposed by Chapter 743 of the Laws of 1894, and from the other provisions of law or statute which compelled observance of the five-cent fare limitation, had undoubtedly accrued prior to February 1, 1928, the plaintiff, under the advice of counsel, determined to present the matter further to the Commission by an exercise of the power and a following of the procedure author-

ized by Sections 28 and 29 of the Public Service Commis-
[fol. 619] sion Law, as to which, under the plain wording of the statute and the decisions of the Court of Appeals, no limitation is prescribed such as that which the Transit Commission had made the basis for determining that the five-cent fare must be continued, as against an application under Section 49. The petition of the plaintiff to the Commission of February 1, 1928, a true copy of which will be submitted upon the hearing of the application for an interlocutory injunction, was, moreover, broad enough to warrant the Commission in invoking, upon its own motion or upon the petition, any and all powers which the Commission in invoking, if it were so disposed, upon its own motion or upon the petition, any and all powers which the Commission had, including those under Section 49 of the Public Service Commission Law. The petition, at the outset, "applies, under Section 29 of the Public Service Commission Law, for an order granting permission to put in effect upon not more than five days' notice after publication at stations and filing with the Commission," the specified tariff sheets changing the fare to seven cents; and concludes:

"Wherefore, the Interborough Rapid Transit Company respectfully applies to your honorable Commission, *pursuant to the powers which have been vested in you by law*, to *approve* the said Thirteenth Revised Sheet No. 1 to I. R. T. No. 2," etc.

The plaintiff greatly desired, and reasonably expected, that the members of the Transit Commission would deal with the schedules and with the petition of February 1, 1928, open-mindedly and in their quasi-judicial capacity, and that after the amendatory schedules had been duly filed, and so accepted and stamped by the Transit Com-
[fol. 620] mission, the latter would deal with them in the regular and familiar course, under the procedure prescribed by Sections 28 and 29, and would reach a determination, after the hearing required by the statute, whether the fares shown in such schedules "are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law."

The Interborough Company's Earnest Appeal for an Opportunity to be Heard Before the Transit Commission

20. When definite statements began to appear in the public press (the then apparent reliability of which statements has since been fully confirmed by the action of the Transit Commission) to the effect that the Transit Commission and its legal advisors proposed to disregard the statutory procedure and its quasi-judicial duty, in the furtherance of some plan for preventing the Interborough Company from instituting any Federal action to enforce the guaranties of the Fourteenth Amendment, counsel for the plaintiff were still reluctant and unwilling to believe that the members of the Transit Commission, under the advice of its chief counsel, would do any such thing, particularly if they were brought to a direct realization of the earnest desire of the plaintiff to have the matter heard on the merits, in an orderly way, before the State regulatory tribunal.

In view of the persistent public announcement of a joint program of the Transit Commission and The City of New York, along the lines above indicated, the plaintiff, on February 8, 1928, which was after the five-day period indicated in the Company's petition had expired, nevertheless sent [fol. 621] to the Transit Commission a direct appeal that the matter of its increased fares be dealt with according to the statutory procedure, as follows (italics mine):

"February 8, 1928.

Honorable John F. Gilchrist, Chairman Transit Commission, 270 Madison Avenue, New York City.

Dear Sir: Some of yesterday afternoon's newsapers stated that the Transit Commission had notified the Interborough Rapid Transit Company that the Commission will hold a hearing today upon the application filed by this Company on February 1, 1928. Lest any public impression be created of default by this Company in any desired appearance, I advise you that no notice of any public or other hearing upon this matter has been received by this Company. It may be that this inference of a hearing before you upon our application arose from its appearance as an item upon your calendar for today.

"In order to make our position altogether clear to you, however, I desire to inform you that representatives of this Company will be glad to appear before you in behalf of our application at any time you may appoint. The allegations of our petition are made under oath and will be supported with proof. According to the reports, the members of the Transit Commission have spent a large part of the past six days in conference with counsel for those opposing the peti- [fol. 622] tion then pending before you in a judicial capacity; in equal fairness now you may be willing to hear the facts and argument in support of the position, in the public manner hereinafter suggested.

"I have seen no reason suggested why our new schedules should not go into effect promptly as to our elevated lines. Commissioner Ryan of the Board of Transportation of the City of New York was publicly quoted on February first as recognizing the inadequacy of the five-cent fare on our elevated lines. Published statements of City Officials during the past six days have contained no facts or figures indicating that a five-cent fare on the subways is possibly sufficient for proper maintenance of the operating properties and the rendering of the best possible service to the public. Their statements as to our application have so far dealt mostly with a claim that, irrespective of the inadequacy of a five-cent fare and its effects on our patrons and all tax-payers and rent-payers, the City of New York should try to hold the Company to the fare stipulated in 1913. Whether such a present effect, as to any part of our subway system, is to be given to the 1913 contract, is, of course, a question of law which will have to be settled by the Courts; but Sections 28 and 29 of the Public Service Commission law contain no such limitation on your jurisdiction, power and responsibility in acting upon our application and schedules as to each our elevated lines and our subway lines. The New York Courts have held that a reasonable rate, higher than that stipulated by franchise or contract, may be made effective and lawful by the procedure which [fol. 623] this Company has followed under the advice of counsel. The way must be deemed fairly open to an adequate fare which will protect our patrons and our property; and, in the language of the United States Supreme Court

(270 U. S. 587, 591-592), the Transit Commission is the 'tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation.'

"If this duty and responsibility is to be disregarded by you and action taken without consideration by you of the confiscatory character of the five-cent fare and its ruinous effects upon rapid transit service, the Interborough Company will have no recourse but to bring the indisputable facts before a tribunal which may not disclaim the power and jurisdiction which today is yours. If, however, as this Company hopes, you will definitely take jurisdiction of our rates and proceed upon any proper complaint to determine the facts which will show whether or not our filed 7-cent rate is excessive, counsel for this Company will be glad to attend before you and arrange for the presentation of our contentions and proofs in the orderly course as above suggested. If you are unwilling to do this and to face the facts as to the utter inadequacy of our present elevated and subway fares, then it will be your refusal which transfers future consideration of these fares to another tribunal. Yours also will be the clear responsibility for any public [fol. 624] consequences of the traffic conditions made worse by your failure to grant prompt relief.

Yours truly, J. L. Quackenbush" (General Counsel for the Interborough Rapid Transit Company).

The Commission Never Granted Plaintiff's Request for Hearing

21. The very earnest request above quoted, with the very definite warning that it would be the Commission's refusal to accord a hearing which "transfers future consideration of those fares to another tribunal," was never acceded to by the Transit Commission, and the letter was never replied to or acknowledged. It now appears, from the statement made by Samuel Untermyer, Esq., the special counsel for the Transit Commission, in open court on February 21, 1928, before District Judge Bondy, that within three days from the filing of the Interborough Company's schedules and application of February 1, 1928, with that body, papers

were prepared and ready which were presented to the Court by the Transit Commission and the Corporation Counsel on February 14th, in suits in the New York State Court to compel the observance of the five-cent fare as being imposed by "law" and "statute." In other words, as to a matter pending before the Transit Commission, in its quasi-judicial capacity, and as to which a very earnest appeal had been made for an open-minded hearing according to the procedure prescribed by the statute, the judicial body had acted in concert with the City of New York, had refused to accord to the Company a hearing such as is expressly provided for by Section 29 and Section 49, subdivision 1, of the Public Service Commission Law, and had prepared papers for the [fol. 625] summary enforcement of the quasi-judicial determination which was not made until February 14th.

On February 14, 1928, and after the commencement of this action, the Transit Commission, at a special session of which the public and the plaintiff had been given no notice, and without serving it upon the plaintiff, and without giving the plaintiff any opportunity to apply for a rehearing or any opportunity to institute certiorari proceedings in the State Courts or the orderly review of that determination, made a purported order "rejecting" the plaintiff's filed tariff sheets, and passed a purported resolution directing the Commission's counsel to institute a summary proceeding in the New York State Court, under Section 57 of the Public Service Commission Law, to compel the plaintiff to observe the five-cent fare as enjoined by "law."

Such action was taken by the said Transit Commission, notwithstanding that the said tariff sheets had actually been accepted by the said Commission and had been filed by it, and been kept on its files, since February 1, 1928, and notwithstanding that the Public Service Commission Law of the State of New York, Section 16, provides that all documents and records in the possession of the said Transit Commission shall be "public records." Such purported resolution and purported order were adopted and made by the said Transit Commission ex parte and without any prior notice to this plaintiff, and without giving the plaintiff any opportunity to be heard in respect thereto, and, in my opinion, were wholly unauthorized, and constituted a denial by a State agency of legislative or ad-

[fol. 626] ministrative relief, and thereby the Transit Commission has so misconstrued and misapplied the laws as to compel observance of the five-cent rate of fare and to prevent permanently a compensatory rate herein, from which there is no relief except by resort to this Honorable Court; and, furthermore, said order is in conflict with the laws and Constitution of the State of New York and with the guaranties of the Constitution of the United States.

22. The fifth cause of action also shows various acts and threatened action by the defendant Transit Commission and the defendant The City of New York to enforce the continuance of a five-cent fare and to prevent the plaintiff from resorting to this Court to obtain an adjudication of its rights to test the validity of any limitations to the five-cent fare (Complaint, Pars. LXV to LXXI, pp. 83-87).

Fare Limitations Summarized

It will then be seen that the fare limitations arise from—

(1) Acts of the Legislature specifically prescribing a five-cent fare on the elevated railroad lines, and particularly Chapter 743 of the Laws of 1894;

(2) The provisions of the Public Service Commission Law which require the publication and filing of tariff schedules, prohibit transportation without such filing, prohibit changes except upon notice, and prohibit the charging of any other or different rates; the orders of the Public Service Commission made pursuant thereto; and the tariff schedules filed by the plaintiff, prior to February 1, 1928, establishing the five-cent rate.

[fol. 627] (3) The provision in the elevated extension certificate granted to the plaintiff March 19, 1913, prescribing a rate of fare of five cents per passenger, although the Rapid Transit Act under which it was granted contained no authorization for prescribing such a rate of fare, which provision has been declared by the Transit Commission, by action taken by it on February 14, 1928, to have "the force of law," and has been admitted and asserted by the Corporation Counsel of The City of New York (at folio 80 of his affidavit, verified February 21, 1928, and submitted

to this Court in the ancillary action) to "have the force and effect of statutes";

(4) The provision in the Contract No. 3 of March 19, 1913, prescribing a rate of fare of five cents per passenger, which has been admitted and construed by the Commission and The City of New York to have the force and effect of "law" and "statute." Under the Rapid Transit Act and the Public Service Commission Law, the plaintiff is required to make such charges as are reasonable; the Commission is empowered to stipulate rates of fare "best suited to the public interest"; the power of the Public Service Commission to fix rates is expressly reserved, and the Commission has been given no power to fix immutably rates to be charged by the plaintiff;

(5) The power delegated by the State Legislature to the Transit Commission to prescribe reasonable rates, after hearing, notwithstanding that other or different rates are prescribed by statute, franchises or contracts other than rates stipulated in constitutional consents granted before [fol. 628] the said Commission and its predecessors were created, which power the Commission has unlawfully refused to exercise;

(6) The power delegated by the Legislature to common carriers to establish reasonable rates by the filing of tariff schedules in the manner prescribed by statute, notwithstanding that other or different rates have been prescribed by statute, contracts or franchises;

(7) The orders made by the Public Service Commission and the Transit Commission, in 1920 and 1922, denying the applications of the plaintiff for an increase in rates, and so requiring the plaintiff to observe the five-cent fare;

(8) The denial by the present Transit Commission of legislative or administrative relief, compelling observance of the five-cent rate and preventing a compensatory rate.

Threatened Acts of Damage

24. The threatened enforcement by the defendants constituting the Transit Commission of the City of New York of the five-cent fare limitation has, have since the com-

mencement of this action become an actuality, by the institution by the Transit Commission of a summary proceeding under Section 57 of the Public Service Commission Law to enjoin the plaintiff from charging a rate of seven cents per passenger, as a violation of "law," and to compel the plaintiff to charge not more than a rate of five cents; by the contemporaneous institution of an action by the Transit Commission, acting in behalf of The City [fol. 629] of New York and another action by The City of New York, through its Corporation Counsel, asking for a similar injunction against the plaintiff, which suits were instituted in the New York State Supreme Court, County of New York, subsequent to the commencement of this action in this Court. The facts as to these State Court suits are more fully shown in the ancillary complaint and the plaintiff's moving affidavits in the ancillary action herein (In Equity, No. E 44-229).

Wherefore, in behalf of the plaintiff Interborough Rapid Transit Company, and in pursuance of the authorization of its Board of Directors, I submit the annexed application for an interlocutory injunction for the relief prayed for in the complaint, and for a temporary restraining order to the like effect pending the hearing and determination of the application for an interlocutory injunction; for which no previous application has been made to any Court or Judge.

Ralph Norton.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No. 17, Bronx Register No. 2966. N. Y. County No. 335, N. Y. Register No. 9258. Kings County No. 38, Kings Register No. 9168. Queens Co. No. 2562, Queens Register No. 5006. Term expires March 30, 1929.

[fol. 630] [Title omitted]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

HENRY T. BERRY, being duly sworn, deposes and says:

1. I reside in Chatham, N. J., and am the Comptroller, and chief accounting officer, of the Interborough Rapid Transit Company, the plaintiff herein. I submit this affidavit in support of an application to be made to this Court for a preliminary injunction and for other relief.

2. I have been continuously employed in, or as the head of, said accounting department of the plaintiff for twenty-five years, and the facts herein alleged as to the financial [fol. 631] history, capitalization, earnings, expenses, taxes, fixed charges and rentals of or paid by the said plaintiff are based upon knowledge acquired by me as the result of such lengthy experience and in the regular course of my duties, all of the books of account of Interborough Rapid Transit Company being in my custody and control.

The allegations herein made with respect to the capitalization and other financial details of the defendant Manhattan Railway Company are based upon knowledge acquired by deponent during the period from 1903 to 1913, when the books of account of said defendant Manhattan Railway Company were in the custody of and kept by the chief accounting officer of its lessee, the Interborough Rapid Transit Company, and since 1913, from annual and other periodic reports of said defendant Manhattan Railway Company made to the Transit Commission and other governmental authorities, copies of which are regularly furnished or submitted to the plaintiff, Interborough Rapid Transit Company, for its information. In particular, the facts herein alleged as to the investment of said defendant Manhattan Railway Company in its elevated railroad lines as of June 30, 1926, and June 30, 1927, respectively, are based upon a detailed examination made by me and my assistants of the corporate balance sheets of said defendant Manhattan Railway Company of June 30, 1926, and June 30, 1927, respectively.

[fol. 632] The Interborough System

Proportion of Properties Provided by the Manhattan Railway Company, The City of New York, and the Plaintiff

3. The plaintiff operates and manages various rapid transit railroad lines within the City of New York, parts of which are owned and leased by the defendant Manhattan Railway Company; other parts of which are owned and leased by defendant The City of New York; and still other parts of which are owned by the plaintiff. The System is divided, as shown by the tariff schedule filed by the plaintiff with the Public Service Commission, into what is known as the "Manhattan Division" and the "Subway Division."

The Manhattan Division consists principally of the elevated railroad lines owned by the Manhattan Railway Company and leased on or about January 1, 1903, by the Manhattan Railway Company to the plaintiff. The Manhattan Division also includes certain elevated additional tracks which were constructed by the plaintiff under and in pursuance of a certificate for additional tracking of elevated lines granted to the Manhattan Railway Company by the Public Service Commission for the First District, acting in behalf of the City of New York, on March 19, 1913, and passed by the Manhattan Railway Company to the plaintiff. The Manhattan Division furthermore includes certain extensions of the elevated lines which were constructed by the plaintiff under and in pursuance of a certificate for elevated railroad extensions granted by the Public Service Commission for the First District to the plaintiff, on March 19, 1913.

The Subway Division consists of the subway rapid transit railroads which were built and equipped and are leased [fol. 633] to the plaintiff for operation under and in pursuance of Contracts Nos. 1, 2 and 3, made between the plaintiff, or its assignors, and the Public Service Commission for the First District, or its predecessors, and dated, respectfully, February 21, 1900, July 21, 1902, and March 19, 1913.

The pertinent provisions in the leases from Manhattan Railway Company and the City of New York to the plaintiff are set forth in the complaint.

4. The relative proportions of property provided by the plaintiff and of property provided by The City of New York, operated by the plaintiff as a part of the Interborough System, including both elevated lines and subway lines, will be apparent from the following classification of the properties of the System for the year 1927, according to the plaintiff's estimates of the present value of the property provided by the plaintiff and the Manhattan Railway Company, and to the estimate by the Transit Commission engineers of the reproduction cost of the property provided by the City:

Property provided by Manhattan Railway Company	$142,894,000
Property owned by plaintiff	140,579,474
Other property provided by plaintiff	272,940,174
Property provided by City	342,380,000
Total present value, as above, at least	$898,793,648

It will thus be seen that out of a total present value of the properties of the System in 1927 of at least $898,793,648, as above stated, the property provided by the plaintiff (including the Manhattan Railway Company) represented $556,413,648, while property provided by the City represented $342,380,000.

[fol. 634] Outstanding Capitalization and Securities of the Plaintiff and the Defendant Manhattan Railway Company

5. As of June 30, 1927, the plaintiff had issued and outstanding 350,000 shares of its common capital stock of the par value of $100 each, or a total of $35,000,000 par value of common capital stock; first and refunding mortgage 5 per cent. gold bonds due January 1, 1966, of the principal amount of $162,700,000; ten-year 7 per cent. notes due September 1, 1932, ten-year 6 per cent. notes due October 1, 1932, and three-year secured convertible 7 per cent. and 8 per cent. gold notes, of the principal amount of $44,331,500; equipment trust certificates Series A at 6 per cent., Series B at 6½ per cent., and Series C at 6 per cent., of the principal amount of $2,890,000.

As of June 30, 1927, the charges to the plaintiff's fixed capital (as that term is defined by the Uniform System of Accounts prescribed by the Public Service Commission for the First District and in accordance with which the plaintiff's accounts have been and are kept) was, for the Subway Division of the rapid transit railroads operated by it, $181,375,787, and for the Manhattan Division of the rapid transit railroad lines operated by it $44,116,549, or a total of such fixed capital of the plaintiff of $225,492,336.

As of December 31, 1927, the only changes in outstanding capital stock and other securities of the plaintiff from the totals just stated above, are: $3,768,000 First & Refunding Mortgage 5% Gold Bonds have been issued, with the approval of the Transit Commission, and $247,000 of 10-Year 7% Notes, and $1,020,000 of the Equipment Trust Certificates have been retired.

[fol. 635] The changes in the plaintiff's fixed capital to December 31, 1927, as compared with the statement hereinabove, was a total increase of $934,744.14, of which $864,798.75 was for the Subway Division and $69,945.39 was for the Manhattan Division.

As of January 31, 1928, and substantially since then, the defendant Manhattan Railway Company had outstanding consolidated common capital stock of the par value of $60,000,000; Manhattan consolidated 4 per cent. bonds of the principal amount of $40,671,000; Manhattan second mortgage bonds of the principal amount of $4,523,000. As of January 31, 1928, the fixed capital of the defendant Manhattan Railway Company amounted to $112,943,654.

Rental Payable to the City of New York

6. By the provisions of subway contracts the plaintiff paid to the defendant The City of New York, a rental for the subway lines built under Contract No. 1 and Contract No. 2, the sum of $2,655,186.26, for the year ended June 30, 1926, and the sum of $2,655,569.91 for the year ended June 30, 1927.

By the terms of the Certificate granted March 19, 1913, to the Manhattan Railway Company, authorizing the construction and maintenance of certain third or additional tracks to the original elevated lines, the plaintiff paid to the defendant The City of New York, as compensation for the

rights so granted, the sum of $31,797.11 for the year ended June 30, 1926, and the sum of $34,411.92 for the year ended June 30, 1927.

[fol. 636] Rental Payable under Manhattan Railway Lease

7. By the terms of the lease of the elevated lines, made by defendant Manhattan Railway Company to plaintiff, dated January 1, 1903, and running for a period of 999 years from November 1, 1875, the lessee (plaintiff) paid to the lessor (the defendant Manhattan Railway Company), as rental, prior to the 1922 Readjustment hereinafter mentioned, the following:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Company	$1,627,320.00
Interest upon Second Mortgage Bonds of the Manhattan Company	180,920.00
Cash rental	35,000.00
7% guaranteed dividend rental on $60,000,000 of Manhattan Railway Company stock	4,200,000.00
Total	$6,043,240.00

Incidental to a certain Interborough-Manhattan Readjustment Plan of 1922, agreements were made by the plaintiff: (a) With the defendant Manhattan Railway Company, increasing the amount paid annually as cash rental to $50,000; and (b) with the holders of over 90 per cent. of the outstanding capital stock of the defendant Manhattan Railway Company, whereby, as to such stock, the guaranteed dividend rental rate of 7 per cent. per annum was reduced to 3 per cent. for the year ending June 30, 1923, 4 per cent. for the year ending June 30, 1924, and 5 per cent. thereafter, with the further provision that payment at such reduced rates should be made, cumulatively, only if and when earned either by the Interborough (plaintiff's) system as a whole, or by the Manhattan (defendant Manhattan railway Company's) leased lines, in accordance with a formula contained in such agreements. For the year ending June 30, 1927, the revised rental so payable was as follows:

[fol. 637]

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Railway Company	$1,627,320.00
Interest upon Second Mortgage Bonds of the Manhattan Railway Company	180,920.00
Cash rental	50,000.00
7% dividend rental on certain stock of the Manhattan Railway Company not participating in the plan	303,898.00
5% dividend rental on the remainder of Manhattan Railway Company stock participating in the plan	2,782,858.00
Total	$4,944,996.00

For the year ending June 30, 1926, the aggregate of the revised rental so paid was $4,924,726.

The said Plan of Readjustment was adopted with the full concurrence and approval of the said Transit Commission or its predecessor.

Actual Revenues and Operating Expenses and Fixed Charges, on Rapid Transit Railroad System Operated by the Plaintiff

8. The following analysis and summary of the operating corporate income account of the plaintiff for each of the two fiscal years ending June 30, 1926, and June 30, 1927, respectively, shows separately the income for said years of each the Manhattan Division and the Subway Division and of the Interborough System as a whole. The tables below are correct transcripts from the books and ledgers of the plaintiff in my custody and they are in full accord with the verified reports for said years filed with the Transit Commission as required by law. In each of said tables, Item 7, described as "Excess Maintenance," is the amount expended for maintenance in excess of 14% of the Revenue on the Manhattan Division and 17% on the Subway Division, and Item 11, described as "Available for Charges on Company and City Property," is the maximum amount [fol. 638] earned by way of a return on the properties operated by the plaintiff and devoted to the public service.

Year Ended June 30, 1926

	Manhattan	Subway	System
1. Gross Income	$5,410,969 19	$19,683,229 17	$25,094,198 36
Less:			
2. Manhattan Cash Rental	$50,000 00	$	$50,000 00
3. Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4. Amortization of Debt Discount and Expense	27,771 92	41,539 07	69,310 99
5. Interest on Unfunded Debt	240,543 27	5,567 25	246,020 52
6. Other Rent Deductions	1,156,347 50	*176,002 00	981,345 50
7. Excess Maintenance			
8. Total	$1,474,572 69	$79,095 68	$1,395,477 01
9. Balance	$3,936,396 50	$19,762,324 85	$23,698,721 35
10. Additional Manhattan Income Taxes			
11. Available for Charges on Company and City Property	$3,936,396 50	$19,762,324 85	$23,698,721 35
12. City Rental under Contracts Nos. 1 and 2		2,655,186 26	2,655,186 26
13. Available for Charges on Company Property	$3,936,396 50	$17,107,138 59	$21,043,535 09
Charges:			
14. Interest on Bonds (Rental)	$1,808,240 00	$2,655,186 26	
15. Manhattan Dividend Rental	3,096,486 00		
16. Interest on 5% Bonds	1,445,243 54	6,628,823 15	
17. Interest on 7% Notes	1,088,456 20	1,290,617 04	
18. Sinking Fund on 5% Bonds	631,949 12	1,821,804 16	
19. Interest on 6% Notes	21,899 99	504,999 37	
20. Interest on Equipment Trust Certificates		291,321 84	
21. Total	$8,062,274 85	$13,192,751 82	$21,255,026 67
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,125,878 35	$6,569,573 03	$2,443,694 68
Passengers carried	346,204,574	784,280,073	1,130,484,647

* Expenditures under 17% of the Revenue on the Subway.
D.—Deficit.

Year Ended June 30, 1927

	Manhattan	Subway	System
1. Gross Income	$5,035,275.70	$19,455,499.61	$24,490,775.31
Less:			
2. Manhattan Cash Rental	$50,000.00	$.....	$50,000.00
3. Interest on Investment of Depreciation Reserve	.....	48,800.00	48,800.00
4. Amortization of Debt Discount and Expense	17,482.43	39,452.84	56,935.27
5. Interest on Unfunded Debt	228,717.91	3,739.20	232,457.11
6. Other Rent Deductions	1,570,287.08	*90,465.88	1,479,821.20
7. Excess Maintenance	.....	.....	.....
8. Total	$1,866,487.42	$1,526.16	$1,868,013.58
9. Balance	$3,168,788.28	$19,453,973.45	$22,622,761.73
10. Additional Manhattan Income Taxes	.....	.....	.....
11. Available for Charges on Company and City Property	$3,168,788.28	$19,453,973.45	$22,622,761.73
12. City Rental under Contracts Nos. 1 and 2	.....	2,655,569.01	2,655,569.01
13. Available for Charges on Company Property	$3,168,788.28	$16,798,404.44	$19,967,192.72
Charges:			
14. Interest on Bonds (Rental)	$1,808,240.00	$2,655,569.01	
15. Manhattan Dividend Rental	3,086,756.00		
16. Interest on 5% Bonds	1,457,159.47	6,640,807.15	
17. Interest on 7% Notes	1,082,562.93	1,280,222.33	
18. Sinking Fund on 5% Bonds	611,809.92	1,764,185.74	
19. Interest on 6% Notes	31,389.62	517,346.88	
20. Interest on Equipment Trust Certificates	.....	215,825.00	
21. Total	$8,077,917.94	$13,073,956.11	$21,151,874.05
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,909,129.66	$6,380,017.34	$1,470,887.68
Passengers carried	359,019,660	814,626,596	1,173,646,256

* Expenditures under 17% of the Revenue on the Subway.
D.—Deficit.

[fol. 640] Investment in Property Provided by the Companies and by The City of New York

9. The following table shows a computation of the investment of the plaintiff, of the defendant Manhattan Railway Company and of the defendant The City of New York, in the entire system of rapid transit railroads operated by the plaintiff as of June 30, 1926, and June 30, 1927, respectively. In so far as said computation relates to property owned or furnished by the plaintiff, the figures were obtained from the balance sheets of Interborough Rapid Transit Company prepared by me or under my direction as of June 30, 1926, and June 30, 1927. In so far as said computation relates to property owned by the Manhattan Railway Company, the figures were obtained from the balance sheets of the defendant Manhattan Railway Company as of June 30, 1926, and June 30, 1927, copies of which had been furnished to me as hereinbefore alleged. In so far as said computation relates to property furnished and owned by The City of New York, the figures were obtained from the annexed affidavit of W. S. Gorsuch, verified February 25, 1928.

The item "Materials and Supplies," under the heading "Miscellaneous Interborough Items," is the cost of material in the hands of the Company, as shown by its balance sheets, necessary for the maintenance and operation of the Interborough system as of June 30, 1926, and June 30, 1927—divided between the two divisions as follows:

June 30, 1926:	
Manhattan Division	$838,976
Subway Division	1,628,601
June 30, 1927:	
Manhattan Division	788,296
Subway Division	1,530,221

[fol. 641] The item "Cash Working Capital," under the same heading, is a computation of a reasonable amount of working capital required, based upon an average month's operating expenses for the year ended June 30, 1926, and for the year ended June 30, 1927. This average for each division is as follows:

1926:	
Manhattan Division	$1,038,333
Subway Division	1,838,513

1927:	
Manhattan Division	1,141,742
Subway Division	1,946,215

Interborough System

Computation Based on Companies' Investment in Company Provided Property, and Transit Commission's Engineers' Original Cost Figures for City Provided Property

Interborough Rapid Transit Company Property	1926	1927
Contracts 1 and 2:		
Subway Equipment	$36,353,631	$36,348,705
Replacement of Existing Equipment	224,489	224,494
Cost of Leases	22,278,589	22,278,589
Contractor's Expense	1,302,817	1,302,817
Real Estate Owned	299,138	299,138
Office Furniture and Fixtures	42,295	42,295
Total	$60,500,959	$60,496,038
Contract 3:		
Construction	$57,879,303	$57,896,828
Additions to Construction	167,654	189,138
Equipment	48,804,961	49,545,698
Additions to Equipment	12,547,460	12,910,821
Replacement of the Railroad	41	41
Replacement of Equipment of the Railroad	322,326	325,147
Replacement of Additional Equipment	12,076	12,076
Total	$119,723,821	$120,879,749
[fol. 642]		
Elevated Certificates:		
Manhattan Third Tracking:		
Plant and Structure	$21,577,405	$21,646,220
Equipment	238,167	238,167
Elevated Extensions:		
Plant and Structure	6,794,485	6,813,655
Equipment	6,765,391	6,759,101
Manhattan Division Power Plant Improvements	5,758,413	5,749,579
Replacement of Manhattan Division Power Plt. Impts	9,450	9,450
Additions to Company Lines	2,699,086	2,900,377
Total	$43,842,397	$44,116,549
Total—I. R. T. Company Property	$224,067,177	$225,492,336

Manhattan Railway Company Property

Real Estate and Structures:		
Land including sites of main power station and seven substations	$2,675,330	$2,675,330
Buildings and Structures outside of Streets, Highways and Public Places	2,752,815	2,752,815
Main Power Station Building and Bulkhead	1,381,865	1,381,865
Sub-Power Station Buildings	493,554	493,554
Engines, Generators, Boilers, etc., in Power Stations	4,945,790	4,945,790
Cars	11,973,827	11,973,827
Subways—Cable Ducts	1,039,133	1,039,133

Land Damages including expense of litigation	22,230,687	22,230,687
Foundation, Structures, Track Superstructures, etc., of Second, Third, Sixth and Ninth Avenue Elevated Lines	35,028,159	35,028,159
Discount of New York Elevated Railroad Co., Metropolitan Elevated Railway and Manhattan Railway Co. Bonds	6,974,285	6,974,285
Amount of Par Value of Metropolitan Elevated Railway Co. Capital Stock and Bonds issued for road built by contract over expenditures for construction as found by Board of R. R. Commissioners in 1883	5,113,309	5,113,309
Intangible Street Railway Capital	14,014,000	14,014,000
Fixed Capital Subsequent to December 21, 1908	4,320,900	4,320,900
Total—Manhattan Railway Co. Property	$112,943,654	$112,943,654
Miscellaneous Interborough Items		
Materials and Supplies	$2,467,577	$2,318,517
Cash Working Capital	2,876,846	3,087,957
Total	$5,344,423	$5,406,474
Total—Company Property	$342,366,254	$343,842,464
City Property		
Contracts 1 and 2	$66,561,000	$66,561,000
Contract 3	110,505,955	113,005,955
Total—City Property	$177,066,955	$179,566,955
Total Investment	$519,422,209	$523,409,419

[fol. 643] Inadequacy of the Revenues Under the Five-cent Fare Limitation, and Confiscatory Effect and Unconstitutionality of Such Limitation

10. Based upon the foregoing statement of investment, upon the year totals and division of "Materials and Supplies" and "Cash Working Capital" shown in the preceding paragraph, and upon the facts and figures as to estimates of the present value and reproduction cost of the properties used and useful by plaintiff in its operation and devoted to the public service, as set forth in the annexed affidavit of W. S. Gorsuch, verified February 25, 1928, I have made the following computations showing the relation of the available earnings for each of the two years ending June 30, 1926, and June 30, 1927, to the respective values of each division and also the total value of the system. Each of such computations similarly shows the amount of earnings which would have been required to yield an 8 per cent. return and the deficiency in the earnings actually available for each of said two years below an 8 per cent. return on the respective values.

Manhattan Division

Computation Based on Plaintiff's Present Value Figures

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1926	$208,514,309	$3,936,397	1 89	$16,681,145	$12,744,748
1927	208,873,038	3,168,788	1 52	16,709,843	13,541,055
Total deficiency below an 8% return on present value during two-year period					$26,285,803

[fol. 644]

Manhattan Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	Minimum present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1926	$179,450,309	$3,936,397	2 19	$14,356,025	$10,419,628
1927	179,777,038	3,168,788	1 76	14,382,163	11,213,375
Total deficiency below an 8% return on minimum value during two-year period					$21,633,003

Subway Division

Computation Based on Plaintiff's Present Value Figures of Property Provided by It, and Commission Figures for City-provided Property

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1926	$686,210,288	$19,762,325	2 88	$54,896,823	$35,134,498
1927	689,920,610	19,453,973	2 82	55,193,649	35,739,676
Total deficiency below an 8% return on present value during two-year period					$70,874,174

Subway Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	Minimum present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1926	$648,111,288	$19,762,325	3 05	$51,848,903	$32,086,578
1927	651,776,610	19,453,973	2 98	52,142,129	32,688,156
Total deficiency below an 8% return on minimum value during two-year period					$64,774,734

[fol. 645] Interborough System

Computation Based on Plaintiff's Present Value Figures of Property Provided by the Companies, and on Commission Figures for Property Provided by the City

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below an 8% return at least
1926	$894,724,597	$23,698,721	2.65	$71,577,968	$47,879,247
1927	898,793,648	22,622,761	2.52	71,903,492	49,280,731
Total deficiency below an 8% return on present value during two-year period					$97,159,978

Interborough System

Computation Based on Transit Commission's Engineers' Reproduction Cost Figures

	Value minimum present	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1926	$827,561,597	$23,698,721	2.86	$66,204,928	$42,506,207
1927	831,553,648	22,622,761	2.72	66,524,292	43,901,531
Total deficiency below an 8% return on present value during two-year period					$86,407,738

Interborough System

Computation Based on Companies' Investment and Transit Commission's Engineers' Original Cost Figures for City Property

	Investment	Earnings available as a return	Per cent of return actually earned on such investment	Earnings required for 8% return on such investment at least	Deficiency in earnings below 8% return at least
1926	$519,422,209	$23,698,721	4.56	$41,553,776	$17,855,055
1927	523,409,419	22,622,761	4.32	41,872,754	19,249,993
Total deficiency below an 8% return on investment during two-year period					$37,105,048

[fol. 646] Interborough System

Computation Based on Transit Commission's Engineers' Original Cost Figures

	Original as above cost	Earnings available as a return	Per cent of return actually earned on such cost	Earnings required for 8% return on such cost at least	Deficiency in earnings below 8% return at least
1926	$476,437,748	$23,698,721	4.97	$38,115,020	$14,416,299
1927	480,424,959	22,622,761	4.71	38,433,997	15,811,236
Total deficiency below an 8% return on cost during two-year period					$30,227,535

Additional fixed charges on account of improvements and additions ordered or threatened by the Transit Commission, additional cost of service, maintenance and additional wages, as more fully elsewhere herein set forth, would produce a deficiency in earnings below an 8 per cent. return in subsequent years, correspondingly greater than that shown in each of the foregoing computations.

11. From my long familiarity with the financial affairs of the plaintiff, the issuance of securities by it and the marketability of the securities which have been issued by it, it is my opinion that a return of 8 per cent. per annum upon the present value of the property used by the plaintiff in the public service is a reasonable return, and is the rate expected and usually realized upon the present value of investments in such and similar property devoted to the public service, with due regard to the risks attending them.

12. In my opinion, the maximum rate of five cents now chargeable by the plaintiff has been, at least during 1926 and 1927, and now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered, [fol. 647] and during that period has been, and now is, and will continue to be, unjust, unreasonable and confiscatory of this plaintiff's property, and has been, and is, and will continue to be, insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the plaintiff in the public service, in its operation and devoted to the public service; and I am advised by counsel, and verily believe, that the enforcement of such maximum fare of five cents contravenes the guarantees of the Fourteenth Amendment of the Con-

stitution of the United States, and of Section 6 of Article I of the Constitution of the State of New York.

Effect of Present Rate Limitation to Curtail the Plaintiff's Credit for Raising Additional Capital

13. Based upon my knowledge and familiarity with the financial history of plaintiff and, in particular, upon my knowledge of its inability to sell its long-term First Mortgage Bonds in 1917 at a reasonable discount, at a time when such bonds were sold on the New York Stock Exchange at prices higher than those quoted for such bonds at any time within the last five years, and a time when the prospective earning power of plaintiff, under the five-cent fare, was greater than that now indicated, and based upon my knowledge of the difficulty which plaintiff encountered in financing certain of its capital obligations in 1918, 1919 and 1921 through the issuance and extension of short-term secured notes, I am of the opinion that plaintiff's credit under existing conditions is such that it could not now secure capital for the purpose of providing for new construction and equipment, either through the sale at a reasonable discount of its said long-term First Mortgage Bonds or of [fol. 648] any other marketable security. In my opinion, that impairment of plaintiff's credit has been occasioned by the insufficiency of the return received by it from the existing maximum rate of fare on the value of the properties used and useful in its operation and devoted to the public service; by the narrow margin by which the present fixed charges of the plaintiff are presently and in the near future will be earned under existing traffic conditions on a five-cent fare; by action taken or threatened by or on behalf of the Transit Commission to impose requirements for additional expenditures by plaintiff aggregating ultimately nearly $40,000,000; and by the unascertainable effect upon plaintiff's operations and earnings of the opening of the new municipal subway system.

Because of the failure of the net revenue received by the plaintiff from the operation of the aforesaid rapid transit railroad lines to yield a fair or reasonable average return on the value of the property used and useful in the service, the plaintiff has been unable, and, in my opinion, at the

existing rate of fare, will continue to be unable to make proper reservation out of its income for surplus and contingencies, as authorized by the Public Service Commission Law of the State of New York.

Prospective Requirements of the Plaintiff for Increases in Operating Expenses and Fixed Charges

14. As of October 1, 1927, the known obligations of the plaintiff to complete Equipment required to be provided by it under Contract No. 3, to meet the instalments still due on cars heretofore purchased by it for operation on the rapid transit railroad lines, and to provide the signals on local tracks of the Subway Division to be installed prior to June 30, 1930, for which the plaintiff has no capital funds available, are payable as follows:

[fol. 649]

	During fiscal year ending			
	Prior to June 30, 1928	June 30, 1929	June 30, 1930	Total
To complete Equipment, Contract No. 3	$1,201,657	$1,217,918	$	$2,419,575
Installment on Cars	1,300,000	1,020,000	570,000	2,890,000
Signals	286,816	410,000	480,000	1,176,816
	$2,788,473	$2,647,918	$1,050,000	$6,486,391

If the Transit Commission issues, as it has been announced it will do, an order to the plaintiff to furnish 432 additional subway cars and makes effective the order already issued to lengthen all of the subway local platforms, the estimate by plaintiff's engineers and officers of the additional capital obligations is as follows:

305 motor cars at $23,000 each	$7,015,000
127 trailer cars at $14,500 each	1,841,000
Total cost of 432 motor and trailer cars	$8,856,000
The plaintiff's Superintendent of Motive Power estimates that even though we should cease to supply power to the surface lines, the additional power equipment required in connection with these cars would cost	2,000,000
Total cost of cars and necessary power equipment	$10,856,000
Cost of the plaintiff's one-half of the construction of the platform extension work	7,265,000
Cost of 382 cars to provide ten-car local trains	9,000,000
Cost of other equipment including power machinery on account of the platform extension work	8,000,000
Total requirements for 432 additional cars, lengthening of all subway local platforms and the provision of additional cars and other equipment in connection therewith	$35,121,000
Estimated cost of subway signals to be installed after June 30, 1930	4,345,000
Total	$39,466,000

This result is based upon separate estimates of the requirements for lengthening of local platforms and for the provision, prior to the completion of that work, of 432 additional cars. If the two projects should be considered together, there may be effected a reduction in the total estimated costs as shown, possibly as much as $8,000,000, depending upon the total number of cars required, and the provision for additional power.

[fol. 650] In addition, there is a further requirement, under an existing order of the Transit Commission, for the installation of signals, in 1933-1937, on local tracks on the elevated lines at an estimated cost of $6,960,000, for which the plaintiff has no funds provided.

The foregoing additional capital expenditures (including the funding of certain improvements paid for out of earnings prior to October 1, 1927) would necessarily increase the plaintiff's interest and amortization charges, as follows:

1929—Funding of cost of additions and improvements made from earnings to October 1, 1927			$4,500,000
Estimated capital expenditures for existing obligations, October 1, 1927 to June 30, 1928			2,788,000
Estimated cost of 432 cars and the necessary power equipment			10,856,000
Total for 1929			$18,144,000
Rounded out at		$18,000,000	
Annual interest and sinking fund thereon, at 6%		1,080,000	
1930—Estimated capital expenditures for existing obligations			2,648,000
Total for 1930			$20,792,000
Rounded out at		$21,000,000	
Annual interest and sinking fund thereon, at 6%		1,260,000	
1931—Estimated capital expenditures for existing obligations			1,050,000
Cost of Company's one-half of the construction of the platform extensions			7,263,000
Estimated cost of equipment in connection with platform extension work after allowing $8,000,000 for possible duplication			9,000,000
Estimated cost of signals after June 30, 1931			11,305,000
Manhattan Division		$6,960,000	
Subway Division		4,345,000	
Total for 1931			$49,412,000
Rounded out at		$49,000,000	
Annual interest and sinking fund thereon, at 6%		2,940,000	

The known facts afford no ground for expecting that the prices of material and the wages paid for labor by the plaintiff will, on the whole, be reduced from those now prevailing. On the contrary, if the indicated possible capital expenditures could be met, there will be also required increases in operating expenses for the following major items and amounts:

[fol. 651]

Summary Showing Increased Operating Expenses of Plaintiff in Immediate Prospect

	First annual period			Second annual period			Third annual period		
	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total
Additional wages	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000
Additional service	540,000	2,220,000	2,760,000	567,000	2,700,000	3,267,000	567,000	2,700,000	3,267,000
Additional maintenance	500,000	500,000	1,000,000	500,000	500,000	1,000,000	500,000	500,000	1,000,000
Total	$2,640,000	$5,120,000	$7,760,000	$2,667,000	$5,600,000	$8,267,000	$2,667,000	$5,600,000	$8,267,000

[fol. 652] The following is a summary of prospective increases in operating expenses and fixed charges to be incurred by the plaintiff upon the making of the improvements in working conditions, property and operation, as aforesaid:

Summary of Increased Operating Expenses and Fixed Charges

	First annual period	Second annual period	Third annual period
Operating expenses	$7,760,000	$8,267,000	$8,267,000
Interest and sinking fund	1,080,000	1,260,000	2,940,000
Total	$8,840,000	$9,527,000	$11,207,000

Change in Price Level Between 1913 and 1926-1927

15. At the present time the payrolls of the plaintiff are approximately 70 per cent of the entire cost of operating and maintaining the Interborough System, while the cost of power station coal is approximately 12 per cent of the same cost.

The increase in rates of pay of the employees of the company between 1913 and the present is shown by the following table:

Year ended June 30th	Average rate per month of general officers	Average rate per month of all other officers and employees paid monthly	Average rate per hour of all employees paid weekly
1913	$1,757 64	$94 87	$ .225
1926	2,416 67	217 59	.574
1927	2,447 92	227 91	.585

The increase in the cost of power station coal between 1913 and the present time is shown in the following table:

Average Cost per Ton (2,240 lbs.) for the Years Ended June 30th

1913	$3 2256
1926	5 5021
1927	5 5875

[fol. 653] The increase in the cost of some of the other principal items of material which the company uses in operating and maintaining its property is shown by the following table:

Purchases Made in the Calendar Years 1913, 1926, 1927

	1913	1926	1927
Handles, Brake Valve, Piece No. 30525, each	$1.125	$2.3156	$2.3156
Axles, Steel Car—Cents per pound	.02975	.0822	.0519
Brake Shoes, Diamond S Reinforced Steel Back—Per net ton	43.50	56.00	64.00
Insulators, Third Rail—Per hundred	23.50	34.75	42.00
Hose, Air Brake 1½"—Per foot	.35	.50	.45
Yellow Pine Ties—Per M. B. M. feet	28.50	66.00	56.40
Oil, Linseed, Raw—Per gal.	.49	.895	.79
White Lead in Oil—Cents per pound	.0645	.1180	.1050
White Zinc in Oil—Cents per pound	.066	.13	.13
Rails, Steel Running, 1st quality 100 Section—Per gross ton	30.00	44.20	44.20
Waste, Wool Motor Packing—Per Pound	.15	.30	.33⅓
Steel Car Wheels (Trailers)—Each	17.50	39.00	39.00
Steel Car Wheels (Motors)—Each	20.50	46.75	46.75

Irreparable Damage Threatened to the Plaintiff

16. During the year ending June 30, 1927, plaintiff transported daily, on the average, about 3,215,469 passengers on the Subway Division and Manhattan Division of the rapid transit railroads operated by it. The number of passengers carried by it during the year ended June 30, 1927, was about 1,173,646,256, of which 359,019,660 were transported on the Manhattan Division and 814,626,596 were transported on the Subway Division. Many of such passengers are non-residents of the City of New York, or are transient visitors from other parts of the State of New York or from other States of the Union. There is no means by which the plaintiff can collect from the passengers transported by it [fol. 654] any part of a fare charged by it unless paid in cash, or by a token issued in exchange for cash, upon or before the transportation of such passengers. If the plaintiff should make a charge to any passenger in excess of a fare of five cents without judicial protection deponent believes that such passenger would refuse to pay such charge; and, if the plaintiff should remove such passengers who refuse to pay such charge from its cars or should refuse to admit them thereto, deponent believes that plaintiff would be at once subjected to a multiplicity of suits from such passengers, to compel transportation or for damages for breach of duty to transport, as well as to prosecution for the fines and penalties prescribed by the Public Service Commission Law for failure to furnish transportation. If the plaintiff should make a charge in excess of a fare of five cents per passenger, the aggregate of the penalties so in-

curred in one year would amount to enormous sums and deponent believes that the damage to the plaintiff would be irreparable and absolutely destructive of all its assets, franchises and property; and deponent believes that a refusal or failure by the plaintiff to desist from charging a fare of more than five cents would involve a risk of absolute ruin to the plaintiff and the entire destruction and confiscation of its property by reason of the enormous fines to which it would be exposed.

Henry T. Berry.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No. 17. Bronx Register No. 2966. N. Y. County No. 335. N. Y. Register No 9258. Kings County No. 38. Kings Register No. 9168. Queens Co. No. 2562 Queens Register No. 5006. Term expires March 30, 1929.

[fol. 655] [Title omitted]

United States of America,
City and County of New York,
Southern District of New York, ss:

Earl E. Starbard, being duly sworn, deposes and says:

1. I am the Vice-President of the Interborough Rapid Transit Company, the plaintiff, and have been in its employ for more than twenty years.

I am familiar with the properties, operations and affairs of the plaintiff. I am also familiar with the conditions, negotiations and agreements under and pursuant to which the plaintiff and the defendant The City of New York constructed and provided that portion of the rapid transit [fol. 656] facilities in the City of New York, leased to and operated by the plaintiff, under Contract No. 3, dated March 19, 1913, and certain certificates of like date, providing for the extension of rapid transit subway lines then operated by the plaintiff, certain elevated railroad connections appurtenant thereto and additional tracks and facili-

ties upon the elevated railroads of the defendant Manhattan Railway Company, its lessor.

II. The subway and elevated lines to be constructed by the City and the plaintiff under the 1913 plan comprised approximately 146.8 miles of additional tracks; the elevated railroad extensions to be constructed by the plaintiff comprised approximately 10.4 track miles, and the additional tracks to be constructed by the plaintiff on the elevated railroad comprised approximately 10.5 track miles, a total of approximately 167.7 track miles of extensions and additions to the system of rapid transit then operated by the defendant. The additional facilities formed part of a comprehensive scheme of rapid transit denominated by the Public Service Commission, a predecessor of the existing Transit Commission, and then representing The City of New York in the negotiations and agreements as the "Dual system of rapid transit for New York City."

Unforeseen Conditions Which Have Supervened to Render the Five-cent Fare Inadequate, Unreasonable, Confiscatory and Invalid as to the Plaintiff

III. In order to carry out the single comprehensive plan of 1913 for the improvement and extension of municipal and and non-municipal rapid transit railroads, and with the [fol. 657] knowledge and approval of the Public Service Commission for the First District or of its successors, the plaintiff formulated and adjusted its capital obligations and fixed charges incidental thereto, in order to provide the necessary funds with which to carry out such plan and the obligations incurred thereunder by the plaintiff. In and by such plan, it was contemplated that the revenues to be derived from the operation of the enlarged system of rapid transit railroads would be sufficient to meet certain charges incurred by the defendant The City of New York and the plaintiff, and to provide a fair and reasonable return upon the investment in all of the properties provided by the defendant The City of New York and the plaintiff.

After the execution of the lease and certificates, the expenses of operating the rapid transit railroads vastly increased, owing to radical economic changes produced by the World War, which were wholly unforeseen by the par-

ties to the instruments at the time of their execution, and the value of the five-cent rate of fare fixed by Contract No. 3 and the elevated extensions certificate became greatly impaired. Since the beginning of the operation of the enlarged system of rapid transit railroads, and for an indefinite future period of the operation of the railroads, the five-cent fare has failed, and will continue to fail, to be sufficient to defray the several charges and provide the return which it was expressly contemplated by the said Contract No. 3 and certificates should be defrayed and provided from year to year during the term of the lease to the plaintiff and the grant of rights to it and the defendant Manhattan Railway Company.

[fol. 658] Circumstances as to Complete Change of Conditions Since the Making of the Leases and Certificate Containing Five-cent Fare Limitation

IV. Since March of 1913, there has been a complete and uncontemplated change in many factors pertinent to the stipulations then deemed to be proper and in the public interest and vitally affecting the reasonableness and propriety of the continuance of the fare limitations inserted in the rapid transit railroad leases then consummated and in the elevated extension certificate then granted. Certain of these changes and conditions have come about by affirmative acts and changed policy of the defendant The City of New York, contrary to the contemplation and purposes for which the said leases and limitations were accepted and entered into by the plaintiff.

(A) A new price level has followed in the wake of the World War. This was in no way contemplated by the parties or provided for at the time the 1913 leases and certificates were accepted and entered into. The change in pertinent facts and circumstances has been drastic and complete. Wages have increased more than one hundred per cent., and the cost of many materials as much. The general level of commodity prices is now about seventy per cent. higher than in 1913. The price of practically everything which the plaintiff has to buy has been adavnced accordingly. For example, for the year ended June 30, 1913, the average price paid by the plaintiff for coal was $3.23 per ton; for the

year ended June 30, 1926, it was $5.51 per ton; for the year ended June 30, 1927, it was $5.59 per ton, and the price paid at the present time is about the same. The Federal, State and municipal taxes for the year ended June 30, 1927, were [fol. 659] approximately thirty-five per cent. greater in amount than for the year 1913. The purchasing power of the nickel and the dollar has greatly decreased; the cost of money for all capital purposes of the plaintiff has greatly increased. The plaintiff is receiving, for the essential transportation service which it renders at 1928 costs of wages, materials, taxes, and carrying charges on new capital, a rate of fare with a purchasing power fixed in 1913, according to 1913 wages, costs and conditions. The further facts, from the records of the plaintiff, concerning the changes in price levels are set forth in the annexed affidavit of Henry T. Berry, the Comptroller of the plaintiff.

Assumption of the continued immutability of rate provisions of such agreements made before the present price level has prevented vital improvements in public services and provoked most serious social consequences.

(B) As a result of these unforeseen changes in the price level and the greatly increased costs of labor and materials, the rates of fares charged on rapid transit and street surface railroads throughout the United States have, during the past few years, been generally and substantially advanced above the five-cent fare in force in 1913, and this has been done despite limitations contained in franchises, leases and agreements. The rates of passenger fare on steam railroads have been substantially advanced since 1913. On the rapid transit railroads in Boston, the fare is now 10 cents; in Chicago, 10 cents; in Philadelphia, 8 cents. In the 272 cities of the United States with a population of 25,000 or more, the average rate of fare on street surface railroads now slightly exceeds eight cents per pas- [fol. 660] senger. In the following cities of New York State, other than the City of New York, the situation as to rates of fare in force, pursuant to the above-quoted provisions of the Public Service Commission Law, notwithstanding the limitation to five cents by pre-war franchises, leases and agreements, is as follows:

[fol. 661]

Table Showing Street Railroad Fares in Force Under Quoted Provisions of Public Service Commission Law of the State of New York

City	Population	Company	Present fare			Former fare	
			Cash rate	Ticket or token rate	Effective	Cash rate	Ticket or token rate
Albany	117,820	United Traction Co	10¢	13 for $1	July 1, 1927	7¢	
Amsterdam	35,200	Fonda, Johnstown & Gloversville R. R	8¢	4 for 30¢	Jan. 1, 1922	8¢	
Auburn	36,742	Auburn & Syracuse R. R	7¢		Jan. 1922	8¢	14 for $1
Binghamton	71,915	Binghamton Ry. Co	7¢		Feb. 1, 1925	6¢	
Buffalo	538,016	International Ry. Co	10¢	3 for 25¢	July 1, 1927	8¢	2 for 15¢
Elmira	48,359	Elmira Water, Lt. & R. R. Co	7¢		May 10, 1925	6¢	
Jamestown	43,414	Jamestown St. Ry. Co	10¢	3 for 25¢ 10 for 75¢ Weekly Pass $1	Nov. 2, 1926	8¢	5 for 35¢
Kingston	26,969	Kingston Consolidated R. R. Co	8¢		June 9, 1924	7¢	4 for 25¢
Poughkeepsie	35,670	Poughkeepsie & Wappinger Falls/Electric Ry	10¢	6 for 50¢	May 3, 1925	9¢	
Rochester	316,786	N. Y. State Rys	8¢	4 for 30¢	Jan. 1, 1926	7¢	4 for 26¢
Rome	28,447	N. Y. State Rys	10¢	3 for 25¢	Jan. 1927	7¢	5 for 35¢
Schenectady	92,786	Schenectady Ry	7¢		Aug. 1, 1920	6¢	
Syracuse	182,003	N. Y. State Rys	10¢	4 for 30¢ 6 for 45¢	Apr. 1, 1927	10¢	10 for 75¢
Troy	72,223	United Traction Co	10¢	13 for $1	July 1, 1927	7¢	
Utica	101,604	N. Y. State Rys	10¢	10 for 75¢	Aug. 18, 1926	7¢	
Watertown	32,836	Beach River Traction Co	10¢	7 for 50¢	Jan. 1927	7¢	16 for $1

[fol. 662] **Continuance of the Five-cent Fare Limitation Imposed upon the Plaintiff by Provisions of Public Service Commission Law and the Orders of the Regulatory Commissions Denying Increase in Fare**

V. (a) As appears from the public records, on or about May 28, 1920, pursuant to the provisions of the Public Service Commission Law, the plaintiff, as a common carrier subject to the jurisdiction of the Public Service Commission, duly presented to and filed with Lewis Nixon, then constituting the Public Service Commission for the First District, its complaint, verified on May 28, 1920, showing that the maximum fare of five cents, chargeable by it as a common carrier, was insufficient to yield reasonable compensation for the service rendered by it in the operation of the subway lines of the plaintiff, and was unjust and unreasonable, and an application by petition dated and verified on May 28, 1920, for a hearing and determination under Section 49 of the said Public Service Commission Law, as to a just and reasonable rate of fare on the said subway lines, which complaint and petition were supported by a showing of facts and reasons therefor.

Thereupon the said Public Service Commission for the First District held a hearing upon the said application, and thereafter on May 28, 1920, made a final order in its Case No. 2500 ordering that the said complaint be dismissed and that the petition of the plaintiff be denied for want of jurisdiction to determine and fix a rate of fare different from that fixed by the said Contract No. 3, hereinbefore more fully described, to wit, five cents per passenger. Thereafter the plaintiff duly applied to the said Public Service Commission for the First District for a rehearing, pursu- [fol. 663] ant to Section 22 of the said Public Service Commission Law, in respect to each and all of the matters determined by the final order of the said Commission made on May 28, 1920, dismissing the complaint and denying the petition of the plaintiff, and thereupon on the 28th day of May, 1920, the said Public Service Commission for the First District made a further order in its Case No. 2500 denying said application of the plaintiff for a rehearing.

(b) On or about March 22, 1922, the plaintiff presented to and filed with the said Transit Commission a complaint

and application, verified March 22, 1922, showing that the maximum fare of five cents chargeable by it on its subways and elevated rapid transit railroads in the City of New York, including each the Subway Division and the Manhattan Division, had been for more than three years, and was then, insufficient to yield reasonable compensation for the service rendered and had been, and was, unjust and unreasonable, and that, for the purpose of protecting and insuring safe, adequate and efficient service upon the lines operated by the plaintiff, and for the preservation of the plaintiff's system as an entity, the public interest required an immediate, reasonable, temporary increase in the existing five-cent rate of fare chargeable by the plaintiff, pending the final determination of the rate as therein prayed for. The said complaint and petition requested that the said Transit Commission, pursuant to the powers vested in it by law, fix and determine the just and reasonable rate, fare and charge collectible, by it at a figure which will yield a reasonable average return upon the property actually used by the plaintiff in the public service, and that, in the meantime, it authorize an immediate temporary in-
[fol. 664] crease in the rate, fare and charge collectible by the plaintiff upon such terms, conditions and safeguards as the Commission might deem proper.

Thereupon, on March 28, 1922, the said Transit Commission made an order in its Case No. 2632, directing that the said application of the plaintiff, verified March 22, 1922, be in all respects denied for lack of jurisdiction.

(c) The said Public Service Commission for the First District and the said Transit Commission each has construed and interpreted the provisions of the said Public Service Commission Law so as to require and compel the plaintiff, by the said orders of dismissal made by the said Commissions, respectively, to observe and charge upon each the Subway Division and the Elevated Division of the rapid transit lines operated by it a rate of fare of five cents per passenger, and no more; and, by reason of the tariff schedules theretofore published, posted and filed by the plaintiff establishing a rate of fare of five cents per passenger on each of the said divisions of its rapid transit railroad lines, the provisions of the said Public Service Com-

mission Law and the said orders made by the said Commissions, respectively, relative to tariff schedules from which the plaintiff may not deviate. I am advised by counsel and verily believe that the dismissal of the said applications or complaint, operated to require and compel the plaintiff to observe such fare of five cents per passenger and to prohibit the plaintiff from charging any rate of fare in excess of such rate of five cents per passenger.

[fol. 665] The Transit Commission's Order for Construction by the Plaintiff of Subway Platform Extensions

VI. As appears from the public records, on July 31, 1923, George McAneny, LeRoy T. Harkness and John F. O'Ryan, then constituting the Transit Commission, adopted a resolution, in its proceeding identified as R. T. 4007, that a hearing be held before it on August 9, 1923, in respect of the question whether the platforms of certain local stations of the Manhattan-Bronx Rapid Transit Company of the Existing Railroads (as defined and described in the said contract, known as Contract No. 3, dated March 19, 1913, between the City of New York and the plaintiff) should be lengthened to 480 feet, for the purpose of permitting operation of ten-car trains at such local stations.

Thereafter hearings were held by the said Commission on many dates to and including February 5, 1926, when the said hearing was closed.

During its course, the said hearing was extended so as to include not only the question whether such platforms of local stations of said Manhattan-Bronx Rapid Transit Railroad should be so lengthened, but also the question whether all station platforms of all stations of the railroad and existing railroads (as defined and described in said Contract No. 3) should, where not then of lengths equal to or exceeding 480 feet, be lengthened so as to be 480 feet in length.

Thereafter such proceedings were had that, at a meeting of the said Transit Commission held April 21, 1926, at which there were present the said George McAneny, LeRoy [fol. 666] T. Harkness and John F. O'Ryan, as Commissioners, the said Transit Commission, by a vote of two to one, made and adopted an order in its said proceeding R.

T. 4007 (of which a copy is annexed to the complaint, marked Schedule "H"), ordering and directing the plaintiff, Lessee under said Contract No. 3, to cause the station platforms at the various stations of the said Railroad and Existing Railroads specified in the said order to be lengthened in accordance with the schedule thereto annexed, as Additions to the Railroad and Existing Railroads, so that they will be 480 feet in length.

At or about the time of the making of the said order of April 21, 1926, the several Commissioners constituting the said Transit Commission filed their respective opinions, that of John F. O'Ryan, Commissioner, recommending that such order of April 21, 1926, be not made.

Thereafter the said Transit Commission, as now constituted or as previously constituted, made orders extending the effective date of the said order of April 21, 1926, and on October 26, 1927, the said present Transit Commission adopted an order directing that the hearing in the said proceeding R. T. 4007 be reopened, and thereupon further proceedings were had therein by the said present Transit Commission. In the course of such further proceedings, the said Transit Commission arbitrarily refused to permit the plaintiff to put in evidence before it various engineering and operating studies and surveys which the plaintiff had meanwhile been able to carry forward and complete, and of which copies had been furnished to the said Transit Commission. These studies and surveys showed, or tended to show, that the proposed lengthening [fol. 667] of station platforms would not in fact afford substantial relief from existing conditions of traffic congestion and would not be advisable as an operating matter. The defendant members of the present Transit Commission declined to receive such further evidence; but, nevertheless, at a meeting thereof on December 31, 1927, an order was made by it in its proceeding R. T. 4007, which order is identified as "Supplemental Order 'A'," directing that the plaintiff, lessee under the said Contract No. 3, shall lengthen or cause to be lengthened for specified distances and in specified directions the station platforms of four stations of the Manhattan-Bronx Rapid Transit Railroad, to wit, the northbound platform and the southbound platform of each the Canal Street station, the Spring Street

station, the Bleecker Street station and the Astor Place station. The said order was therefore made unreasonably, arbitrarily, and in denial to the plaintiff of a fair hearing and due process of law, guaranteed by the State and Federal Constitutions. A copy of the said order of December 31, 1927, in the proceeding R. T. 4007 is annexed to the complaint herein, marked Schedule "I."

I am advised by counsel, and verily believe, that the said orders and decisions of the said Transit Commission in the proceeding R. T. 4007 were and are unauthorized by law, and, if enforceable against the plaintiff, were and are in violation of the provisions of the Constitutions of the State of New York and of the United States and impair the obligations of the franchise contracts of the plaintiff with the State of New York and deprive the plaintiff of its property and rights without due process of law and without [fol. 668] just compensation and deny to it the equal protection of the laws.

The Transit Commissioner's Proceeding to Require the Plaintiff to Provide 432 Additional Subway Cars

VII. On February 24, 1927, the present Transit Commission made an order in its Case No. 2851, entitled "In the Matter of the Hearing on motion of the Commission upon the regulations, practices, equipment, appliances and service of Interborough Rapid Transit Company on the Lexington-Fourth Avenue and Broadway-Seventh Avenue Lines operated by the said company," directing that a hearing be held regarding the subject-matter thereof, to the end that the said Transit Commission may determine whether or not the regulations, practices, headways and methods of operation and service given upon the Lexington-Fourth Avenue and Broadway-Seventh Avenue Lines are unreasonable, improper or inadequate and may determine the just, reasonable, proper and adequate regulations, practices, headways and service thereafter to be enforced, to be observed and to be in use in the transportation of persons on the said lines, and to fix and prescribe the same by order to be made by the said Commission and to be served upon the plaintiff. Thereafter hearings were held

by and before the said Transit Commission or one or more of the members thereof, and the taking of evidence was closed.

At and during the said hearing, the said Commission was represented by special counsel, who has been employed by the said Commission gratuitously, and who arbitrarily and with bias and prejudice against the plaintiff conducted [fol. 669] the examination of witnesses and made addresses to the said Commission or one or more of the Commissioners as though he were acting as a prosecutor in behalf of the People in a criminal proceeding. Both before the close of the said hearings and thereafter, and without due deliberation or the prerequisite findings under the statute, or any formal order such as is required by the provisions of the Public Service Commission Law in order to make the directions of the Transit Commission effective and enforceable as against the plaintiff, the said special counsel for the said Transit Commission announced in the public press that the said Commission would make an order requiring this plaintiff to acquire 432 additional cars for operation on its subway division.

I am advised by counsel for the plaintiff, and verily believe, such threatened order, if made by the said Transit Commission, would be unauthorized by the said Public Service Commission Law or by any other legislative act of the State of New York, and would be in violation of the provisions of the Constitutions of the State of New York and of the United States and would impair the obligations of the franchise contract of the plaintiff with the State of New York, and would deprive the plaintiff of its property and rights without due process of law and without just compensation, and would deny it the equal protection of the laws.

Destructive Competition and Oppressive Policy Carried on by the Defendant the City of New York

VIII. The making of the 1913 leases and contracts clearly contemplated that the municipal entity which, as a proprietor and railroad corporation, leased railroad proper- [fol. 670] ties owned by it to the plaintiff for operation for the period therein fixed would not itself become an oper-

ator of competing rapid transit properties and an active competitor of the lines leased to the plaintiff by agreements, some of which contain the five-cent fare limitation. The 1913 leases and agreements erected an elaborate and comprehensive plan for future subway construction and facilities to be provided as need therefor arose, and to be operated by the plaintiff. As more fully shown in the opinion of Commissioner John F. O'Ryan, then a member of the Transit Commission, referred to in the paragraph marked XLVII in this complaint, the defendant The City of New York has not at all fulfilled its duties and obligations under the 1913 plan and agreements, and has wholly neglected and failed to carry out the progressive provisions then made for the future.

At the least, it was then contemplated that the City should not become a competitor of the plaintiff's rapid transit service except in the manner, and upon the contingencies and payments, provided for in the 1913 agreements, viz, the "recapture" by the City of indicated portions of the routes, payment therefor to the plaintiff on a stipulated basis, and subsequent municipal operation on a basis which would be substantially non-competitive with the lines remaining for operation by the plaintiff. Nevertheless, without such "recapture" and payment, and with municipal policies meanwhile pursued which have barred any rights of "recapture" by the defendant The City of New York of any portion of the lines operated by the plaintiff, vast municipal funds and diligent municipal efforts are being devoted, at the present time, to the building of new rapid transit lines proposed to be operated by The City of New York, in its proprietary capacity, and with the [fol. 671] advantage of exemptions enjoyed by it, in competition with the subway and elevated lines leased to the plaintiff.

It has been conservatively estimated that the City's new Eighth Avenue Subway, projected and started subsequently to 1913 and contrary to the underlying plan of the 1913 agreements, will take from the existing lines of the plaintiff at least 110,000,000 passengers per year, thereby further reducing its net earnings from the five-cent fare and rendering such stipulated fare still more inadequate and confiscatory, all by affirmative and wilful act of the City of

New York. This change in basic municipal policy was in no way contemplated by the parties at the time the 1913 leases and certificates were accepted and entered into; on the contrary, there were definite provisions whereby future expansion and construction would be dealt with under the contracts, and such additional lines and facilities operated by the plaintiff as lessee.

This imminence of municipal competition, with the certainty of further diminution and destruction of the plaintiff's already inadequate revenues and net earnings, appears from the facts as shown by the Transit Record for December, 1927, and January, 1928, published by the Board of Transportation of the City of New York as to the progress of work on construction contracts, respectively, as of November 30, 1927, and December 31, 1927. Omitting the Brooklyn and Queens contracts and the 53rd Street Line, the table hereinbelow shows the progress of work on the different sections of the municipal Eighth Avenue Subway. The existing West Side subway line of the plaintiff and the proposed competing line of the City are close together; they cross at Columbus Circle, are a block apart southward to 8th Street, where they again cross and continue [fol. 672] southwardly, a block apart, to lower Manhattan, thus traversing practically the entire length of Manhattan Island. From Bank Street, in lower Manhattan, northward to and beyond 207th Street, the sections were from seventy-nine per cent to ninety-eight per cent completed as of December 31, 1927. As the last part of any subway construction contract is a restoration of sub-surface structures and pavement, these percentages mean that the structure itself is so substantially completed that tracklaying could practically have been started some time ago, with the possibility of at least a "shuttle" operation within a short time, furnishing service from the vicinity of Dyckman Street to a point even below 18th Street. The following table shows the substantial completion of its competing municipal railroad:

(fol. 673) City's Table Showing Substantial Completion of One of Its Competing Rapid Transit Railroads

Rt.	Sec.	Contractor	Limits	Per cent of cost completed November 30, 1927	Per cent of cost completed December 31, 1927
101	3-4	Rosoff Sub. Const. Co	Church St.-6th Ave., Park Place to 3rd St	29	33
102	1	Morants & Raymond, Inc	8th Ave., Bank to 18th St	79	81
102	2	Geo. H. Flinn	8th Ave., 18th to 28th St	92	94
102	3	Rosoff Sub. Const. Co	8th Ave., 28th to 38th St	84	86
102	4	C. H. Locher	8th Ave., 38th to 48th St	83	85
102	5	Heyman & Goodman, Inc	8th Ave., 48th to 58th St	88	91
102	6	Frederick L. Cranford, Inc	8th Ave.-Central Park West, 58th to 68th St	83	85
78	1	J. F. Cogan Co	Central Park West, 68th to 79th St	87	88
78	1-A	A. A. Johnson Corp	Central Park West, 79th to 88th St	88	90
78	2	T. A. Gillespie Co	Central Park West, 88th to 101st St	93	95
78	2-A	Rosenthan Eng. Contr. Co	8th Ave.-Central Park West, 101st to 111th St	82	83
78	3	Heyman Goodman Co	8th Ave., 111th to 122nd St	96	97
78	3-A	Rosoff Sub. Const. Co	St. Nicholas Ave., 122nd to 132nd St	95	95
78	4	George J. Atwell	St. Nicholas Ave., 132nd to 141st St	91	92
78	4-A	LaRocca Const. Corp	St. Nicholas Ave., 141st to 149th St	65	69
78	5	Rodgers & Hagerty	St. Nicholas Ave., 149th to 160th St	94	94
78	6	Rodgers & Hagerty	St. Nicholas Ave.-Broadway, 160th to 173rd St	89	90
78	6-C	Slattery Eng. & Const. Co	Broadway, 173rd to 177th St. (an insignificant spur)	35	45
78	7	Michael Del Balso	Ft. Washington Ave., 174th to 183rd St	85	87
78	8	Silas B. Mason	Ft. Washington Ave., 183rd St. to Overlook Terrace	95	96
105	1	Arthur McMullen Co	Broadway, Overlook Terrace to Cummings St	93	94
105	2	Silas B. Mason	Broadway, Cummings to 211th St	91	92
105	3	D. C. Serber	207th St., Broadway to 10th Ave. (except one section which is 69 per cent completed)	97	98

[fol. 674] The Dual Rapid Transit Plan Precluded Municipal Competition

IX. The dual system was devised by the Public Service Commission and the Board of Estimate and Apportionment of The City of New York as the basis of the procurement and development of transit facilities through the instrumentality of two unified systems of operation, the one operated by the plaintiff and the other by the then Brooklyn Rapid Transit Company, and together including all the lines of rapid transit wholly operated within the City of New York, other than in the Borough of Richmond. The City of New York and the Public Service Commission made, at the same time, and as part of the said dual system, provision for the operation, as part of the system of the Brooklyn Rapid Transit Company, of new lines of subway and for extensions and third tracking of existing elevated railways, aggregating approximately 166 miles, in addition to the then existing mileage of the Brooklyn Rapid Transit Company. All, or substantially all of the rapid transit facilities within the City of New York other than in the Borough of Richmond were then and now are comprised in the two unified systems.

X. The negotiations instituted by the City and conducted by its representatives, the Public Service Commission, were based upon the declared policy of the City and Commission *to effect future transit provision for the City of New York by means of the development and extension of the two existing operating units*, and the powers vested in the City, in respect of independent operation and so-called recapture, were intended to be employed, at least primarily, only for the purpose of insuring *rapid transit development by the two operating units upon terms just and* [fol. 675] *reasonable to the City;* and the then avowed policy of the City, in devising and effecting the dual system, was to secure adequate extensions of rapid transit then and in the future without involving wasteful and destructive competitive operation.

As a result of the negotiations, the policy was finally formulated in a report dated May 22, 1912, made to the Board of Estimate and Apportionment of the said City by its Committee charged with negotiating the terms of

the said operating agreements. The report was adopted by the Board May 24, 1912, and is, in part, as follows:

"Throughout the negotiations that have led to the presentation of the pending plans, the Public Service Commission and the members of your Committee have kept in mind the need of providing not merely a series of roads for the convenience of the traveling public, but *a basis for future development of the city*, along logical and well-ordered lines."

"Your Committee has never doubted that, in order to secure the greatest future benefit, *the existing subway and elevated lines should be used as a nucleus for future growth.* The City and the Interborough Company combined have an investment of $100,000,000 in the present subway, and the Brooklyn Company has a private investment in plant and equipment estimated at $60,000,000. The two systems embrace 66.9 miles of road and 178 miles of track. *A failure to utilize these lines, or to properly articulate them with others in a manner that will offer the best basis for the development of the city plan, and avoid economic waste, would in the judgment of your Committee be indefensible;* [fol. 676] certainly so long as the right to the City to recapture and readopt any of the additional lines now to be built, if it so desires, stand undisturbed. *Instead of three or four systems it has seemed better to so group the lines, new and old, that all would come within two great systems.*" (Italics supplied.)

XI. The plaintiff throughout the negotiations, in accepting said Certificates and Contract No. 3, and in the investment of vast sums of money in providing the new and extended facilities, relied upon the foregoing representations made by the City and its representatives, and by the Public Service Commission acting in concert with the City and its representatives, in the negotiations and in the granting of the rights of transit operation, and the plaintiff, in the discussion of terms with the City and Commission, made clear its reliance thereon.

In its supplementary proposal, dated May 9, 1911, involving a proposed contribution to be made to said transit facilities, in the amount of $123,824,500, addressed to Hon.

William R. Willcox, Chairman of the Public Service Commission for the First District, New York City, and Hon. George McAneny, Chairman of the Special Committee of the Board of Estimate and Apportionment, the representatives of the City in the negotiations, the plaintiff stated:

"It is manifest that if, after extending our lines largely at our own cost, through the main arteries of travel, we should be met immediately with an unnecessary duplication of lines by the City, the result would be our financial ruin. *With this in view, and for the express purpose of avoiding the need of duplicated lines, we have decided to ex-* [fol. 677] *tend our offer to cover other additional routes,* so as to afford a service and capacity equal to the growing needs of the population of this City for many years to come." (Italics supplied.)

XII. The Commission and the representatives of the City, whether in discussing the possibility of an independent system of rapid transit referred to in the negotiations as the "triborough system," in making provision for the recapture of rapid transit facilities to be operated as parts of the Dual System, or in their actual procedure in the negotiations extending over a series of years, proceeded upon the declared assumption that *the powers reserved to the City, contemplating the possibility of independent operation, were not intended to be exercised otherwise than in the event of a failure to procure, on just and reasonable terms, an extension of the facilities of the two operating units,* and that the reservation of the right to recapture the lines and to transfer the lines so recaptured to an existing operator was in pursuance of the plan of the Dual System to avoid a multiplication of systems if reasonably possible.

The City of New York made clear that the reason it was necessary that it should possess the powers to effect independent operation, if necessary, was that otherwise the City might not be in a position at all times to secure reasonable extensions of and additions to the two systems, the operators of which might otherwise prove unwilling to make such extensions. This policy was formulated on the theory that rapid transit development should be controlled

by a balance of profitable and unprofitable operation, so that the construction in regions of greater traffic density [fol. 678] and short hauls would be available to procure present construction and future extensions upon a basis of equity alike to the City and to the two operating units, and it was represented that the City did not contemplate the provision of a third or independent system, excepting only in the event of a failure to procure extensions of the existing lines upon reasonable terms.

XIII. Deponent is informed and believes that the policy of development through the "dual system" thus adopted pervaded the negotiations and the terms of Contract No. 3 and the certificates which reserved to the City sufficient power of control over the situation to enable it to procure just and reasonable terms of extension in future negotiations with the two operating units.

In the report by the Committee of the Board of Estimate and Apportionment, there was defined a policy "to establish a system that will penetrate to all parts of the City at approximately the same time, in this way compelling the richer short haul lines to support the less profitable extensions."

In the joint report of the Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District, dated June 5, 1911, laying down the policy of the City substantially as subsequently embodied in said Contract and Certificate, one of the conclusions of the conferees was as follows:

"That where a proper measure of control can be maintained, it is good policy and correct economy to utilize and extend the facilities offered by existing rapid transit lines already at the service of the City, rather than to reduce the uses of such lines through wasteful competition."

[fol. 679] XIV. The lease of the lines of the Manhattan Railway Company to the plaintiff was then an asset of great value and urged by the City to be a proper basis on which to obtain provision of compensatory and relatively unprofitable extensions of the rapid transit system of the plaintiff, and the attitude and policy of the City in this regard was embodied in the conditions expressed in the Certificates

granted to the Manhattan Railway Company, simultaneously with Contract No. 3, that, if Contract No. 3 "shall not take effect * * * this certificate hereby granted shall become null and void and all rights given hereby to the Manhattan Company and all its obligations hereunder shall cease and determine." The Manhattan lines, as the result of world-wide conditions of increased costs following the World War, cannot now earn under a five-cent fare a just and reasonable return upon the value of its property, or, in addition to the other costs and charges thereof, the rental reserved under the lease, and, as deponent is informed and believes, the open, flagrant and notorious efforts of the representatives of the City of New York to procure a denial by the Transit Commission to the Manhattan Railway and to the plaintiff of a just and reasonable rate of fare constitute a breach of trust and of the contract with this defendant as its co-adventurer in the said business of rapid transit.

XV. The report of the Joint Committee of the Board of Estimate and Apportionment and the Public Service Commission, June 5, 1911, which, together with the supplementary report of May 22, 1912, constitutes, in my opinion as well as of others, an authoritative expression of the policy of the City and the Commission relative to the dual scheme of rapid transit development, substantially as em- [fol. 680] bodied in the certificates and agreements executed March 19, 1913, fully discloses the paramount importance attached to the subject of the future development of rapid transit by extensions of the two operating systems aforesaid. As the report of June 5, 1911, states, "all depends on the arrangement made between the City and the forty-nine year operator for the operation of future extensions." That a satisfactory basis had been found for the provision of extensions under said contract was pointed out; and the alternative of operation by the City of "an independent trunk line through the fertile part of the City so that extensions can be added to it and the benefits of short haul be donated to the support of the desired extensions" was indicated as an alternative which the City had found means to avoid. Contract No. 3 and the Certificate to the plaintiff and to the Manhattan Company were executed, therefore,

with the assurance, reached after prolonged negotiations, that the plaintiff was secured against destructive competition, unless it should unreasonably refuse to provide future extensions to its existing system; and that this understanding permeated the said negotiations and was a vital consideration in entering into said Contract No. 3 and said Certificates. In reliance upon that assurance, the plaintiff has expended great sums of money and has, among other things, adapted its power plant to the provision of an enlarged and extended unified operation as contemplated in Article XXXVIII of the said contract, as follows:

"It is the expectation of the parties that through the utilization of the power house, substations and other electrical equipment forming part of the Existing Equipment adequate power will be afforded for the operation of the [fol. 681] Railroad (including Additions) without the construction of additional power houses. In furtherance of this purpose the Lessee may improve, reconstruct, modify or change the power houses, substations and other electrical equipment forming part of the Existing Equipment and include such improvements, reconstructions, modifications or changes in Equipment to be furnished under this contract."

XVI. Contract No. 3 embraced a revision of Contracts Nos. 1 and 2, and the sum of $181,375,786.77 expended by the plaintiff pursuant to and under its agreements with the said City has been, by virtue of Contract No. 3, made to depend not only in respect to the income thereon, but for the security of the investment itself, almost solely upon the earnings of the subway and elevated lines.

Subversion by the City of Dual Plan

XVI. The City of New York, as deponent is informed and believes, disregarding the obligation of the contract and the bona fides of the relation to the plaintiff under the rapid transit contracts, has wilfully entered upon the construction of competitive rapid transit facilities paralleling many of the routes granted to the plaintiff by said contract and certificates, with the declared purposes of operating them at a rate of fare admitted by the expert advisers of the City to be grossly unremunerative and involving huge deficits to

the City and under unfair, unreasonable and competitive conditions, impairing, as deponent is informed and believes, the obligations of Contract No. 3 and the certificates; and the City, contrary to its avowed policy under which it procured the investment of funds of the plaintiff under the contract and certificates, has, as deponent is informed and [fol. 682] believes, wholly neglected and refused to construct the new lines as additions to the existing dual system of rapid transit, or even negotiate with the plaintiff for their provision.

The competitive system now under construction by the City is, as deponent is informed and believes, in an advanced state of completion, substantially as hereinabove set forth, with which deponent is familiar and believes to be true.

The City of New York, as deponent is informed and believes, has undertaken the construction of independent and competitive system, and threatens to operate the same, pursuant to an unjust and wilful policy directed to the impairing of the obligations of its contract with the plaintiff and for the purpose of compelling the plaintiff to submit to a surrender and transfer to it of essential rights accruing to the plaintiff under the contracts and certificates.

In pursuance of such policy, the Transit Commission, which acts as agent of the City in relation to the contracts, has, in its capacity as a State regulatory body, aided and advised by Samuel Untermyer, its special counsel, vigorously and partially exercised the State's regulatory powers for the announced and predetermined purpose of compelling the *defendant* to purchase 432 additional cars for use in its subway lines, which, as deponent is informed and believes, are wholly unnecessary and is a provision utterly unreasonable for the public service, especially in view of the fact that, upon the completion of the competitive sys- [fol. 683] tem, the amount of equipment necessary for the adequate operation of the plaintiff's lines must of necessity be materialliy reduced. The City in its proprietary capacity and through the Transit Commission, its agent, has insisted and required, as deponent is informed and believes, that the plaintiff extend local subway platforms, provide additional rolling stock and extensions of power facilities

incident thereto, and provide signals on local subway tracks after 1931, which would require the plaintiff to raise approximately $40,000,000 of new capital, involving a radical, unwarranted and unauthorized modification of the scope and character of the lines not contemplated by or within the purview of said Contract No. 3.

The City, as deponent is informed and believes, is fully aware that such radical changes in the scope and mode of operation of plaintiff's lines would involve expenditures unwarranted by the plaintiff's present revenue and operating conditions, and insists upon them at this time, when the City's own competition is imminent, for the wilful purpose of compelling the destruction of the contract itself, and the transfer of the rights of the plaintiff hereunder to the City.

The purpose of the City to impair the value of the property operated by the plaintiff and owned by it or its lessor, the Manhattan Railway Company, and to force upon the plaintiff inequitable and confiscatory terms inconsistent with, contrary to and destructive of the contract and of the rights of the defendant thereunder, was stated by the Mayor of the said City, John F. Hylan, in the plan of rapid transit submitted by him to the Board of Estimate and Apportion-
[fol. 684] ment of the said City, September 6, 1922, wherein it was stated that:

"The City intends to spend about Six Hundred Million Dollars during the next fifteen years to construct and equip these new rapid transit lines * * *. These new rapid transit lines will be constructed by the City itself. The City will have no partners in this gigantic enterprise and it will entertain no partnership in the operation of any of these lines when finished. It will be exclusively a city undertaking. The City will become the sole operator of all these new lines and of the existing subway lines which the city owns, and which are now leased to private operators.

"The city intends to discontinue its present partnership arrangements with the Interborough and the Brooklyn Rapid Transit Companies as soon as it can legally do so. It intends to take over the City owned subway lines oper-

ated by these private companies and operate them itself in conjunction with the new subways."

The plan was made by said Board of Estimate the basis of hearings upon the subsequent adoption of routes, and, as deponent is informed and believes, threatened not merely to terminate the relations of the City with the defendant, but contemplated the termination of the contract before the expiration thereof, its plan stating that the "City will probably receive nothing for the balance of the contract period unless the City takes over the operation of subways and terminates the contracts."

[fol. 685] XVII. Deponent is further informed and believes that the plan formulated by Mayor Hylan on behalf of the City, and subsequently pursued by it, proposed to destroy the elevated railway lines leased by the defendant by unfair and destructive competition, it being set forth in such plan:

"One of the important effects of the construction of new rapid transit lines will be that existing privately owned elevated structures in the built-up sections of Manhattan, Bronx and Brooklyn will ultimately be removed, *because their continued operation by private owners will be unprofitable*. These elevated structures will begin to disappear after the first period of new City construction. Each successive construction period will result in further elimination of elevated lines and eventually all these unsightly structures will be gone." (Italics supplied.)

As deponent is informed and believes, the elevated lines are indispensable to the accommodation of the traveling public, and will continue to be upon the completion and operation of the new and competitive lines now being constructed under the Mayor Hylan plan; and the threat to effect their elimination is based upon an intent to operate the new and competitive lines at an unjust, unremunerative and confiscatory rate.

[fol. 686] XVIII. As for the subway lines leased to this plaintiff, in the cost of which the plaintiff has made a large investment, the plan states:

"One of these will be the present east side subway which will remain with the Interborough Rapid Transit Company until the expiration of its lease with the City in 1956, or until such time prior as it will have been obliged to dispose of its rights to the City."

XIX. Among the so-called salient features of the City's plan for rapid transit aforesaid is an intended provision of:

"The longest ride anywhere on earth for a nickel";

and a provision for:

"Unified City operation of all city owned rapid transit lines on a 5¢ fare * * *

"It will ultimately result in the elimination of all elevated structures. * * *

"It will put an end to the illicit and unwarranted attempts of private operating companies to increase carfares in New York City."

Samuel Untermyer, Esq., as special counsel for the Transit Commission, speaking in its behalf, both as the agent and representative of the City in its proprietary capacity, and also as counsel for the Transit Commission in its capacity as the repository of the regulatory powers of the State, has publicly declared the purpose, in the alternative of failure of the plaintiff to alter the character of its subway structure and to provide equipment as aforesaid, to seize, on behalf of the City, the rapid transit lines [fol. 687] provided under Contract No. 3 in part by the funds of the defendant and leased to it by the City as aforesaid.

Earl E. Starbard.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No. 17. Bronx Register No. 2966. N. Y. County No. 335. N. Y. Register No. 9258. Kings County No. 38. Kings Register No. 9168. Queens Co. No. 2562. Queens Register No. 5006. Term expires March 30, 1929.

[fol. 688] [Title omitted]

UNITED STATES OF AMERICA,
City and County of New York,
Southern District of New York, ss:

WILLIAM S. GORSUCH, being duly sworn, deposes and says:

I am an engineer by profession and am employed by the Interborough Rapid Transit Company.

I have been employed by the Interborough Company for the past sixteen years and have been in charge of the Engineering Economics Division. This division deals largely with various economic problems of operation and construction pertaining to the power facilities of the company, but at times is called upon for special studies in con-
[fol. 689] nection with various other construction and operating problems of the company.

I was graduated from Maryland Institute in mechanical design and later from The Johns Hopkins University in engineering, and hold a certificate of registration as Professional Engineer in New York State. For a number of years I have been an active member of the American Institute of Electrical Engineers, being Chairman of the Committee on Power Generation for the last two administrative years.

After graduating from The Johns Hopkins University and prior thereto my experience was as follows: I was engaged with the Wentstrom-Dynamo & Motor Company on drafting, shop work and testing; in the employ of the American Sugar Refining Company where I took an active part in designing and constructing a large refinery in Maryland; with the Maryland Steel Company, engaged in designing and preparing estimates for steel buildings and bridges; with Bartlett-Hayward & Company as assistant to the Chief Engineer in charge of constructing sugar refineries and machinery; later I was put in charge of the coal, coke and ash handling machinery division of the Gas Department of that company. I was also engaged by Dr. Louis Duncan, Consulting Engineer, as Engineer in Charge of Construction of the Maryland Telephone Company.

Later I entered the employ of the New York Central

Railroad Company, where I took an active part in the design and construction work of the electrification of the terminals and lines of that company.

Prior to going with the Interborough Company I was Principal Assistant Engineer in Charge of the Engineering Department of the Metropolitan Street Railway Com- [fol. 690] pany during the period of rehabilitation. This department had charge of all the construction work of the power station, sub-stations, feeder and duct systems, contact rail system, shops, car house equipment, and of the preparation of specifications and testing of rolling stock equipment. There was also a certain amount of operation and maintenance under the jurisdiction of this department.

In 1921-1922 deponent prepared the valuation of the property of the Manhattan Railway Company and that provided by the Interborough Company for both subway and elevated divisions and testified, as to the values of the property provided by the Interborough Company and used in the public service, in the transit investigation of April and May, 1922, conducted by the Transit Commission.

I am and have been familiar with the various properties used and useful in the operation of the Interborough Rapid Transit Company and of the rapid transit lines, including its Manhattan and Subway Divisions.

I am, and have been for many years, familiar with the market prices of material and labor entering into the construction and installation of the various properties used by the plaintiff on the rapid transit railroads operated by it, and have kept myself currently informed with such prices and the changes therein, and have from time to time made investigations as to and studies of such prices and the trend thereof.

The figures used in the computations herein set forth of reproduction values for the year 1926, based principally upon estimates made by the engineers of the Transit Commission, are the same figures which were introduced in evidence by special counsel to the Transit Commission in the 1927 transit investigation and are shown in Exhibits 40 [fol. 691] and 102. This investigation was conducted by the Transit Commission in connection with the preparation of what has been known as the unification plan for the transportation lines in the City of New York under the

provisions of the Act of 1921, being Chapter 134 of the Laws of 1921.

The figures of reproduction cost for the year 1927, based upon the figures of the Commission's engineers, are derived by taking the figures of the Commission's engineers for 1926 and adding thereto net additions to fixed capital for the year ending June 30, 1927. The Commission's engineers also made an estimate of the expenses necessary to recondition the property, which figures, also shown upon the said exhibits, are set up in the following table:

To recondition property provided under Contracts 1 and 2	$254,000
Contract No. 3	375,000
Elevated Extension Certificates	1,297,000
Original Manhattan Property	654,000
Total for the Interborough Rapid Transit System	$2,580,000

The figures used by deponent in this affidavit showing the earnings available as a return and the deficiency below an eight per cent return, the fixed capital assets, investment of both companies, and a pro rata distribution of materials and supplies and cash working capital are taken from or based upon statements contained in the affidavit of Henry T. Berry, hereto annexed.

Under my supervision and direction, an appraisal has been made of the property provided by both the Interborough and Manhattan Companies used in the operation of the rapid transit railroad lines, including the property provided under the 1913 Elevated Extension and Improvement Certificates.

[fol. 692] This valuation was prepared on the basis of the cost to reproduce the property at prices of material, labor and money prevailing at the time of the appraisal.

In preparing an appraisal of all property provided by the Company under Contracts 1, 2 and 3, and the 1913 Elevated Extension and Improvement Certificates, it was not necessary to resort to the usual detailed inventory method, for the reason that in every case it was possible to establish, from our records, the actual original cost of practically all of the items of property installed. With this as a

basis, the cost to reproduce was ascertained by taking the actual cost of each principal item of the property and increasing or decreasing each in the ratio that the prevailing prices bear to prices current at the time the work was actually performed. This applies particularly to all bare costs and certain overhead charges, such as engineering, legal and administrative and miscellaneous construction expenditures. Other overhead charges, such as interest and cost of financing, were ascertained by giving due regard to the amount of money to be raised, prevailing interest rates, etc.

The land used and useful in the public service was included only at original cost as shown by the books of the Interborough Rapid Transit Company, although according to the affidavit of Charles E. Williams, the appraiser, the actual value of said land for the years in question is greatly in excess of the said original cost.

A detailed physical inventory was made in 1921 of the property leased by the Manhattan Railway Company to the Interborough Rapid Transit Company and the items so inventoried were appraised under my direction and supervision.

[fol. 693] To this inventory was applied the unit of basic prices prevailing in June, 1921, which prices include material and labor with allowances for contingencies, compensation insurance, contractors' services and other miscellaneous items such as clerical help in the field.

The basic prices were partly obtained from the company's records and partly from information received from manufacturers and through other reliable sources and these costs adjusted to conform to the cost prevailing at the time of computing the cost to reproduce new. The land of the Manhattan Railway Company was included at the amount of the normal market values, as appraised by Mr. Charles E. Williams, an appraiser whose affidavit is submitted herewith, no consideration being given to special use for railway purposes.

Overhead charges on construction are expenditures made for the work as a whole and which cannot be apportioned accurately among the various inventory items.

It was estimated that, after the necessary construction funds had been guaranteed, it would require conservatively

a construction period of approximately four years before all the property could be placed in operation with an additional six months for finishing the work and settling contracts and claims. Due consideration was also given to preconstruction costs, engineering and superintendence and all expenditures during construction, miscellaneous construction expenditures, taxes and interest during construction and cost of financing.

This valuation made in 1921 was used to obtain the cost to reproduce new the Manhattan Railway property at prices prevailing in 1926 and 1927 by applying index numbers which represent the change in prices between 1921 and 1926 or 1927.

[fol. 694] Herein below is set forth a summary of the deponent's estimate of the present value of the specified properties provided by the plaintiff and devoted to the public service in the operation of Manhattan Division (elevated lines), the maximum amount of earnings from such operation actually available as a return thereon, and the deficiency in the actual earnings below the reasonable and required return thereon.

The properties embraced in the summary consist, in the main, of the construction and equipment provided under the Elevated Railroad Extension and Improvement Certificates of 1913 and the property of the Manhattan Railway Company, exclusive of property necessarily removed in order to perform the work required under those Certificates; together with a pro rata proportion of the cost of materials and supplies, as shown by the plaintiff's accounts and records, and of cash working capital (based on one month's operating expenses of the Manhattan Division). For the purpose of this computation, there has been deducted, without prejudice, from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for 1927, without conceding the correctness or propriety of such a deduction.

The said properties on the Manhattan Division are all owned by the plaintiff or the Manhattan Railway Company.

The stated amounts of present value are exclusive of the cost of the records pertaining to the elevated lines;

the increases in the value of land since 1921; the going value; the cost of portions of the elevated lines as they existed in March, 1913, which were replaced and superseded [fol. 695] in the making of the extensions and improvements thereon; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included at original cost.

Manhattan Division

Computation Based on Company's Present-value Figures

	1926	1927
Elevated Certificates	$65,032,000	$65,338,000
Original Manhattan Railway Property	143,556,000	143,556,000
Materials and Supplies	838,976	788,296
Cash Working Capital	1,038,333	1,141,742
Gross Present Value at least	$210,465,309	$210,824,038
Amount necessary to Recondition	1,951,000	1,951,000
Present Value at least	$208,514,309	$208,873,038
Earnings Available as a Return	$3,936,397	$3,168,788
Per cent of Return Actually Earned on such Value	1.89	1.52
Earnings Required for 8% Return at least	16,681,145	16,709,843
Deficiency in Earnings below 8% Return at least	12,744,748	13,541,055

The following summary sets forth the corresponding computations upon the minimum present value of the elevated railroad properties, comprising the Manhattan Division, based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting the expenditures estimated by commission engineers for reconditioning the property. The deponent believes that the actual present value of the properties, upon the basis of the Transit Commission's engineers' own figures, is substantially greater than the sums here shown. The plaintiff accordingly submits this summary and computation without prejudice, and with reservation of right to prove the full and complete figures in the trial of this action:

[fol.696] Manhattan Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	1926	1927
Elevated Certificates	$64,959,000	$65,233,000
Original Manhattan Railway Property	114,565,000	114,565,000
Materials and Supplies	838,976	788,296
Cash Working Capital	1,038,333	1,141,742
Gross Present Value of	$181,401,309	$181,728,038
Amount necessary to Recondition	1,951,000	1,951,000
Minimum Present Value of	$179,450,309	$179,777,038
Earnings Available as a Return	$3,936,397	$3,168,788
Per cent of Return Actually Earned on such Value	2.19	1.76
Earnings Required for 8% Return at least	14,356,025	14,382,163
Deficiency in Earnings below 8% Return at least	10,419,628	11,213,375

Herein below is set forth a summary of the deponent's estimate of the present value of the properties used and useful in the operation of the Subway Division of the plaintiff and devoted to the public service, under Contracts Nos. 1, 2 and 3, including the property provided by the plaintiff and by the City of New York, the actual earnings from such operation available as a return thereon, and the deficiency in earnings below the reasonable and required rate of return thereon.

The properties covered by the estimate consist, in the main, of the construction and equipment provided under Contracts Nos. 1, 2 and 3, by the plaintiff and by The City of New York together with a pro rata proportion of the cost of materials and supplies as shown by the plaintiff's books of account or records, and cash working capital based upon one month's operating expenses of the subway lines, the actual cost of the Belmont Tunnel in excess of the amount allowed as a part of the "Cost" under Contract No. 3, and such undistributed structural costs or overheads applicable to such properties as have virtually been conceded to be reasonable by the engineers of the Transit [fol. 697] Commission. The estimate of the value of the property provided by The City of New York under Contracts Nos. 1, 2 and 3 is based principally upon the estimate of reproduction cost thereof made by the engineers of the Transit Commission. For the purposes of the computation, there has been deducted from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be neces-

sary to recondition the property, a like deduction being made for 1927, without conceding the correctness or propriety of such a deduction.

Subway Division

Computation Based on Company's Present-value Figures of Property Provided by it and Commission Figures for City-provided Property

	1926	1927
Company Property Contracts 1 and 2	$106,793,000	$106,788,000
Company Property Contract 3	230,804,000	232,010,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	1,628,601	1,530,221
Cash Working Capital	1,838,513	1,946,215
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Gross Present Value Company and City Property at least	$686,839,288	$690,549,610
Amount necessary to Recondition	629,000	629,000
Present Value Company and City Property at least	$686,210,288	$689,920,610
Earnings Available as a Return	$19,762,325	$19,453,973
Per cent of Return Actually Earned on such Value	2.88	2.82
Earnings Required for 8% Return at least	54,896,823	55,193,649
Deficiency in Earnings below 8% Return at least	35,134,498	35,739,676

The following summary sets forth the corresponding computations of the minimum present value of the properties comprising the plaintiff's subway division based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property.

[fol. 698] The deponent believes that the actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action:

Subway Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	1926	1927
Company Property Contracts 1 and 2	$102,997,000	$102,997,000
Company Property Contract 3	190,328,000	191,484,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	1,628,601	1,530,221
Cash Working Capital	1,838,513	1,946,215
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Overhead Omitted	6,173,000	6,173,000
Gross Present-Value Company and City Property	$648,740,288	$652,405,610
Amount necessary to Recondition	629,000	629,000
Minimum Present-Value Company and City Property	$648,111,288	$651,776,610
Earnings Available as a Return	$19,762,325	$19,453,973
Per cent of Return Actually Earned on such Value	3 05	2 98
Earnings Required for 8% Return at least	51,848,903	52,142,126
Deficiency in Earnings below 8% Return at least	32,086,578	32,688,159

Herein below are set forth the present value of the rapid transit railroad properties—both subway and elevated lines—the maximum amount of earnings available as a return thereon, the per cent or rate of return actually earned, and the deficiency in earnings below the reasonable and required rate of return of eight per cent upon such present value.

The amount of such present value, as to property provided by the plaintiff, is based upon estimates of reproduction cost made by engineers for the plaintiff, and embraces the property provided by the plaintiff under Contracts Nos. 1, 2 and 3, and the Elevated Extension and Improvement Certificates of 1913, and the original Manhattan Railway [fol. 699] property (exclusive of property necessarily removed in order to perform the work required under said certificates), and, as to the property provided by the defendant The City of New York under Contracts Nos. 1, 2 and 3, is based principally upon estimates made by engineers of the Transit Commission; together with the cost of materials and supplies as shown by the plaintiff's records, cash working capital based upon one month's operating expenses, actual cost of the Belmont Tunnel in excess of the amount allowed as a part of the cost of Contract No. 3 and certain items of undistributed structural costs or overheads

aggregating $6,173,000, as set forth on Sheet No. 2 of Exhibit 40 of the 1927 transit investigation, the propriety of allowing which items is not disputed by the Transit Commission's engineers. For the purpose of the computation, there has been deducted from the reproduction cost the expenditures estimated by the Commission's engineers as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for 1927, without conceding the correctness or propriety of such deduction.

The stated amounts of present value are exclusive of the cost of the plaintiff's records; the increases in the value of land since 1921; the going value; the accumulated deficits in the preferentials; the cost of portions of rapid transit properties as they existed in March, 1913, which were replaced and superseded in the reconstruction of the Manhattan Railroad; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included at original cost.

[fol. 700] The summary of the present value of rapid transit properties above described, the amount of the actual earnings available as return, the per cent of return actually earned, and the deficiency in earnings below a fair return on such present value, is as follows:

Interborough System

Computation Based on Company's Present-value Figures of Property Provided by the Companies and on Commission Figures for City-provided Property

	1926	1927
Company Property Contracts 1 and 2	$106,793,000	$106,788,000
Company Property Contract 3	230,804,000	230,010,000
Company Property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway Original Property	143,556,000	143,556,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Gross Present Value Company and City Property at least	$897,304,597	$901,373,648
Amount necessary to Recondition	2,580,000	2,580,000
Present Value Company and City Property at least	$894,724,597	$898,793,648
Earnings Available as a Return	$23,698,721	$22,622,761
Per cent. of Return Actually Earned on such Value	2.65	2.52
Earnings Required for 8% Return at least	71,577,968	71,903,492
Deficiency in Earnings below 8% Return at least	47,879,247	49,280,731

The amounts in this affidavit of the estimated cost to reproduce new, as prepared by deponent, of the Manhattan Railway Company property and the property representing the Interborough Rapid Transit Company's investment under Contracts 1, 2 and 3 and Elevated Extension and Improvement Certificates, were made without prejudice, to the best of the deponent's ability, within the limited time available, but he believes that, even upon a most conservative estimate of cost to reproduce new the said properties, the aggregate would still be at least $25,000,000 or $30,000,000 higher than the corresponding figures of the Transit Commission engineers.

[fol. 701] The following summary sets forth the corresponding computations of the minimum present value of the rapid transit railroad properties, including the subway properties and the elevated properties, based principally upon estimates of the reproduction cost made by engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property.

The deponent believes that the actual present value of the properties is greater than the sums hereinafter shown, and the plaintiff submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action:

[fol. 701]

Interborough System

Computation Based on Transit Commission's Engineers' Reproduction-cost Figures	1926	1927
Company Property Contracts 1 and 2	$102,997,000	$102,997,000
Company Property Contract 3	190,328,000	191,484,000
Company Property Elevated Certificates	64,959,000	65,233,000
Manhattan Railway Original Property	114,565,000	114,656,000
City Property Contracts 1 and 2	142,687,000	142,687,000
City Property Contract 3	197,193,000	199,693,000
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Overhead Omitted	6,173,000	6,173,000
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Gross Present Value of Company and City Property	$830,141,597	$834,133,648
Amount necessary to Recondition	2,580,000	2,580,000
Minimum Present Value of Company and City Property	$827,561,597	$831,553,648
Earnings Available as a Return	$23,698,721	$22,622,761
Per cent of Return Actually Earned on such Value	2.86	2.72
Earnings Required for 8% Return at least	66,204,928	66,524,292
Deficiency in Earnings below 8% Return at least	42,506,207	43,901,531

For the purpose of illustrating the wide margin by which the five-cent fare is in adequate to allow a fair return upon even the actual investment in the rapid transit railroad properties used by the plaintiff in the service of the public, [fol. 702] and without waiving any right to earn a fair return upon the present value of such properties, there is set forth herein below a computation of the original cost of the above specified rapid transit railroad properties, on the subway lines and the elevated lines (for the Company-provided property, as shown by the books of account of the Interborough Company and/or the Manhattan Company; and for the City-provided property as determined by the engineers of the Transit Commission), together with materials and supplies and cash working capital as above stated; the per cent. of return actually earned thereon, and the deficiency in earnings below the required rate of return of 8 per cent:

Interborough System

Computation Based on Companies' Investment and Transit Commission's Engineers' Original Cost Figures for City Property

Interborough Rapid Transit Company Property	1926	1927
Contracts 1 and 2		
Subway Equipment	$36,353,631	$36,348,705
Replacement of Existing Equipment	224,489	224,494
Cost of Leases	22,278,589	22,278,589
Contractor's Expense	1,302,817	1,302,817
Real Estate Owned	299,138	299,138
Office Furniture and Fixtures	42,295	42,295
Total	$60,500,959	$60,496,038
Contract 3		
Construction	$57,809,303	$57,806,828
Additions to Construction	167,654	189,138
Equipment	48,804,961	49,545,698
Additions to Equipment	12,547,470	12,910,821
Replacement of the Railroad	41	41
Replacement of Equipment of the Railroad	322,326	325,147
Replacement of Additional Equipment	12,076	12,076
Total	$119,723,821	$120,879,749
Elevated Certificates		
Manhattan Third Tracking		
Plant and Structure	$21,577,405	$21,640,220
Equipment	238,167	238,167
Elevated Extensions		
Plant and Structure	6,794,485	6,813,655
Equipment	6,765,391	6,759,101
Manhattan Division Power Plant Improvements	5,758,413	5,749,579
Replacement of Manhattan Division Power Plants	9,450	9,450
Additions to Company Lines	2,699,086	2,900,377
Total	$43,842,397	$44,110,549
Total—I. R. T. Company Property	$224,067,177	$225,492,336

[fol. 703] Manhattan Railway Company Property

Real Estate and Structures:		
Land including sites of main power station and seven substations	$2,675,330	$2,675,330
Buildings and Structures outside of Streets, Highways and Public Places	2,752,815	2,752,815
Main Power Station Building and Bulkhead	1,381,865	1,381,865
Sub-Power Station Buildings	493,554	493,554
Engines, Generators, Boilers, etc., in Power Stations	4,945,790	4,945,790
Cars	11,973,827	11,973,827
Subways—Cable Ducts	1,039,133	1,039,133
Land Damages including expense of litigation	22,230,687	22,230,687
Foundation, Structures, Track Superstructures, etc., of Second, Third, Sixth and Ninth Avenue Elevated Lines	35,028,159	35,028,159
Discount of New York Elevated Railroad Co., Metropolitan Elevated Railway and Manhattan Railway Co. Bonds	6,974,285	6,974,285
Amount of Par Value of Metropolitan Elevated Railway Co. Capital Stock and Bonds issued for road built by contract cover expenditures for construction as found by Board of R. R. Commissioners in 1883	5,113,309	5,113,309
Intangible Street Railway Capital	14,104,000	14,014,000
Fixes Capital Subsequent to December 31, 1909	4,320,900	4,320,900
Total—Manhattan Railway Co. Property	$112,943,654	$112,943,654
Miscellaneous Interborough Items		
Materials and Supplies	$2,467,577	$2,318,517
Cash Working Capital	2,876,846	3,087,957
Total	$5,344,423	$5,406,474
Total—Company Property	$342,355,254	$343,842,464
City Property		
Contracts 1 and 2	$66,561,000	$66,561,000
Contract 3	110,505,955	113,005,955
Total—City Property	$177,066,955	$179,566,955
Total Investment	$519,422,209	$523,409,419
Earnings Available as a Return	$23,698,721	$22,622,761
Per cent. of Return actually earned on such Investment	4.56	4.32
Earnings Required for 8% Return on such Investment, at least	41,553,776	41,872,754
Deficiency in Earnings below 8% Return, at least	17,855,055	19,249,993

[fol. 704] Reducing the above computation of the investment to the incontestable basis furnished in the calculations of "original cost" based principally upon estimates made by engineers of the Transit Commission, the resultant amounts, corresponding to the amounts set forth in the preceding summary of deficiency in earnings, are as follows:

Interborough System

Computation Based on Transit Commission's Engineers' Original Cost Figures

	1926	1927
Company Property Contracts 1 and 2	$47,093,000	$47,088,080
Company Property Contract 3	119,817,228	120,973,155
Company Property Elevated Certificates	43,628,968	43,903,121
Original Manhattan Railway Property	71,419,000	71,419,000
City Property Contracts 1 and 2	66,561,000	66,561,000
City Property Contract 3	110,505,955	113,005,955
Materials and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Overhead Omitted	6,173,000	6,173,000
Original Cost of Company and City Property	$476,437,748	$480,424,959
Earnings Available as a Return	$23,698,721	$22,622,761
Per cent. of Return Actually Earned on such Cost	4.97	4.71
Earnings Required for 8% Return on such Cost at least	38,115,020	38,433,997
Deficiency in Earnings below 8% Return at least	14,416,299	15,811,236

William S. Gorsuch.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No. 17. Bronx Register No. 2966. N. Y. County No. 335. N. Y. Register No. 9258. Kings County No. 38. Kings Register No. 9168. Queens Co. No. 2562. Queens Register No. 5886. Term expires March 30, 1929.

[fol. 705] [Title omitted]

State of New York,
County of New York,
Southern District of New York, ss:

Henry T. Berry, being duly sworn, says:

I am the comptroller of the Interborough Rapid Transit Company, and have been such since February 1, 1924. Among other fiscal duties, I have charge of the tax bills received by the Company from the City of New York, check and confirm the amounts thereof, verify the properties and values against which they are assessed, and supervise the payment of taxes by the Company. I am therefore familiar with the valuations placed by the City of New York, for pur-

poses of taxation, upon the various parcels of land (unimproved) owned by the Interborough Rapid Transit Com-
[fol. 706] pany or by the Manhattan Railway Company, and used and useful by the Interborough Rapid Transit Company in its business as a railroad common carrier, and am also familiar with the assessed valuations placed upon various parcels of land purchased by the Interborough Rapid Transit Company from its capital funds and now used and useful by the Interborough Rapid Transit Company in such public service, but to which parcels of land legal title is held by The City of New York as contributions made by the Interborough Rapid Transit Company under Contract No. 3. The foregoing applies particularly to the assessed valuations for taxes payable in 1926, 1927 and 1928, such valuations for each year being determined as of approximately October 1st of the preceding year.

Each such valuation of a parcel of land (unimproved) is made by the Deputy Tax Commissioner of the City of New York assigned by the Board of Tax Commissioners to the particular district in which such parcel is situated. Each Deputy Tax Commissioner is appointed by the City of New York from a civil service list determined as a result of a competitive civil service examination, for entrance to which each candidate is required to possess and show experience and qualifications to form a judgment as to the value of such land (unimproved). Each Deputy Tax Commissioner is required by law to take an oath of office upon appointment, and is required to make oath or affidavit to the valuations determined and reported by him each year, before a Justice of the Supreme Court of the State of New York, to the effect that the values so determined and reported represent his judgment and opinion as to the amounts of money each such parcel of land would sell for under ordinary circumstances, if wholly unimproved.
[fol. 707] As to the parcels of land used and useful by the Interborough Rapid Transit Company in its business as a railroad common carrier, the assessed valuations, determined and reported as above stated, are as follows:

Parcel			Assessed valuation		
Block No.	Lot No.	Street No. or other location	1926	1927	1928
		Borough of Manhattan			
8	12	No. 4 Front St	$27,000	$27,000	$27,000
30	35	Pearl St. and Coenties Slip	450	450	450
241	5	No. 2 Catharine St	14,000	14,000	14,000
293	23	100-104 Division St	100,000	110,000	110,000
502	42	173-175 Spring St	30,000	30,000	30,000
915	23	237-241 East 34th St	56,000	65,000	65,000
1043	56	354-356 West 33rd St	38,000	50,000	60,000
1486	3	Bet. 74th and 75th Sts.—Ave. A and Exterior St	400,000	440,000	440,000
1626	1	Bet. 98th and 99th Sts.—Lexington and 4th Aves	425,000	493,000	493,000
1626	21	Bet. 98th and 99th Sts.—Lexington and 3rd Aves	450,000	537,000	537,000
1793	7	Bet. 128th and 129th Sts.—2nd and 3rd Aves	525,000	525,000	525,000
1794	21	129th St. and Harlem River—2nd and 3rd Aves	75,500	75,000	75,000
1805	1	Bet. 128th and 129th Sts.—2nd Ave. and Harlem River	85,500	100,000	100,000
1805	2	Bet. 128th and 129th Sts.—2nd Ave. and Harlem River	100,000	125,000	125,000
1845	2	Bet. 109th and 110th Sts.—Manhattan and Columbus Aves	5,000	5,000	5,000
1845	3	Bet. 109th and 110th Sts.—Manhattan and Columbus Aves	100,000	110,000	110,000
1846	6	Bet. 110th and 111th Sts.—Manhattan and 8th Aves	265,000	285,000	285,000
1846	19	Bet. 110th and 111th Sts.—Manhattan and 8th Aves	1,000	2,500	2,500
2106	330	Bet. 159th and 160th Sts. and Speedway	100,000	100,000	100,000
		Totals, Borough of Manhattan	$2,776,950	$3,093,950	$3,103,950

		Borough of Bronx			
2295	49	132nd St. and Southern Blvd.—Alexander and Willis Aves	$24,000	$24,000	$24,000
2295	51	132nd St. and Southern Blvd.—Alexander and Willis Aves	10,500	10,500	10,500
2295	64	132nd St. and Southern Blvd.—Alexander and Willis Aves	133,000	133,000	133,000
2296	17	Bet. Southern Blvd. and 134th St.—Alexander and Willis Aves	4,000	4,000	4,000
2296	18	Bet. 134th St. and Southern Blvd.—Alexander and Willis Aves.	18,000	18,000	18,000
2297	25	Bet. 134th and 135th Sts.—Alexander and Willis Aves	16,000	16,000	16,000
2298	24	Bet. 135th and 136th Sts.—Alexander and Willis Aves	16,000	17,000	17,000
2299	23	Bet. 136th and 137th Sts.—Alexander and Willis Aves	15,450	18,950	18,950
2300	19	Bet. 137th and 138th Sts.—Alexander and Willis Aves	38,500	39,500	39,500
2301	15	Bet. 138th and 139th Sts.—Alexander and Willis Aves	37,500	38,500	38,500
2302	22	Bet. 139th and 140th Sts.—Alexander and Willis Aves	18,000	20,000	20,000
2303	23	Bet. 140th and 141st Sts.—Alexander and Willis Aves	18,000	20,000	20,000
2303	25	Bet. 140th and 141st Sts.—Alexander and Willis Aves	4,500	5,000	5,000
2304	21	Bet. 141st and 142nd Sts.—Alexander and Willis Aves	18,000	20,000	20,000
2305	22	Bet. 142nd and 143rd Sts.—Alexander and Willis Aves	19,000	21,000	21,000
2306	17	Bet. 143rd and 144th Sts.—3rd and Willis Aves	37,500	43,500	43,500
2306	42	Bet. 143rd and 144th Sts.—3rd and Willis Aves	5,000	5,500	5,500
2306	58	Bet. 144th and 145th Sts.—3rd and Willis Aves	6,000	6,000	6,000
2306	59	Bet. 144th and 145th Sts.—3rd and Willis Aves	5,500	5,500	5,500
2306	60	Bet. 144th and 145th Sts.—3rd and Willis Aves	2,500	3,500	3,500
2306	61	Bet. 144th and 145th Sts.—3rd and Willis Aves	2,000	2,000	2,000
2306	62	Bet. 144th and 145th Sts.—3rd and Willis Aves	50,000	52,000	52,000
2306	63	Bet. 144th and 145th Sts.—3rd and Willis Aves	400	500	500
2306	84	Bet. 144th and 145th Sts.—3rd and Willis Aves	55,000	56,500	56,500
2307	1	145th St. and 3rd Ave	19,000	19,000	19,000
2366	40	3193-95 3rd Ave	65,000	78,000	78,000
3061	72	179th and 180th Sts.—3rd and Monterey Aves	127,000	127,000	127,000
3061	122	179th and 180th Sts.—Monterey and La Fontaine Aves	143,000	143,000	143,000
3062	9	Quarry Road and Monterey Ave	20,000	20,000	20,000
3062	21	180th and 181st Sts.—Monterey and La Fontaine Aves	85,000	85,000	85,000
3273	102	Strip through St. John's College Grounds	100,000	100,000	100,000
		Totals, Borough of Bronx	$1,114,350	$1,152,450	$1,152,450
		Totals	$3,891,300	$4,246,400	$4,256,400

Property provided by Interborough Company under the Elevated Extension and Improvement Certificates of 1913—Manhattan Division
Borough of Bronx

Parcel			Assessed valuation		
Block No.	Lot No.	Street No. or other location	1926	1927	1928
2299	23	Bet. 136th and 137th Sts.—Alexander and Willis Aves	$3,750	$3,750	$3,750
2305	22	Bet. 142nd and 143rd Sts.—Alexander and Willis Aves	3,500	3,500	3,500
2306	17	Bet. 143rd and 144th Sts.—3rd and Willis Aves	6,500	6,500	6,500
2823	51	917 Summit Ave	5,000		
2504	40	Anderson Ave. Station and Adjoining Property	35,000	27,500	
2504	45	Anderson Ave. Station			38,000
2501	6	Bet. Jerome and Cromwell Aves	8,000	8,000	
2501	45	Bet. Jerome and Cromwell Aves	200	200	200
2501	22	Bet. Jerome and Cromwell Aves	200	200	200
2501	36	Bet. Jerome and Cromwell Aves	1,800	1,800	1,800
2493	7	Bet. Cromwell and River Aves	10,000	10,500	
2493	7	Bet. Jerome and Cromwell Aves. and River Ave			25,000
2539	6	N. Y. Central R. R. Right of Way	500	500	500
2539	2	N. Y. Central R. R. Right of Way	1,000	1,000	1,000
2539	7	Bet. Right of Way and Sedgwick Ave	7,000	7,000	7,000
2523	49	Bet. Sedgwick and Summit Aves	10	10	10
2523	50	Bet. Sedgwick and Summit Aves	200	200	250
2523	52	Bet. Sedgwick and Summit Aves	500	500	600
2523	54	Bet. Sedgwick and Summit Aves	200	200	250
2523	71	Bet. Sedgwick and Summit Aves	100	100	125
2524	14	Bet. Summit and Ogden Aves	500	500	600
2524	12	Bet. Summit and Ogden Aves	500	500	600
2524	16	Bet. Summit and Ogden Aves	1,000	1,000	1,200
2504	40	Bet. Jerome and Anderson Aves	800	800	
3273	101	Fordham Connection	2,500	2,500	2,500
		Totals	$89,260	$76,760	$93,585
		Grand total, Manhattan Division	$3,980,560	$4,323,160	$4,349,985

[fol. 710] Property provided by Interborough Company under Contracts No. 1 and No. 2—Subway Division

Parcel			Assessed valuation		
Block No.	Lot No.	Street No. or other location	1926	1927	1928
		Borough of Manhattan			
874	71	108–110 East 19th St	$73,000	$80,000	$80,000
1025	11	225–227 West 53rd St	73,000	100,000	110,000
1106	1	58th and 59th Sts.—11th and 12th Aves	860,000	870,000	870,000
1109	28	58th and 59th Sts.—11th and 12th Aves	295,000	295,000	295,000
1109	30	58th and 59th Sts.—11th and 12th Aves	Exempt	Exempt	Exempt
1243	57	264–266 West 9th St	44,000	50,000	55,000
1730	7	73–77 West 132nd St	16,000	21,000	23,500
2089	39	608 West 143rd St	27,000	30,000	30,000
2170	163	Hillside and 11th Ave	35,000	35,000	35,000
		Totals, Borough of Manhattan	$1,423,000	$1,481,000	$1,498,500
		Borough of Bronx			
2726	64	1043 Simpson St	$11,000	$11,000	$14,000
3139	11	Boston Road, 177th and 179th Sts	60,000	60,000	60,000
3141	8	Boston Road, 177th and 179th Sts	18,000	18,000	18,000
3414e	1	240th St. and Broadway	168,000	168,000	168,000
3414e	200	240th St. and Broadway	8,600	8,600	8,600
		Totals, Borough of Bronx	$265,600	$265,600	$268,600
		Borough of Brooklyn			
260	11	27–31 Willow Place	$12,000	$12,000	$12,000
260	25	58 Joralemon St	2,600	2,600	2,600
		Totals, Borough of Brooklyn	$14,600	$14,600	$14,600
		Totals	$1,703,200	$1,761,200	$1,781,700

[fol. 711]

Property provided by Interborough Company under Contract No. 3—Subway Division

Parcel Block No.	Parcel Lot No.	Street No. or other location	Assessed valuation 1926	1927	1928
		Borough of Manhattan			
132	7	77-79 Murray St	$75,000	$75,000	$75,000
159	51	122-126 Park Row	100,000	100,000	100,000
791	72	150-154 West 16th St	57,000	57,000	68,500
1311	44	150-154 East 57th St	140,000	175,000	225,000
874	10	113-115 East 18th St	32,500	34,500	34,500
874	11	113-115 East 18th St	14,500	15,000	15,000
1744	31	147th and 148th Sts.—Lenox Ave. and Exterior St	82,000	140,000	140,000
		Totals, Borough of Manhattan	$501,000	$596,500	$658,000
		Borough of Bronx			
3974	48	Westchester and St. Peter's Aves	$7,000	$11,000	$12,800
3312	66	2633 Jerome Ave	20,000	22,000	40,000
4657	51	East 211th St., East of White Plains Road	7,000	12,000	12,000
2493	27	162nd St. and River Ave	5,000	5,000	5,000
2892	50	351-357 East 139th St	12,000	13,300	13,300
5985	13	East 230th St. and White Plains Road	225,000	300,000	300,000
5985	110	East 230th St. and White Plains Road	1,400	2,000	2,000
		Totals, Borough of Bronx	$275,400	$365,300	$385,100
		Borough of Brooklyn			
1276	8	815-819 Nostrand Ave	$30,000	$32,500	$39,500
3589	31	230-234 Livonia Ave	5,000	8,000	8,000
		Totals, Borough of Brooklyn	$35,000	$40,500	$47,500
		Borough of Queens			
264	15	360-364 Jackson Ave	$16,000	$16,000	$16,000
618	45	Roosevelt Ave., East of 80th St	15,000	15,000	17,500
		Totals, Borough of Queens	$31,000	$31,000	$33,500
		Totals	$842,400	$1,033,300	$1,124,100
		Grand total, Subway Division	$2,545,600	$2,794,500	$2,905,800
		Grand totals, Interborough System	$6,526,100	$7,117,600	$7,255,785

The foregoing grand totals for the Interborough System do not include Land or Easements provided exclusively at the expense of the

[fol. 712] I am familiar with the rule that assessed values of utility property for purposes of taxation are not binding upon the owner, in rate litigation or other proceedings; but I am advised that the City of New York may not repudiate the qualifications of its Deputy Tax Commissioners, selected and appointed as aforesaid, or the values which they have determined, reported and supported by oath, in the course of their official duties, as above stated. The above assessed valuations are therefore set out, for the purposes of this application, without prejudice to the right of the Company to prove and show the full market value of such land, upon the trial of this action.

Henry T. Berry.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No. 17. Bronx Register No. 2966. N. Y. County No. 335. N. Y. Register No. 9258. Kings County No. 38. Kings Register No. 9168. Queens Co. No. 2562. Queens Register No. 5006. Term expires March 30, 1929.

[fol. 713] [Title omitted]

United States of America,
State and County of New York,
Southern District of New York, ss:

Charles E. Williams, being duly sworn, deposes and says:

I reside at No. 11 Crest Road, Ridgewood, New Jersey, and have an office at 505 Fifth Avenue, in the City and State of New York.

I am now and have been for more than twenty years engaged in the real estate business, during which time I have had charge of various estates located in the various parts of the City of New York, involving the collection of rents, leasing of stores and apartments, overseeing repairs and making appraisals. A substantial portion of my real estate business has involved negotiations of and actual sales of various parcels of property located in the various boroughs of the City of New York.

[fol. 714] From time to time I have been employed by many banks, insurance companies and trustees to make appraisals of different kinds of properties located in the City of New York and have also been engaged by the Interborough Rapid Transit Company and other street railroad companies in the City of New York to make appraisals for tax and other purposes, and in this way I have become thoroughly familiar with values in different sections of the city.

I have been for more than twenty years a member of the Real Estate Board of New York and for several years a member of the Appraisal Committee of that Board.

I have read the affidavit of Mr. Henry T. Berry, annexed hereto, and am familiar with the various parcels of property therein referred to, having made an extensive examination of each of the said parcels at various times during the past ten years, including an examination of the City Tax Assessment Rolls, for the purpose of becoming familiar with the city's assessed valuations of said parcels of property.

Said parcels of land, shown to have been provided by the Manhattan Railway Company and referred to in the said affidavit of Mr. Henry T. Berry, are the same parcels of land which I appraised in the year 1921 for the sum of $5,050,000, which figure I gave to Mr. W. S. Gorsuch and which was used by him in developing his valuation of the entire Manhattan Division property, and which he has also used in his valuation of the same property for succeeding years.

Deponent now states from his personal knowledge and examination of said parcels of land that the present market value of said same parcels of land were during the years 1926-1927 and are at the present time greatly in excess of the market value of the said parcels of land as determined by deponent for the year 1921.

[fol. 715] Deponent makes further reference to the said affidavit of Mr. Henry T. Berry and directs attention to the various parcels of land therein shown to have been provided by the Interborough Rapid Transit Company, under what are known as Contracts Nos. 1, 2 and 3, and the Elevated Extension Improvement Certificates. Deponent states that he is familiar with the assessed valuations of

said parcels of land as set forth in the affidavit of the said Henry T. Berry and the deponent further states that, from his knowledge of the book cost of said parcels of land and said assessed valuations referred to in the said affidavit of Henry T. Berry, he does now state that the market value of said lands employed in the public service under said Contracts Nos. 1, 2 and 3 and Certificates were during the years 1926-1927 and are at the present time greatly in excess of the original cost of said lands, which original cost was used by Mr. W. S. Gorsuch in developing his valuation of the entire property provided by the Interborough Rapid Transit Company under said Contracts and Certificates.

Charles E. Williams.

Sworn to before me this 25th day of February, 1928. Emil Pensel, Notary Public. Bronx County No 17. Bronx Register No. 2966. N. Y. County No. 335. N. Y. Register No. 9258. Kings County No. 38. Kings Register No. 9168. Queens Co. No. 2562. Queens Register No. 5006. Term expires March 30, 1929.

[fol. 716] In United States District Court

[Title omitted]

Notations Showing Admission of Service on the Governor and Attorney General

(1) Copy application for Interlocutory Injunction and Temporary Restraining order, order to show cause, and affidavits in support of application. Filed March 12, 1928. Endorsed: "Copy of within paper received Feb. 28, 1928. Albert Ottinger, Attorney General."

"State of New York, Executive Chamber, Albany, George B. Graves, Secretary to Governor

Feb. 28, 1928.

Received from Emil Pensel from office of James L. Quackenbush, attorney for Interborough Rapid Transit

Co. application for interlocutory injunction and temporary restraining order, order to show cause and affidavits in support of application, in the case of Interborough Rapid Transit Co. against John F. Gilchrist et al.

Geo. B. Graves.

[fol. 717] (2) Copy of Complaint filed March 13, 1928. Endorsed: "Copy received. Geo. B. Graves, for the Governor, Mar. 10, 1928."

"Service of a copy of the within complaint is admitted this 10th day of March, 1928.

Albert Ottinger, Attorney General, by Wendell P. Brown, Third Assistant."

(3) Copy Amended & Supplemental Complaint. Filed March 13, 1928. Endorsed: "Copy Received. Geo. B. Graves, for the Governor, March 10, 1928."

"Service of a copy of the within amended and supplemental complaint is admitted this 10th day of March, 1928.

Albert Ottinger, Attorney General, by Wendell P. Brown, Third Assistant."

[fol. 718] In United States District Court

[Titles omitted]

Defendant Transit Commission's Affidavits and Exhibits in Opposition to Motion Before Statutory Court for a Temporary Injunction

[fol. 719] State of New York,
County of New York,
Southern District of New York, ss:

Clarence M. Lewis, being duly sworn, says:

I am Counsel for defendant the Transit Commission, being the Metropolitan Division of the Department of Public Service of the State of New York and consisting of the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood.

I have read the Complaint herein, verified February 14, 1928; the Application for Preliminary Injunction and Temporary Stay herein, dated and verified February 25, 1928; the affidavits in support of said application, by Ralph Norton, Henry T. Berry, Earl E. Starbard, William S. Gorsuch, and Charles E. Williams, all sworn to on February 25, 1928; and the Order to Show Cause herein, dated and [fol. 720] signed by Judge Bondy on February 28, 1928.

The only defendants that plaintiff seeks to restrain are The City of New York, a municipal corporation, and the Transit Commission, a successor to the Public Service Commission for the First District, a State body which acts in two entirely distinct and dissimilar capacities: 1, as a regulatory body under the Public Service Commission Law, and 2, as an official representative of the City of New York as contractor in contracts made pursuant to the provisions of the Rapid Transit Act.

Contract Relation of the City and the Plaintiff

Plaintiff is a domestic railroad corporation operating within the City of New York a system of underground street railroads, known as the "Subway Division" and composed of railroads owned and leased to it by the City, and a system of elevated street railroads, known as the "Manhattan Division" and composed of railroads owned and leased to it by the Manhattan Railway Company and of extensions to such railroads owned by the plaintiff.

Complaint, Art. I; Art. XXXIII, pages 36 and 37.

The Rapid Transit Act (Chapter 4, Laws of 1891, as amended and supplemented) authorizes the construction by the City of rapid transit railroads, and Section 27 of that act provides in part:

"27. Contract for Equipment, Maintenance, and Operation of Road.—

1. The public service commission shall, subject to the approval of the board of estimate and apportionment, or [fol. 721] other analogous local authority of such city, have full power and authority to provide for the maintenance,

supervision, care and operation of the railroad or railroads and also the aforesaid galleries, ways, subways and tunnels for subsurface structures and all other appurtenances, constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said commission shall be best qualified to fulfill and carry out said contract, for the equipment. * * *

Subdivision 3 of the same section further provides in part:

"2. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval;"

On March 19, 1913, the City of New York, acting by the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment, entered into a contract, known as Contrat No. 3, a true copy of which is submitted herewith, marked Exhibit "D," and made a part hereof, with plaintiff, therein referred to as the Lessee, under and pursuant to the Rapid Transit Act (Chapter 4, Laws of 1891, as amended and supplemented), by which the City agreed to construct certain underground railroads, referred to as the Railroad, and to lease said Railroad to plaintiff, and plaintiff agreed to contribute towards the cost of construction of said Railroad, to equip it, and to maintain and operate it in conjunction with cer- [fol. 722] tain existing underground railroads, referred to as the Existing Railroads, owned by the City and leased by it to plaintiff, for a single fare.

Complaint, Art. XXXIX, page 43.

Contract No. 3 provided in part as follows:

"Article LXII. The Lessee shall, during the term of the contract be entitled to charge for a single fare upon the

Railroad and the Existing Railroads the sum of five (5) cents but not more."

Complaint, Art. XLI, page 47.

Contract No. 3. further provided in part as follows:

"Article XXXI. No correction or change in this contract shall be made except by written instrument duly authorized by the Commission and approved by the Board of Estimate and consented to by the Lessee, and by the sureties on its bonds."

On March 19, 1913, the Public Service Commission for the First District, with the consent and approval of the Board of Estimate and Apportionment and of the Mayor of the City of New York, granted to the plaintiff, under and pursuant to the Rapid Transit Act, a Certificate for the construction and operation by plaintiff of certain extensions to the elevated street railroads owned by the Manhattan Railway Company and leased by it to plaintiff. This Certificate (a true copy of which is submitted herewith, marked Exhibit "E," and made a part hereof) was accepted by the plaintiff.

This Certificate provided in part as follows:

"Article VI. The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over [fol. 723] which the Interborough Company is provided with trackage rights as in this certificate provided), and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more."

Complaint, Art. XXIX, page 33.

Complaint, Art. XXXIX, page 33.

Section 24, subdivision 4, of the Rapid Transit Act then provided and still provides in part as follows:

"4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such

persons, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time, with the consent of such person, firm or corporation, be modified by the commission."

Contract No. 3 fixes and governs the rate of fare to be charged by plaintiff on the railroads, known as the "Subway Division," operated by it; and the Certificate fixes and governs the rate of fare to be charged by it on the railroads, known as the "Manhattan Division," operated by it.

Methods of Modifying the Contracts

The Rapid Transit Act provides that Contract No. 3 may be modified by agreement between the contracting parties, the City and the plaintiff. In consenting to such change the City acts by the Transit Commission in its capacity [fol. 724] as representative of the City as contractor with the Company, and this action s subject to the approval of the Board of Estimate and Apportionment (Rapid Transit Act, section 27, heretofore quoted).

The Rapid Transit Act also provides that the Certificate may be modified by agreement between the contracting parties. The terms of such contract may be modified by the Transit Commission in its capacity as representative of the City as the contractor with the Company with the consent of the plaintiff (Rapid Transit Act, section 24, heretofore quoted).

Plaintiff now claims and these defendants deny that the Transit Commission as a regulatory body may modify the terms and conditions of the contracts, as to rates, without amending the contracts by agreement and without the approval of the Board of Estimate and Apportionment.

Such power as the Transit Commission has to modify rates as a regulatory body is conferred upon it by section 49 of the Public Service Commission Law (Complaint, pp. 16 and 17). Subdivision 1 of section 49 provides as follows:

"§ 49. Rates and Service to be Fixed by the Commission.—1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or [fol. 725] charges, chargeable by any such common carrier, railroad or street railroad corporation, are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall, with due regard among other things to the estimated prospective earning capacity of such property at the rate of fare at the time fixed and existent and to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, *notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute*, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. At any hearing involving a rate, the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate, if on motion of the commission or in a complaint filed with the commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the commission may give to the hearing and decision of such question preference over all other questions pending before it and decide the same as speedily as possible." (Italics ours.)

The Transit Commission believes and has always believed that such delegation of power to alter rates "author-

ized by general or special statutes" does not confer upon it power to alter rates fixed in contracts under the Rapid Transit Act.

[fol. 726] Plaintiff's Prior Attempts to Secure Modification of Rates

The complaint shows (Art. XLVI, page 58) that on May 28, 1920, the plaintiff made application under Section 49 of the Public Service Commission Law to Lewis Nixon, then constituting the Public Service Commission for the First District, for a hearing and determination as to the just and reasonable rate of fare on the subway lines. This was denied for want of jurisdiction, as was an application for a rehearing. Plaintiff then obtained a writ of certiorari to test the question of law thus raised; printed its papers and brief; and then discontinued its certiorari proceeding.

The complaint also shows (Art. XLVI, pages 58 and 59) that on March 22, 1922, the plaintiff made application under Section 49 of the Public Service Commission Law to the Transit Commission, then composed of George McAneny, LeRoy T. Harkness, and John F. O'Ryan, asking it to fix and determine the just and reasonable rate on its subway and elevated lines.

At the time this application was presented, namely, March 22, 1922, the power of the Transit Commission over rates was much broader than it was when the application of May 28, 1920, was presented. In 1921, the Legislature "for the relief of the emergency which is hereby declared to exist" had created the Transit Commission and had given it the broadest power over rates (L. 1921, chap. 134) by amending Section 49, subdivision 1, of the Public Service Commission Law, so that the clause which previously read and now reads:

"notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute,"

[fol. 727] was made to read:

"notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement."

On March 22, 1922, the very same day that plaintiff presented its application, Governor Miller signed Chapter 153 of the Laws of 1922, which amended Section 49 so as to provide that the Transit Commission should not increase such rates, except as part of and as might be provided in the plan of readjustment under Article VI of that act.

Accordingly on March 28, 1922, the Transit Commission denied that application for lack of jurisdiction (Complaint, Art. XLVI, page 59). Plaintiff asked for no rehearing and sought no judicial review.

The Court of Appeals of the State of New York has admonished the Commission not to "reach out for dominion over matters not clearly within the statute" (People ex rel. N. Y. etc. R. R. Co. v. Willcox, 200 N. Y. 423, 432).

A carrier may, after refusal of a rehearing, apply to the State courts by certiorari to have the question of power determined. This is neither a long nor a difficult proceeding; and a preference may be given to such cases.

[fol. 728] Plaintiff's Present Attempt to Increase its Contract Rates

Plaintiff's application of February 1, 1928, was not under Section 49 of the Public Service Commission Law but was under Section 29 thereof, and was based on a different theory from that entertained by plaintiff in 1920 and 1922. Its present theory is that the Legislature by Section 29 has delegated to it the power to increase the rates fixed in its contracts with the City (Complaint, Articles XXXI, XXXII, pages 35, 71; Supporting affidavit of Ralph Norton, paragraph 17, fol. 79, page 27).

During the period of operation by plaintiff under these contracts, it has filed and kept on file with the Public Service Commission for the First District and/or the Transit Commission, and now has on file with the Transit Commission, printed tariff schedules, filed pursuant to Section 28 of the Public Service Commission Law, which show as the charge for transportation of passengers upon the railroads operated by it, the rate of five (5) cents for a single fare.

Complaint, Art. XVI, page 19.

On February 1, 1928, plaintiff, acting under Section 29 of the Public Service Commission Law, filed certain sheets

purporting to amend its tariff schedules then on file and in effect to become effective March 3, 1928, which showed that on and after March 3, 1928, plaintiff purposed to charge a fare of seven (7) instead of five (5) cents. It has also filed at its stations copies of these new sheets showing an intent to charge a seven (7) cent fare on and after March 3, 1928.

Complaint, Art. XXXIII, page 35.

[fol. 729] At the same time plaintiff applied to the Transit Commission under section 29 of the Public Service Commission Law for an order granting permission to put these new sheets into effect upon not more than five days' notice.

Complaint, Art XXXIV, page 37.

These sheets which stated that they would become effective on March 3, 1928, and the application for an order permitting them to go into effect at a date earlier than that, were not filed with or presented to the Transit Commission until after it had closed its regular weekly meeting for the transaction of business, held on Wednesday, February 1, 1928.

This application (a true copy of which is submitted herewith, marked Exhibit "A," and made a part hereof) consisted of 54 printed pages and contained a discussion of numerous questions of law, arising under State statutes, facts relating to its corporate history and transactions and figures and tabulations relating to the value of its property and to its financial condition. The first paragraph of this application is as follows:

"Interborough Rapid Transit Company, by E. E. Starbard, its Vice President, hereby applies, under Section 29 of the Public Service Commission Law, for an order granting permission to put in effect, upon not more than five days' notice after publication at stations and filing with the Commission, the following sheets:"

I believe and so advised the Commission, prior to its action on February 14, 1928, that, while a carrier may file any schedules it pleases, schedules which purport to increase rates fixed by contract are not effective when the contract rate has not been altered prior to the filing of the

[fol. 730] schedules and, if filed, are a nullity and require no suspension; that the proper method in such case was to reject the schedules as unlawful, and to apply to the State Court in a summary proceeding under section 57 of the Public Service Commission Law for a judicial construction of that law and for an orderly determination of the question of law, and that it was unnecessary to hold a hearing on the facts where the only question involved was one of law.

I believe the law to be that a rate fixed by contract cannot be altered by one of the parties to that contract, merely by filing schedules which notify the Commission and the public that it intends to do so; that the contract rates in this case would not have been altered by an order of the Commission permitting them to go into effect; and that the only way by which the Commission may alter a fixed rate, other than a rate fixed by contract, is in a proceeding under section 49 of the Public Service Commission Law, which authorizes it to act only after a hearing and in which evidence must be taken on all questions of fact involved.

It is my opinion that no hearing such as the Public Service Commission Law requires, namely, one in which both sides are entitled to be heard and are obliged to present their evidence under oath and subject to the right of cross-examination, could possibly have been held and completed before March 3, 1928, or for many months thereafter, if such hearing were to go into the facts and matters alleged in the application. It is also my opinion that a hearing in this case is unnecessary, since the only question presented by the application was one of law, and would be improper, since the Commission has no power to enter upon a hearing concerning the reasonableness of these contract rates. [fol. 731] Plaintiff claims that a seven cent fare can be "established by the plaintiff pursuant to legislative power delegated to it" (Complaint, Art. XXXI, pages 35, 71); that the five-cent contract rate can be superseded by filing schedules showing a seven-cent rate; and that this increased rate became lawful and effective thirty days after filing the schedules, or on March 3, 1928. Plaintiff asked the Transit Commission to let these go into effect upon not more than five days' notice, not, as the Complaint (Art. XXXIV (b), page 39) and the supporting affidavits (fol. 90, page

30) tend to imply, in five days from filing the application.

The supporting affidavit of Ralph Norton states (paragraph 18, fol. 81, page 27):

"The particular reason for filing such a verified petition, along with the schedules was to place before the Transit Commission a careful statement of the considerations of law and fact which had led the plaintiff to file the amendatory schedule leaves for a seven-cent fare and to hope for the favorable action of the Transit Commission."

Plaintiff's Action in This Court

Plaintiff was advised and believed that the City would begin a suit or suits to prevent a breach of Contract No. 3, and that the Transit Commission would bring a summary proceeding under Section 57 of the Public Service Commission Law to prevent the threatened violation of certain provisions of that law, if the Commission should dismiss the application for want of jurisdiction and the plaintiff should, notwithstanding threaten to put into effect the increased fare provided for by the schedules filed by it on February 1, 1928 (Complaint, pages 29, 39, 81, 82; Sup-[fol. 732] porting affidavit of Ralph Norton, page 30). The plaintiff knew that a regular weekly meeting of the Transit Commission would be held on Wednesday, February 15, 1928. On Tuesday, February 14, 1928, it filed and served the Complaint herein, which was accompanied by no interlocutory injunction, restraining order, stay, or any motion therefor.

This action was brought while plaintiff's application was still pending undetermined before the Transit Commission, and before that body had made any determination thereon.

The Complaint, including the Schedules thereto annexed, consists of nearly 123 printed pages. It is in narrative form; full of argumentative allegations; and consists in large part of excerpts from numerous state statutes, conclusions of law and fact, characterizations of the motives and conduct of State and City officials, and inferences and beliefs based on nothing but statements attributed to the public press.

In its essence, the suit is claimed to be one to test the validity of certain "legislative rates, or orders legislative

in their nature" limiting plaintiff to a charge of five cents (Complaint, Art. LXXI, page 87; Affidavit of Ralph Norton, paragraph 3, fol. 38, page 13). The Complaint shows, however, that the charge of five cents is fixed by Contract No. 3 and by the Certificate, and not by any act of the Legislature or by any regulatory order.

The First Cause of Action involves the rates of fare on the Manhattan (or Elevated) Division, or that part of it owned by the Manhattan Railway Company but leased to and operated by plaintiff (Complaint, Art. VII, page 5). It shows various acts of the Legislature and articles of [fol. 733] association authorizing higher rates of fare than five cents for predecessor companies (Complaint, Art. X, pages 7, 9) which were merged in the Manhattan Company (Complaint, Art. VI, pages 4 and 5). It sets forth a statutory limitation (Chapter 743, Laws of 1894) upon the East Side elevated lines of the Manhattan Railway Company, of not exceeding five cents (Complaint, Art. XI, page 10).

It appears that these lines are not being operated by the Manhattan Railway Company but by plaintiff (Complaint, Art. VII, page 5). It is not alleged that plaintiff is bound by this rate. The next cause of action shows that plaintiff is bound by the contract rate in the Interborough Certificate (Complaint, Art. XXIX, page 33).

It is not alleged that plaintiff has ever applied to the Commission to be relieved of such statutory rate.

It is not alleged that anybody has threatened, is threatening or will threaten to enforce this or any other statutory rate against the plaintiff, which has leased these roads and which is operating them under a contract to charge not more than five cents.

The order of the Public Service Commission for the First District quoted only in part, in Art. XVI, on pages 20 and 21 of the Complaint is an order which regulates merely the form of the schedules. It adds nothing to the duty of the carrier to file schedules, which is imposed by Section 28 of the Public Service Commission Law. Section 28 does not fix the rate to be charged, but merely requires that the rates to be charged must be shown in printed schedules.

The Second Cause of Action involves the rate of fare on the Manhattan (or Elevated) Division, including the [fol. 734] parts owned by the Manhattan Railway Com-

pany and those owned by plaintiff. It is shown that the rate of fare of five cents to be charged by plaintiff is fixed by the contract made by the grant and acceptance of the Certificate (Complaint, Art. XXIX, pages 33, 34).

The Third Cause of Action involves the rate of fare on the Subway Division. It is shown that the rate of fare of five cents is fixed by Contract No. 3 (Complaint, Art. XLI, page 47).

The Fourth Cause of Action merely views the case in the aspect of operation by plaintiff of both the Manhattan Division and the Subway Division. The rates are fixed in the same way as previously indicated.

The Fifth Cause of Action merely re-alleges the preceding portions of the Complaint and complains of other acts and utterances which have nothing to do with the rate of fare.

In its third cause of action, plaintiff complains that the City is building more subways (Complaint, Art. XLV (C), page 53); that plaintiff has been directed to lengthen certain station platforms, under an order adopted by the Transit Commission on April 21, 1926 (Complaint, Art. XLVII, page 60); and that the Transit Commission threatens to make an order requiring plaintiff to acquire 432 additional cars (Complaint, Art. XLIX, page 63).

In its fifth cause of action it complains of the action of the Transit Commission in questioning and denying the right of the plaintiff to withdraw from the funds in its hands as the result of joint operation under Contract No. 3 any money for counsel fees, experts, printing or other expenses connected with this effort of the plaintiff to secure an increased fare (Complaint, Art. LXVI, page 83). [fol. 735] The direction for lengthening station platforms was not made by the Transit Commission under its regulatory powers, but under Article LXX of Contract No. 3, which is as follows:

"Article LXX. The principal object of the City in making this contract is to secure for the public convenience an adequate, comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the Existing Railroads. By the foregoing provisions of the Lease the Lessee has covenanted, among other things, to operate the Railroad and

the Existing Railroads carefully and skillfully, according to the highest standards of railway operation; to supply adequate Equipment; to run trains so as to furnish adequate service; to use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. These covenants on the part of the Lessee are among the principal moving considerations to the City in making this contract, and any breach thereof will entitle the City to the remedies provided in this contract. If at any time Additions to the Railroad or Equipment or to the Existing Railroads or Existing Equipment or any change in the mode of operating the Railroad or the Existing Railroads or conducting the business thereof are necessary in order to carry out the purposes of the Lease in securing service and facilities as shall be safe and adequate in all respects just and reasonable, the Commission may direct the construction or provision of such Additions and the making of such changes in the mode of operation of the Railroad or the Existing Railroads or in the conduct of the business thereof as may be necessary to accomplish such purposes. Such construction or provision of Additions and such changes shall be [fol. 736] made to the satisfaction of the Commission and, when necessary, under such forms of contracts, plans, specifications and directions as it may issue or approve. If the direction shall have reference to the Equipment or to the operation the costs of complying therewith shall be borne by the Lessee. If the direction shall have reference to Construction the cost of complying therewith shall be shared equally by the City and by the Lessee (except in the case of Additions to the Extensions in which event the cost shall be borne wholly by the City) and the work necessary shall be done under the supervision and direction of the Commission and under contract let by the Commission or directly by the Lessee as the Commission may elect. If the Lessee shall neglect or refuse to comply with such directions the Commission in addition to other remedies may cause such changes or Additions to be made at the expense of the Lessee."

The controversy over the expenses of this litigation also arises under Contract No. 3 and the steps taken by the Commission were according to the procedure outlined in the contract.

No order requiring plaintiff to acquire more cars has been made; and an order requiring it to install signals on the local tracks [Complaint, Art. XLV (E) (2), page 56] was voluntarily accepted by plaintiff.

The prayer for judgment asks in part (Complaint, pages 88 to 91) that it be adjudged and decreed:

1. That the provisions of Chapter 743 of the Laws of 1894, of the Public Service Commission Law, of the Railroad Law, of the Rapid Transit Act, and "of the said other acts of the Legislature of the State of New York" in so far as they prevent plaintiff from charging more than five cents are illegal and void.

[fol. 737] 2. That the decisions of the Transit Commission directing the extension of station platforms are illegal and void.

3. That an order requiring additional cars (which has not been made) would, if made, be illegal and void.

4. That "said order of said Transit Commission" or any other order or direction by it or by the defendant the City of New York preventing or tending to prevent the plaintiff from resorting freely to test the validity of said rates or fares are likewise illegal and void.

5. That the Public Service Commission Law in so far as it prevents plaintiff from charging a higher fare forthwith is illegal and void.

6. That plaintiff has no adequate remedy at law for the injury which will result from the enforcement of "said acts," and that such injury will be irreparable.

7. That plaintiff be granted injunctions against the Transit Commission and The City of New York from enforcing "said acts," or the order relating to station platform extension, or from proceeding to seize the property, or from enforcing any order requiring plaintiff to provide additional cars, or from bringing any suits under the Public Service Commission Law, the Railroad Law or the

Rapid Transit Act to compel compliance by plaintiff of the provisions of "said acts," in so far as they prohibit plaintiff from charging a fare of seven cents, or from doing anything interfering with the right of plaintiff to charge "any rate which it may lawfully charge or receive."

7. (sic) That the rights of the parties be declared.

[fol. 738] 8. (sic) That plaintiff have such other and further relief as to the Court may seem meet and the nature of the case may require.

In addition to asking the Court to decree the invalidity of the statutes, acts and orders, the prayer for judgment also asks that it be decreed that the contract, the certificates, the tariff schedules heretofore filed by plaintiff itself and orders and decisions of the Commission are void and that their enforcement be enjoined.

Certain public officers who are under the duty of enforcing State statutes and laws, to wit, the Attorney General of the State of New York, and the District Attorney of New York County, are not made defendants in this action, but the City of New York, a municipal corporation, which has no such duty is made defendant, although the complaint alleges that the City is neither a necessary nor a proper party (Complaint, Art. IV, page 3).

Proceeding by Transit Commission

On February 14, 1928, the Transit Commission, acting in its capacity as a regulatory body, held a special meeting, and adopted an opinion in Case No. 2897 (a true copy of which is hereto annexed, marked Schedule "1," and made a part hereof), an order rejecting as unlawful the tariff schedule sheets filed by plaintiff on February 1, 1928, and a resolution directing Counsel to the Commission to bring a summary proceeding under Section 57 of the Public Service Commission Law in order to have stopped and prevented the violation of law which would have been involved had plaintiff charged a rate higher than that allowed by law or than that shown in its tariff schedules on file and in effect.

[fol. 739] On the same day, Counsel to the Commission presented to the Supreme Court, New York County, a petition setting forth the facts and obtained an order requiring

the plaintiff to answer by February 17, 1928, and setting the matter for hearing on February 20, 1928, and also obtained an order to show cause with stay restraining plaintiff from charging a fare in excess of five cents, or compelling payment of any fare in excess of five cents. All these papers were duly served on the Secretary and Treasurer of the plaintiff on February 14, 1928, and true copies thereof are submitted herewith, marked Exhibit "1," and made a part hereof.

This proceeding, entitled "Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant, is brought primarily to obtain a construction of the Public Service Commission Law of the State of New York, and will furnish a simple and expeditious method of ascertaining from the Courts of this State what the laws of this State mean, and of settling the differences in legal opinion as to their meaning which prevails between plaintiff and this defendant.

The Transit Commission has no police force or any officers or employees capable of enforcing the law by direct action. The only method under the law by which it may proceed to enforce a statute, order or franchise is by judicial proceedings in the Courts of the State of New York.

Actions by the City

On February 14, 1928, The City of New York brought two substantially identical actions in the Supreme Court of the State to enjoin the threatened breach of Contract No. 3 by the plaintiff. One of these actions was brought by the Transit Commission acting, not in its regulatory [fol. 740] capacity, but as an official representative of the City under the Rapid Transit Act (section 9; section 24, subdivision 4). The other was brought by the Corporation Counsel as another representative of the City under the provisions of the Greater New York Charter.

In both actions, the City obtained an order to show cause with a stay restraining plaintiff from charging any fare in excess of five cents or from compelling the payment of any fare in excess of five cents. The papers in these actions were duly served on the Secretary and Treasurer of the plaintiff on February 14, 1928.

A true copy of the papers in the action entitled, "The City of New York, acting by the Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant," is submitted herewith, marked Exhibit "H," and made a part hereof.

The actions by the City are not brought to enforce any statute or order fixing a rate or rates, but are actions upon an ordinary contract to secure specific performance and to enjoin a breach thereof.

These actions and this proceeding were not a part of any "conspiracy," nor brought in an attempt to oust this Court of any jurisdiction. They were in contemplation before plaintiff began this action, and plaintiff knew they were in contemplation. They were not intended to deprive plaintiff of any right, but were brought to determine what these rights were. In my opinion they do not tend to interfere in any way with the trial by this Court of the issues raised by the Complaint herein.

Plaintiff contends that as part of a "conspiracy" the City and the Commission published their plans broadcast [fol. 741] in the public press. I do not know by what means these statements came to the press. At no time from the date of the filing of the application by plaintiff up to and including the decision by the Transit Commission on February 14, 1928, did I have any interview with any newspaper or give any statement to the press, but refused to do so. After inquiry I believe that no one from the Commission gave out any such statements or had any such interviews. These newspaper reports were often inaccurate and unfounded. The action taken was obvious to anyone familiar with the statutes involved and could easily have been foreseen, and suggested to the press by anyone interested. The Complaint shows that plaintiff was fully aware of the provisions under which the Commission might act (Complaint, Art. XX, page 27).

Plaintiff's conclusions as to the bad faith, wrongful conduct, and ignorance of the law, on the part of these defendants, are too numerous to be answered in detail, but I make emphatic denial to all allegations or imputations of bad faith, unusual procedure or mistakes of law; and I say that the Commission had determined on the State suits

long before this suit was brought or suggested; that they were not intended to oust this Court of any jurisdiction it might have, but were merely to obtain the speediest determination in the face of the emergency threatened by plaintiff; and the procedure followed was usual, legal and reasonable.

Confident as to the correctness of the Commission's stand on these questions of law, I was not afraid to submit them to the couts. I am not afraid to submit them to this Court, but I believe that this Court has no jurisdiction over the matters raised in the State actions or proceeding and no jurisdiction over the matters covered by the action herein. [fol. 742] I am of the opinion that the issues actually presented are few and simple; but that the complaint is purposely made voluminous and obscure to the end that it may raise a doubt in the mind of this Court and create a fear perhaps after all there may be a confiscation or property, and on the strength of that doubt and fear secure a so-called temporary injunction which would in effect give to the plaintiff the power to charge what fares it pleases while the action is allowed to drag along before some Special Master.

I believe that this Court is concerned only with arriving at the true meaning and intent of the statutes and contracts involved and would receive with respect the construction placed upon them by the Courts of the State to whom they are more or less familiar, and would find their construction of help in determining the issue presented in this case, assuming that any issues are presented.

I do not fear to have these statutes and contracts constructed in either court, but I object to any action taken at the beginning of this suit upon this mass of papers, which would permit the plaintiff to fix its own rates before those questions are determined one way or another, or which would prevent the Courts of this State from constructing them.

Clarence M. Lewis.

Sworn to before me this 12th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co., No. 33. Reg. No. 2824. Cert. filed in N. Y. Co. No. 116. Reg. No. 8088. Cert. filed in Kings Co. No. 47. Reg. No. 8048. Cert. filed in Queens Co. No. 375; also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 743] SCHEDULE "1."

State of New York,
Department of Public Service,
Metropolitan Division:

TRANSIT COMMISSION

Case No. 2897

In the Matter of the Application of INTERBOROUGH RAPID Transit Company, Under Section 29 of the Public Service Commission Law

Opinion

On Feburary 1st, 1928, the Interborough Rapid Transit Company filed with the Commission revised tariff sheets indicating an intention to charge seven cents instead of five cents on and after March 3, 1928, on the subways and elevated lines operated by it in the City of New York, and at the same time applying to the Commission to grant permission to put the revised tariff into effect upon not more than five days' notice. The application is made under Section 29 of the Public Service Commission as is shown by its terms. It is not made pursuant to any other provision of law and the only matter before the Commission is the application of Section 29. In my opinion, Section 29 is not applicable to the fare fixed by contracts between the City of New York and the Interborough Rapid Transit Company, nor to the fare fixed by the certificate granted by the Public Service Commission for the First District and accepted by the Interborough Rapid Transit Company which fixes the fare on the elevated lines. The company is evidently proceeding on the theory that it may alter the fare fixed in the agreements solely by its unilateral act without securing the consent of the other parties to the contract. This theory is unten-
[fol. 744] anble. The provisions for the five-cent fare to which the company agreed when it made its contract with the city can only be altered as provided by the contract itself with the consent of all the parties and until that is done the provisions in question stand as they did when the agreements were made in 1913.

It is clear that the five-cent fare is still the fare agreed upon and allowed by law and that it cannot be altered by the mere filing of tariff schedules. A seven-cent fare would be as much a violation of the contract and as unlawful on March 3rd, 1928, as it is today or has been for the past fifteen years.

Under these circumstances it would be improper and meaningless for the Commission to make any order in furtherance of the application. Such action would not alter the five-cent fare.

For the foregoing reasons the schedules should be rejected as unlawful and the application dismissed.

Leon G. Godley.

Dated New York, February 14th, 1928.

We concur: John F. Gilchrist, Charles C. Lockwood.

[fol. 745] United States of America,
State of New York,
County of New York, ss:

Samuel Untermyer, being sworn, says:

I am the senior Counsel for the defendants named in the title of this action other than the defendants Prendergast and the Manhattan Railway Company and as such this litigation is under my general direction and that of my associate Counsel.

On February 1, 1928, the plaintiff filed with the defendant, the Metropolitan Division of the Public Service Commission, known as the Transit Commission, and posted and caused to be published under Sec. 29 of the P. S. C. Law of the State of New York a rate of fare of seven cents instead of the then lawful rate of five cents, which had been duly [fol. 746] posted and advertised pursuant to Sec. 28 of the said law and to Contract 3 and the related certificates and was then and is now the rate of fare being charged on the plaintiff's lines and is the only rate of fare now lawfully in force.

The plaintiff also filed with the Transit Commission on February 1, 1928, a petition, of which the accompanying exhibit marked "A" is a copy and is hereby embodied in

and made part of this affidavit. Attention is here called to the fact that by the terms of said petition the Transit Commission was asked to put the increased rate into effect and to do so five days after the filing thereof, but no action had been taken by the Commission on said petition up to the time of the beginning of this suit.

Inasmuch as the Commission was advised that under the provisions of Section 29 of the P. S. C. Law it was being insisted upon by the plaintiff and it might be hereafter claimed that the said increased fare would have automatically taken effect 30 days after the filing and posting of the rate unless suspended by the Commission pending a hearing and inasmuch as the City of New York with which the plaintiff made its contracts to maintain a five-cent rate claimed that the Commission had no jurisdiction over the question of rates because of the fact that they were fixed by contract, preparations were made by the City through the Corporation Counsel, to begin suit in the Supreme Court of the State of New York against the plaintiff to enjoin it from putting said rate into effect on March 3, which would be the date of the expiration of the 30 days in the event that the Transit Commission should decide that it had no jurisdiction over the rate and could on that ground dismiss the aplication.

[fol. 747] The fact that such a suit was impending and that the Transit Commission had also given instructions to its Counsel in order to prevent the Company from attempting to put the increased rate into effect to prepare for like action in the State Court so that in the event it should find, after investigation, that it had no jurisdiction over the rate of fare to be charged, was widely published in all the newspapers of the City for at least one week prior to the beginning of this action. Information of such intended action leaked out from unknown sources so that the plaintiff and its Counsel had for many days in advance of the possible State Court suits full notice of the proposed action to be taken in case the Transit Commission should determine that it had no power to suspend the rate thus posted or otherwise to protect the rights of the public.

Whilst this question was under investigation by the Transit Commission and before any decision had been rendered or determination reached the plaintiff filed its com-

plaint in this action at 9.20 on the morning of Tuesday, February 14, 1928. Previous to the filing of such complaint and on the preceding Friday, February 10, just before the week-end holiday, the Commission had arranged to meet on the morning of February 14 and then to render its decision on the aforesaid pending petition, but all this was without knowledge, intimation or suspicion of the contemplated bringing of this suit or any other intended action in the courts on the part of the plaintiff.

The Transit Commission accordingly met at 10 o'clock on the morning of February 14 and then rendered its decision accompanied by an Opinion by Commissioner Godley which was concurred in by the other Commissioners and which had been prepared over the week-end holiday for the [fol. 748] consideration of and discussion by the Commission, in ignorance of any intended action by the plaintiff. I had never seen or known the contents of that opinion until after it was filed.

Following the rendering of the said Opinion and the entering of an order thereunder the Transit Commission and the City of New York began their suits in the Supreme Court of the State of New York for the County of New York to enjoin the plaintiff from putting the increased rate into effect in order to protect the public and The City of New York against the threatened attempt of the plaintiff to put such increased rate of fare into effect, which the plaintiff both claimed would otherwise have been the result of the dismissal of the plaintiff's petition by the Transit Commission.

Applications were duly and in the orderly course made to Judge Glennon of the Supreme Court of the State of New York, who was regularly assigned to that term, the motion part for such applications, for injunctions which were granted by him about noon of that day and were served shortly thereafter with the summonses, petitions and complaints in said State suits. Meantime, the plaintiff had about two hours previously served on some of the defendants copies of the bills of complaint in this action that had been filed by it as above stated at 9.20 on that morning.

The orders to show cause why the injunction in the State Court actions should not be continued during the pendency of those actions that accompanied the restraining order

were made returnable before the special term of the Supreme Court on February 20, 1928.

On February 17, 1928, the plaintiff filed in this Court without leave of Court a so-called Ancillary Complaint [fol. 749] against the defendants, with accompanying affidavits and an order signed the previous night by Judge Winslow at his house at Yonkers requiring them to show cause in this Court on the 21st day of February, 1928, why they should not be enjoined from prosecuting the aforesaid suits and special proceedings that they had begun in the State Court accompanied by an order restraining the defendants in that action from further prosecuting or taking any steps therein.

This application came on to be heard before Judge Bondy on February 21, 1928, at which time I appeared specially for the defendants in said action and advised the Court that my appearance was only for the purpose of challenging the jurisdiction of this Court and of making certain preliminary objections to the hearing of the motion. The defendants had meantime hurriedly prepared certain affidavits bearing only on the preliminary objections which they desired to urge; and they had not intended nor were they ready on such notice to argue the question on the merits.

I urged before Judge Bondy that the motion was one that could be heard only by a Statutory Court under Sec. 380 of the Judicial Code and am still so insisting but Judge Bondy decided to reserve his decision on that question and ruled that the merits of the entire motion must be heard, for which we were not prepared and so stated.

Following the argument, briefs and reply briefs of each side have been filed and served covering about 350 printed pages and that motion is now under advisement by Judge Bondy against the protest of the defendants, who claim, among other things, that no Federal question is involved in this controversy, that no cause of action has been stated in the complaint, that the proceedings in this action are [fol. 750] automatically stayed under Sec. 380 of the Judicial Code as the result of the bringing of the State Court suits and that Judge Bondy had no jurisdiction to hear the motion and that this suit was prematurely begun.

In the course of the argument and in answer to the contention advanced by me that the State suits were essential

for the preservation of the rights of the public in order to prevent the increased fare from automatically going into effect on March 3, Judge Bondy asked plaintiff's counsel whether he was willing to consent that the increased fare should not go into effect pending the determination of the motion before him, in answer to which plaintiff's counsel stated that he was willing so to stipulate. I immediately protested against such action, stating that the defendants wanted no such stipulation and would accept none and that they would rely upon the injunction orders issued by the State Courts to protect the car-riders against the increased fare going into effect, if the Court should determine that this would be the result of the filing and posting of the plaintiff's schedules on February 1st.

Subsequently, on March 1, 1928, plaintiff's counsel presented a proposed order containing a provision in the nature of the stipulation above referred to which was strenuously objected to by me on behalf of the defendants on the ground that they were fully protected by the State Court orders against any such contingency and that they were not willing to imperil or affect the State jurisdiction by accepting any such order by this Court; that they had not asked for it; that they had protested against it and would continue so to protest; and that its manifest purpose was to strengthen the hands of the plaintiff in its attempt to [fol. 751] transfer the litigation from the State Court to this Court.

Defendants beg here to refer as part hereof to the complaint and ancillary complaint in this action and to the complaints and petition in the State Court suits and to the affidavits in support of the application to enjoin the State actions as well as to the affidavits of Mr. Nicholson, the Corporation Counsel; Mr. Clarence M. Lewis, the General Counsel for the Transit Commission, and to my affidavit in opposition to said motion, and also to the other papers and proceedings above recited, all of which I ask to have considered as part of this affidavit.

The defendants having strenuously urged before Judge Bondy that this action was not entitled to priority over the State Court actions and that the latter should not be stayed, because of the facts above stated and because the action was prematurely begun, the plaintiff filed and served on

Saturday, March 3, 1928, a so-called "amended and supplemental complaint" to which I beg leave herewith to refer, in which it is sought to overcome the objection that this action was prematurely begun by reciting the decision of the Transit Commission after the beginning of this action.

This document has been returned to the plaintiff's counsel on the ground that there was no order of Court or other authority for its service. The defendants here, besides contending that the original complaint states no cause of action and no case for Federal cognizance or jurisdiction, also specifically claim that no question is involved in this controversy of a confiscatory rate or of any rate of fare other than that fixed by the agreements between the parties.

[fol. 752] The facts with respect to these agreements are in the form of (1) an Act of the Legislature of the State of New York known as the Rapid Transit Act; the amendments thereof; (2) the contracts known as Contracts Nos. 1, 2 and 3 dated in 1900, 1902 and 1913, respectively, between the plaintiff and the City of New York and the so-called Extension and Additional Tracks Certificates constituting contracts between the parties, copies of which (except the Rapid Transit Act to which reference is hereby made) are submitted herewith as Exhibits "B," "C," "D," "E" and "F," and also to the various monthly, quarterly and annual reports of operation and administration filed by the plaintiff with the Transit Commission showing the gross and net operating revenues and the gross and net profits of the plaintiff and its lessor company, the Manhattan Railway Company.

A resume of this data covering the period therein referred to will be found in a Report and Recommendations by me to the Transit Commission of September 30, 1927, together with the several schedules thereto attached filed by me with the Transit Commission September 30, 1927, copy of which is submitted herewith as part hereof, marked Exhibit "G," and which as to the statements of fact therein contained I ask to have embodied herein as part hereof. I do not, however, include in said Exhibit any of the Recommendations or expressions of opinion contained in the said Report. It is attached hereto as a convenient form of setting forth in this affidavit the figures contained in said Report and the schedules thereto attached as part thereof,

many of which were compiled by and are taken from the official files of the Transit Commission based mainly upon official reports of the plaintiff to the Commission from sworn testimony in public hearings before the Commission at which the plaintiff was represented by Counsel.

[fol. 753] The statements in said Report as to the valuation of the properties of the plaintiff and of the Manhattan Elevated Division were compiled as of June 30, 1926, by engineers of the Commission, but have not been approved or adopted by the Commission and do not represent official estimates or valuations of said properties.

The basic data and figures contained in the said Report, marked "G," were introduced in evidence by consent or verified under oath from the witness stand in the public hearings had in connection with the pending unification or readjustment of the Transit lines of The City of New York that were held by the Commission pursuant to Secs. 106-108 of the P. S. C. Law.

The following is a summary as of June 30, 1927, of facts corresponding to the facts appearing from said Exhibit and from the testimony taken before the Commission in said proceeding insofar as the same have a bearing upon the necessity or occasion for a temporary injunction in this action.

(1) That on February 21, 1900, the City of New York, being then and now the owner, leased to the plaintiff the subway properties referred to in the agreement between them known as Contract No. 1 which is submitted herewith as Exhibit "B," under the terms set forth in that contract, and that on July 21, 1902, the City likewise leased to the plaintiff the properties then and now owned by it referred to in the agreement between them known as Contract No. 2, submitted herewith as Exhibit "C," upon the terms therein set forth and that both said contracts were in full force and effect at the time of the making of Contract No. 3, which is submitted herewith as Exhibit "D."

[fol. 754] (2) That at the time of the execution and delivery of Contract No. 1 in 1900 and of Contract No. 2 in 1902, there was no regulatory power or supervisory body over rates of fare on street railroads in the city of New York.

That by the terms of Contract No. 3 the provisions of Contracts Nos. 1 and 2 were modified and the operations thereunder continued as provided by Contract No. 3, but that Contracts Nos. 1 and 2 were not then nor at any other time superseded but that on the contrary they continued as so modified and still continue in full force and effect.

Refering to the statement at page 45 of the Complaint in this action, to the effect that the provisions of Contracts Nos. 1 and 2 fixing a five-cent fare were superseded by Contract Nos. 3, the contrary is the fact, as will appear from the following provisions of Contract No. 3, under Chapter 1 headed "Outline of Contract and Definitions" and the further sideline "Modifications of Contracts 1 and 2" (p. 3):

The City and the Lessee further agree upon the modification of Contract No. 1 and Contract No. 2 in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, except in the respect and to the extent herein specifically set forth."

An examination of Contract No. 3 will, I am satisfied, convince the Court that the road constructed thereunder and the lease thereof by the City was treated by the contracting parties as in the nature of an extension of the old roads owned by the City that had been constructed under Contracts Nos. 1 and 2 and for the cost of construction of [fol. 755] which the City had substantially paid in their entirety.

(3) The cost to the City of New York of the property referred to in Contract No. 1 at June 30, 1927, was $59,478,049.05 and of the property described in Contract No. 2 was $7,167,517.14, including the estimated cost of superintendence. The City has also invested at June 30, 1927, in the property referred to in Contract No. 3 the sum of $113,896,665.68 as its original investment, to which must be added the accrued interest and sinking fund on its investment, amounting to a further sum of $40,685,011.46, making a total investment at June 30, 1927, of $221,137,243.33 in the subway property.

The total investment of the plaintiff in the subway at June 30, 1927, as shown on the annual report of the Interborough Rapid Transit Company to the Transit Commission, was $181,375,787.06. This included items of $23,581,405.70 carried on the books as cost of leases and contractor's expenses, which items are disputed by the City.

By the terms of Contract No. 3, Exhibit "D," the plaintiff was assured from and out of the earnings, after payment of taxes, rental under Contracts Nos. 1 and 2 and all prior charges, an annual net revenue and profit of $6,335,000, said sum having been arrived at as being the average annual net earnings of the years 1910 and 1911, being the then two most prosperous years in the history of the plaintiff. This payment was to have priority over all interest charges and sinking fund upon the City's investment.

The City claims that all these payments to the plaintiff have now been fully met and that the plaintiff, which, as the lessee and operator of the property, controls all the revenues, has been overpaid to the extent as thus far ascertained of about $2,200,000, whilst the plaintiff contends on [fol. 756] the other hand that there are accrued deficits still owing it as of October 31, 1927, amounting to about $4,800,000.

(4) The above described payments made to the plaintiff are in addition to interest and sinking fund on its total investment under Contract No. 3, all of which payments have been and are being fully met and discharged.

The lease from the City to the plaintiff expires on December 31, 1967, forty years from this time. The entire property provided under Contract No. 3 must then be returned to the City, including equipment, without compensation. This does not, however, include additions to the property or to the equipment. For these additions the Company is entitled only to the unamortized proportion thereof. That is to say—the City must pay for the unamortized proportion of the cost of these additions and for this additional equipment for the unexpired part of the forty-year term from the time when the additions and additional equipment were furnished.

This means that not only the original investment of the Company under Contract No. 3 but all additions and additional equipment as well furnished up to this time will be-

come the property of the City without compensation in 1967. That is the purpose of the amortization fund which is being paid out of the net revenues resulting from joint operation under the contract as part of the fixed charges of the Company.

If therefore, this were a rate case, which the defendants insist it is not in any sense, and if there were no contract governing the rate of fare, the problem, bearing on the subject of a reasonable as against a confiscatory rate, would be—not as to the value of the property—but as to the value to the Company of the lease for its unexpired term of forty years. None of the figures of property values embodied [fol. 757] in the Complaint in this action have therefore any relevancy whatever to the question of reasonable return on the Company's investment, for they are all based upon the value of the entire property and service—which is owned by the City of New York except as to the equipment under Contracts Nos. 1 and 2, for which the City must pay the then value at the expiration of the terms of those two leases, less certain stipulated amounts.

The fixed charges of the Company deductible before the City can get anything, and which have been fully paid to date, include the amortization of the Company's cost of the lease through the amortization fund set up by the contract, and they also include depreciation. So that at the end of the term the Company's entire present investment in the property would be paid off through the operation of these funds.

(5) All of these amounts are payable in priority to the payment of interest and sinking fund on the City's investment under Contract No. 3, on which nothing whatever has ever been paid.' Its accrued deficits now amount to about $85,000,000.

The plaintiff, on the other hand, has according to the claims of the City of New York, received all the payments that are coming to it, and there has been paid not only the interest and sinking fund on $210,000,000 of outstanding bonds and other funded debt outstanding against the property of the plaintiff, but also the interest on the bonded debt of $45,000,000, outstanding against the property of the Manhattan Railway Company, a lessor company.

(6) The plaintiff has also been and is able, out of its net revenues up to this year, to pay and discharge the guaranty to the stockholders of the Manhattan Railway Com- [fol. 758] pany by way of dividend on the $60,000,000 of outstanding stock of that Company, a sum that amounts to upwards of $3,000,000 per year and has been and is in funds with which to meet its current obligations as they mature.

(7) The outstanding guaranty of the plaintiff to the Stockholders of the Manhattan Railway Company is a conditional guaranty payable only from and out of net earnings of the plaintiffs as to about 94% of the outstanding stock of the Manhattan. As to the remaining 6% or thereabouts of such stock it constitutes an absolute guaranty of dividends on such stock at the rate of 7% per annum which has been and is being fully paid.

(8) After receiving a return of about 8¾% on its investment in Contracts Nos. 1, 2 and 3, plus a portion of its accrued deficits, the plaintiff, according to its own sworn reports to the Transit Commission, was able to pay full interest on its funded debt, make a large sinking fund payment on these obligations, meet interest on the bonds of the Manhattan Railway Company and dividends on the stock of the Manhattan Railway Company and still increase its surplus by the following amounts:

1926	$2,443,694.68
1927	$1,470,887.68

The earnings for these years are understated because of arbitrary deductions by the plaintiff of substantial amounts for Federal Income Taxes which have never been assessed or paid and which probably never will have to be paid.

The earnings for the last year were after a loss of approximately $2,000,000 due to a strike of workmen on the property operated by the plaintiff of which $967,876.37 [fol. 759] were expenses incurred by the plaintiffs in the conduct of that strike that lasted about 26 days and which are being contested as deductions from revenues under Contract No. 3 and the Extensions Certificate against the City.

(9) Because of the fact that there are now accrued deficits owing to the City of approximately $85,000,000, as

above stated, and that according to the claim of the City the accrued deficits of the Company have been paid and overpaid, the surplus earnings under Contract No. 3, over and above the guaranty of $6,335,000 annually to the plaintiff and the payment of fixed charges on its funded debt, will go to the City until its deficits are paid, and for that reason only the plaintiff will not be entitled to receive from the net earnings of the Company under Contract No. 3 any additional amounts in dividends until these accrued deficits to the City have been paid.

Under the terms of Contract No. 3 all the net earnings of the plaintiff, after payment of its guaranty of $6,335,000 and of the fixed charges on its subway investment, must be applied to the payment and liquidation in full of the City's accrued deficits, amounting to about $85,000,000, assuming that the plaintiff's accrued deficits have all been paid (and overpaid) as is claimed by the City.

Within the next two or three years these accrued deficits payable to the City, unless reduced, will probably exceed $100,000,000.

For these reasons no part of any increased fare under Contract No. 3 would come to the plaintiff. All of it would have to be used to pay the contractual deduction on the City's investment of about $114,000,000 and interest on the City's accrued deficits of about $85,000,000, making a total annual charge of upwards of $13,000,000.

[fol. 760] If, therefore, by reason of an increased fare of 2 cents, the Company should realize added net earnings of $9,000,000 per year under Contract No. 3, every dollar of this amount would be required, on the very low basis of net revenue of 50% of the gross receipts from the added fare, for the payment of the contractual deduction on the City's investment and interest on its accrued deficit with no profits available for reducing the deficits or the investment and with not sufficient profits to meet all such accrued deficits, contractual deductions and interest payments on the City's debts.

It appears from the testimony on the car hearing before the Commission hereinbefore referred to and from the accompanying Report (Exhibit "G") that the total cash capital investment of the shareholders of the plaintiff was about $21,000,000, on which they received from June 30,

1904, to June 30, 1919, $65,625,000 in cash dividends, but they have received no dividends since 1919. In each of three years the dividends thus distributed amounted to about 34% of the actual capital investment and in other years from 20% to 25% thereof. For further particulars as to these amounts I beg again to refer to the Report, Exhibit "G."

(10) I am informed and believe that the net earnings of the plaintiff from June 30, 1927, up to this time have been materially greater than those in the years avove indicated and that the business of the Company is rapidly increasing. It was testified under oath in the hearings above referred to by officers of the Company that the increase in pasenger traffic for the 6 months ended December 31, 1927, over the traffic of the preceding 6 months was about 50,000,000 pasengers and that for the three-year period to [fol. 761] June 30, 1930, it would be about 141,000,000 passengers. The above facts and figures, summarized from the accompanying exhibits, are stated for the purpose of showing that there is no urgency for a temporary injunction enjoining the continuance of the present rate of fare resulting in a higher fare, in anticipation of the trial, as is claimed by the plaintiff. The estimated gross revenue from such increase to seven cents would be more than $26,000,000 for the first year and larger sums thereafter. On the basis of an operating ratio of 55% estimated annual net revenue would be about $11,700,000.

(11) The defendants stoutly insist that the present fare yields not only an adequate but a generous return on the actual investment of the plaintiff in the property, but that apart from that fact (1) the plaintiff does not own the property from which it is demanding this return but is merely the lessee thereof and there is nowhere a statement of the value of that lease; (2) the City of New York has an option, now overdue, for the termination of said lease on one year's notice by repaying the plaintiff's actual investment with a small bonus; (3) the City's admitted accrued deficits of about $85,000,000 constitute a claim prior to any equity of the plaintiff's stockholders; and (4) after the payment of cost of operation, taxes, rentals to the City under Contracts 1 and 2, fixed charges on the plaintiff's

funded debt, its annual guaranty of $6,335,000 (all of which are being more than fully earned) and of the current fixed charges of the City's investment and of the City's accrued deficits of about $85,000,000, the remaining profits are by the terms of Contract No. 3 equally divisible between the plaintiff and the City, so that in no event would the plaintiff or its shareholders be entitled to earn upon a basis of the value of the physical properties even if it owned [fol. 762] them, which it does not. The fare is fixed by contracts and the adequacy of the fare is therefore not an issue in this case. There are many other reasons why the alleged reproduction cost of the properties (that the plaintiff, by the way, do not own and which the defendants contest) has no bearing upon the rate of fare chargeable, even if the fare were not fixed by agreements between the parties, as it is.

If the contract is sustained as binding upon the parties, as defendants contend it will be, there will be no occasion for an inquiry into the amount of the plaintiff's investment or the reproduction costs or value of the property or into any of the other allied questions that enter into a controversy involving the issue of confiscatory rates, which this is not in any sense.

For these among other reasons the defendants ask that if their preliminary objections are overruled and this Court should entertain jurisdiction and decide that the complaint states a cause of action, the Court is asked first to try and determine the question of the validity and binding force of the contracts before dealing with the issue of whether the plaintiff is entitled to a temporary injunction against the maintenance of the present rate of fare. No such issue will arise if the defendants succeed in their contention that the plaintiff is bound by the agreement as to the rate of fare and the parties may thus be saved great expense in the needless trial of an issue that may never be tried, the total cost of which, including its costs and expenses, the plaintiff claims the right to impose on the City.

(12) As bearing on the situation between the City of New York and the plaintiff as lessee of the Manhattan Division the following are facts as disclosed by the attached documents:

Under the Elevated Extensions and additional Track Certificates, Exhibits "E" and "F," for the construction [fol. 763] of additional tracks and extensions of the Elevated lines, the plaintiff expended $44,116,549.32. These moneys it secured by the issue and sale of $47,330,574 of its 5% Mortage Bonds and 6% and 7% Notes. By the terms of an agreement and plan of readjustment of May 1, 1922, it is agreed with the Manhattan Company and its stockholders to waive any claim which it might otherwise have against the Manhattan Company on account of its expenditures for improvements upon and additions to the property of the Manhattan Company. The fixed charges on this $47,330,574 have been and are being paid out of the plaintiff's revenues, and the result has been and continues to be that whilst the fixed charges on the securities issued for these improvements are being regularly paid the City is receiving no return on its investment.

The same situation is true with respect to the other fixed charges on the plaintiff's property represented by the balance of the $162,580,986 of Mortgage Bonds and Notes. In consideration of the agreement of the plaintiff to maintain a 5 cent fare and to permit the City to take back its recapturable properties under Article LXXVIII of Contract No. 3 the City has subordinated the payment of all the fixed charges on its investment under Contract No. 3 to the fixed charges on the investment of the plaintiff thereunder and to the annual payment of $6,335,000 to the plaintiff under Contract No. 3 and as a result of which it has received no part of its interest or sinking fund on its investment.

Various other questions are presented by the moving papers on this application to which reference are here briefly made as follows:

(13) The order of the Transit Commission made on the 29th day of June, 1927, requiring the installation of safety [fol. 764] signals and appliances on the Elevated Division postpones the inauguration of such improvements until the year 1933 and the total completion thereof to 1936. They are then extended over a period of years. This order, of which the plaintiff now complains, was the result of a compromise between the plaintiff and the Transit Commission and was entered by consent.

(14) The order of the Commission requiring the lengthening of platforms so as to add to the carrying capacity of the plaintiff for its constantly increasing traffic was made pursuant to a proceeding begun in 1921 by the predecessor of the present Transit Commission.

After lengthy hearings, the predecessor Commission decided on the 21st day of April, 1926, that the platforms should be lengthened in the manner indicated. The cost of this improvement is variously estimated at between $12,000,000 and $14,500,000, of which, according to the City's contention, one-half is payable by the plaintiff and the other half by the City, whilst the plaintiff insists that these improvements do not constitute "additions" under the terms of Contract No. 3 and that it is not liable for any part thereof, notwithstanding which the plaintiff is here contending that the requirement (which is a capital expenditure and is not payable out of income) is confiscatory. A further order to this end was entered by the present Commission on the 31st day of December, 1927, but requires only the lengthening of four platforms at this time, at an estimated cost of $2,000,000, for which the City admits its liability for one-half the cost and the plaintiff claims that the City is liable for the total cost.

(15) As to the alleged requirement of the Commission that the plaintiff furnish 432 additional cars to accommodate its rapidly growing traffic there have been lengthy pub-[fol. 765] lic hearings before the Commission, at all of which the plaintiff has been actively represented by Counsel and as to which it has introduced a mass of testimony, but there has yet been no decision upon that application. And yet the plaintiff here claims that this order, if made, which has not been made and as to which no decision has been rendered by the Commission and which if made would be a capital expenditure, is confiscatory.

(16) Replying to the allegations in the moving papers on these subjects, and especially to the claim that the plaintiff is unable to meet these requirements without defaulting on the payment of its fixed charges, I beg to refer to the testimony introduced before the Commission on that subject as part of the papers in opposition to this motion as demonstrating that its various assertions on these points

are untrue. I beg also in that connection to attach hereto as part hereof a letter dated January 7, 1928, written by me by direction of the Transit Commission to the Counsel for the plaintiff, which is hereto annexed marked Schedule "1," as showing the extent to which the Transit Commission has offered to aid in the financing of these improvements.

(17) Upon the hearing respecting the necessity for additional cars, testimony of witnesses such as Dr. Harris, the Commissioner of Health of The City of New York, and another physician was introduced to the effect that the present traffic congestion, claimed to be due to the scarcity of equipment, is dangerous to life and health and will become increasingly so as the traffic increases. No testimony was introduced by the plaintiff to controvert that of these experts.

The result of the injunction now asked for with respect to the lengthening of platforms and the furnishing of cars [fol. 766] will be to take away from the Transit Commission its supervisory and regulatory powers over the plaintiff and its ability to protect the public, and to transfer all those questions into this Court with the incidental indefinite and dangerous delays.

(18) In conclusion I emphatically deny that there has been any bias or prejudice on my part either personally or as Special Counsel for the Transit Commission against the plaintiff except that from the evidence submitted I have reached and expressed certain conclusions based upon that evidence and upon that alone.

(19) It is true that as Counsel for the Commission, based solely on the testimony before the Commission at public hearings at which the plaintiff has been throughout represented by counsel and has called and examined witnesses in support of its various contentions I have protested against certain acts of the officials of the Company as being grossly unjust to the City. Among other things I have as the result of such testimony and upon the basis thereof protested against the plaintiff taking advantage of the fact that it is in possession of the funds from joint operations under Contract No. 3 to extract from those funds large

sums of money and to obligate the fund for additional large sums in the prosecution of this suit for the purpose of destroying the City's contract rights, thus using the money of the City to defeat the City's claims.

The Company has funds of its own which I have insisted should be used for that purpose instead of diverting the moneys that would otherwise be payable to the City on account of its accrued deficits.

For the same reason and based on the same testimony I have protested on behalf of the Commission against the mis-[fol. 767] use by the plaintiff of hundreds of thousands of dollars that have been expended in publicity campaigns for the purpose of which was admitted by the witness was to bring about an increased fare contrary to the provisions of the contracts between the City and the plaintiff and have given notice that efforts will be made to recover this money back into the treasury to be applied to the payment of the accrued deficits of the City.

The plaintiff's stockholders who are in control of the Company have, as before stated, no further financial interest in the plaintiff inasmuch as the net revenues under Contract No. 3 over and above the annual sum guaranteed the plaintiff and the amounts necessary to pay fixed charges on its investments under Contract No. 3 are now claimed by the City to be applicable to the payments of its accrued deficits of about $85,000,000 so that if the Company should earn a still further sum of $14,000,000 per year over fixed charges and the interest on its money investment in the property it would not even pay the interest on these accrued deficits after discharging the current fixed charges on the City's investment which would have to be paid after the current fixed charges on the plaintiff's investment and no part of which have as yet been paid. It will thus be noted that the chances of any dividend upon the stock of the plaintiff are so remote as to be negligible and that the City will have to bear the burden of extravagance and other mismanagement.

1. Whatever difficulty the plaintiff may experience in borrowing the money for capital requirements such as lengthening platforms and furnishing additional cars to meet the requirements of its increasing business is due not to the

[fol. 768] character of the security or the extent of its earnings both of which are ample according to all rules of financial credits for such purposes.

2. The assets and present prospective earnings of the company are an ample basis for the purpose.

If any such difficulty exists it is due entirely (1) to the flimsy and unsound character of the financial structure of the plaintiff in pyramiding a gross funded debt of $210,000,000 on a paid-in capital of only $21,000,000 in cash represented by its stock, or almost 10 to 1 of funded debt to stockholding investment; (2) to the foolhardy covenant contained in the $10,500,000 outstanding note issue of 1922 given to its stockholders that it would not sell or negotiate any part of the almost $200,000,000 of its unissued 5% first mortgage bonds that were intended to be issued for enlargements and improvements without paying off the notes at a premium. Every prosperous railroad requires money for expansion and capital improvements to meet its growing business and particularly this Company whose business has increased twofold since 1913 and is increasing at the annual rate of 6%.

3. The improvident, short-sighted and inexcusable policy of the Company in paying out all its earnings in the years of its greatest prosperity instead of putting aside reserves for future needs. As before stated, it paid over $65,000,000 in dividends in 16 years on its $21,000,000 of cash capital investment. If it had paid its stockholders an annual average of 7% during those years it would now have with the accrued interest on this fund around $60,000,000 available for extensions and betterments.

It had literally "gutted" the Company by its excessive dividend payments and other outlays and now seeks to place the burden of its policy on the City and to make the [fol. 769] public suffer for its delinquencies in inadequate service.

Many if not almost all the prosperous railroads in the country whose stocks are selling above par financed their equipment requirements by the issue of Car Trust Certificates and their extensions, roadbed and other improve-

ments by long-term bond or stock issues that are kept available for such purposes.

It is solely because of the absence of such ordinary foresight and precautions that the 5% bonds of the Company are selling around 77% of their par value whilst the 6% bonds of the B.-M. T. with a more intelligent capital structure which is also operating on a five-cent fare are readily saleable around par.

4. The character of the management is also largely responsible for the poor credit of the Company. Some of the facts bearing on that subject that were developed from the testimony of the officials of the Company at the aforesaid public hearings at which the Company was represented by Counsel and given full opportunity to examine and cross-examine witnesses are hereby referred to as part hereof and will be read into the record on the argument.

A comparison of the capital structure and management of the plaintiff and the B.-M. T. will demonstrate the reason for the financial difficulties of the former and the prosperity of the latter which on a five-cent fare is not only meeting all its fixed charges but earning over $6.00 and paying $4.00 per share on 770,000 shares of capital stock that at the time of their issue sold at $6 per share and are now selling at over $60 per share. All the B.-M. T. earnings come from the subways owned by the City and leased to the [fol. 770] Company at the same time and on the same general conditions as the plaintiff's properties. The B.-M. T. Company is losing money on its surface and elevated lines after paying fixed charges and the above stated earnings represent what remains from the subway earnings after deducting such losses.

It was testified at the hearing, supported by stock lists of the Company, that of the 350,000 outstanding shares of stock the combined holdings of all the directors of the Company amounted to 112 shares.

Samuel Untermyer.

Sworn to before me this 12th day of March, 1928.
William A. Young, Notary Public, Kings County Clerk's No. 2; Reg. No. 8001; New York Co. Clerk's No. 2; Reg. No. 8007. Term expires March 30, 1928.

[fol. 771] SCHEDULE "1"

January 7, 1928.

Re Transit-Interborough Rapid Transit Co.

To the Board of Directors, Interborough Rapid Transit Co., c/o J. L. Quackenbush, General Counsel, 165 Broadway, N. Y. C.

DEAR SIRS: There are three principal controversies now outstanding between the Company and the City, involving the questions of whether—

(1) The Company has overdrawn its accrued preferentials to the extent of $2,200,000 (as thus far ascertained) or whether it is still entitled to approximately $4,800,000;

(2) Whether the Company is obligated to pay one-half of the cost of the extensions to the station platforms that have been ordered by the Commission, or whether this entire expense must be borne by the City, and whether the work shall be immediately begun and vigorously prosecuted; and

(3) Whether the Company shall furnish 432 additional cars.

In order that the public may secure at the earliest practicable time all possible improvements in service I have been carefully considering the possible compromise of these controversies and have made to the Transit Commission the following suggestion, which it has approved, and which I am authorized to convey to your body for its action, subject, of course, to the ratification of any compromise by the City authorities:

1. That the impending controversies between the Company and the Commission, as to whether the Company has [fol. 772] overdrawn its accrued preferentials by $2,200,000 or thereabouts (as thus far ascertained), or whether it is still entitled to receive further moneys on that account, be adjusted by each party releasing the other from all claim without further payments.

This would permit of the immediate receipt by the City of payments on account of its accrued preferentials amounting now to about $80,000,000.

2. That the Company now accept and proceed forthwith to carry out the order for additional platforms, assuming one-half of the cost of such additions; and

3. That the Company now order the additional 432 cars that are the subject-matter of the pending application, for delivery as soon as possible, and that 20 per cent of the cost thereof be paid as hereinafter provided from time to time as the payments are required to be made;

4. That from and out of the moneys receivable by the City from the accrued preferentials, which will from January 1st, 1928, and steadily thereafter come to the City, it will lend and advance to the Company its one-half of the cost of additions to the platforms, repayable by the latter at 4 per cent per annum interest and 1 per cent sinking fund;

5. That the City buy the cars and lease them to your Company or that the cost of the 432 additional cars be loaned and/or advanced by the City to the Company at 4 per cent per annum interest, payable semi-annually, on Car Trust Certificates repayable in ten annual installments.

These advances to be made solely from and out of the sums receivable by the City on account of its accrued defi- [fol. 773] cits and so that the latter will not in any event be called upon to issue City bonds or other obligations for the loan or to charge any part thereof in the budget.

I have no doubt about the ability to finance these money requirements without resort to the City treasury and will be glad, if desired, to assume that task as an incident of such settlement.

In this connection your particular attention is called to the provisions of the contract of March 19, 1913, Article XXXIX, which gives the City the right to supply the cars if the Company fails to do so and to recoup itself as provided by the Contract.

I regard the above-suggested compromise of the question of the ovedrraft by the Company of its accrued deficits as exceedingly generous to the Company, but if you think

otherwise and would prefer to litigate, that decision need not interfere with the adjustment of the other controversies above set forth. The Commission would be willing to recommend, in that event, that the part of the fund in controversy may notwithstanding be used for the purposes above indicated, to the extent of your Company's remaining claim for the City's counterclaim, without prejudice to the rights of either.

On account of the urgency of the situation, your immediate attention to these suggestions is requested.

Very truly yours, (Signed) Samuel Untermyer.

[fol. 774] State of New York,
County of New York,
City of New York, ss:

Clarence M. Lewis, being duly sworn, deposes and says:

I am, and at all times since on or about July 1, 1926, have been, the Counsel to the Transit Commission.

The orders made by the Transit Commission on the 21st day of April, 1926, and on the 31st day of December, 1927, copies whereof are annexed to the complaint herein and designated therein as Schedules "H" and "I," requiring the lengthening of station platforms and other matters so that 10-car local trains may be operated at stations of the Railroad and Existing Railroads described in the contract known as Contract No. 3, were made after a hearing had been held before the Transit Commission on many days from and including August 9, 1923, to and including December 16, 1927.

[fol. 775] As appears from page 9 of the official stenographer's minutes of such hearing, at the opening of the session thereof held on September 6, 1923, the then Chairman of said Commission, George McAneny, stated the purpose of such hearing to be as follows:

"This is a hearing held in the matter of the proceedings to be taken by the Commission in the matter of lengthening the local platforms at stations of the Interborough Rapid Transit Company.

"This hearing this morning is held pursuant to the general inquisitional power of the Commission under the Rapid Transit Act and contracts entered into by virtue thereof. Any hearing on the subject of lengthening station platforms, while not contractually necessary to permit the Commission to exercise its authority with respect to betterments and improvements, is nevertheless held because of the importance of the subject in itself and to permit all who are interested either for or against the Commission's proposed plan to be heard."

and the then Counsel to the Transit Commission introduced into evidence a copy of said Contract No. 3, and also spread upon the said minutes Article LXX of said Contract No. 3 which provides as follows:

Article LXX. The principal object of the City in making this contract is to secure for the public convenience an adequate, comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the Existing Railroads. By the foregoing provisions of the Lease the Lessee has covenanted, among other things, to operate the Railroad and the Existing Railroads carefully and skillfully, according to the highest standards of railway operation; to supply adequate Equipment; to run trains so as to furnish adequate service; [fol. 776] to use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. These covenants on the part of the Lessee are among the principal moving considerations to the City in making this contract, and any breach thereof will entitle the City to the remedies provided in this contract. If at any time Additions to the Railroad or Equipment or to the Existing Railroads or Existing Equipment or any change in the mode of operating the Railroad or the Existing Railroads or conducting the business thereof are necessary in order to carry out the purposes of the Lease in securing service and facilities as shall be safe and adequate and in all respects just and reasonable, the Commission may direct the construction or provision of such Additions and the making

of such changes in the mode of operation of the Railroad or the Existing Railroads or in the conduct of the business thereof as may be necessary to accomplish such purposes. Such construction or provision of Additions and such changes shall be made to the satisfaction of the Commission and, when necessary, under such forms of contracts, plans, specifications and directions as it may issue or approve. If the direction shall have reference to the Equipment or to operation the cost of complying therewith shall be borne by the Lessee. If the direction shall have reference to the Construction the cost of complying therewith shall be shared equally by the City and by the Lessee (except in the case of Additions to the Extensions in which event the cost shall be borne wholly by the City) and the work necessary shall be done under the supervision and direction of the Commission and under contracts let by the Commission or directly by the Lessee as the Commission may elect. If the Lessee shall neglect or refuse to comply with such directions the Commission in addition to other remedies [fol. 777] may cause such changes or Additions to be made at the expense of the Lessee."

The said order made by the Transit Commission on December 31, 1927, was made in pursuance of the authority vested in the Transit Commission under said Article LXX of said Contract No. 3, and I verily believe that the said order made on April 21, 1926, was likewise made in pursuance of the authority of said Article LXX, and that neither of said orders was made under any authority other than under said Contract No. 3, and that in such proceedings no hearing is required by the statute, and I verily believe that neither of said orders is reviewable by certiorari.

As appears from the official stenographer's minutes of such hearing, the representatives of the plaintiff herein, being its President and its Counsel, admitted the desirability for such lengthening of such station platforms, Mr. Hedley, its President, at page 235 of the minutes, saying:

"I believe that you have got to develop the present subway as far as it is possible to develop, and one of the best moves that could be made now is to increase the length of the local trains."

and Mr. Quackenbush, its Counsel, at page 103, saying:

"There is no difference between the Commission and the Company as to the desirability of increasing the lengths of these platforms."

and again at page 116:

"There is no difference between the Commission and the Company in principle here. It is a matter of ways and means."

and again at page 172:

"I will say this, in answer to your inquiry Mr. Chairman. [fol. 778] As I said at the previous hearing, we do not disagree that this imrovement would be very desirable from the point of view of the public."

and again at page 304:

"The congestion upon the existing subways of the Interborough is so great that the lengthening of the platforms and the running of additional cars which would be done because of them will be in the interest of the public service."

The order of the Transit Commission referred to in Article XLV (page 56) of the complaint requiring plaintiff to install signals upon the local tracks of both subway and elevated lines, was adopted by the Commission in Case No. 2864 on June 29, 1927.

The hearing in that case in respect to the safety and adequacy of signal system and signal equipment used or operated on the local tracks of the subway and elevated lines was set by order of the Commission, adopted May 13, 1927. This hearing was adjourned from time to time, and during the period of the adjournment the engineers of the Commission conferred with the engineers of the plaintiff, and an understanding was reached as to a program of installation which the Company would accept. On June 29, 1927, the Commission adopted the order in question which specified the lines on which and the times within which the signal system was to be installed, and provided, as authorized by Section 23 of the Public Service Commission Law, that within fourteen (14) days after service upon it of a certified copy of said order the plaintiff should notify the Commission in writing whether the terms thereof were accepted and would be obeyed. A certified copy of such

order was duly served upon the plaintiff on June 29, 1927, and by a notice of acceptance dated and verified July 13, [fol. 779] 1927, the plaintiff notified the Commission as follows:

"You are hereby notified that the terms of the order in Case No. 2864, entitled as above and adopted by the Commission on June 29, 1927, are accepted and will be obeyed."

No order such as referred to in Article XLV (page 56), Article XLIX (pages 62 and 63), Article LI (page 67) and subdivision (5) of paragraph 7 of the Prayer for judgment (page 90), of the complaint, has been made by the Transit Commission requiring, in its Case No. 2851, the plaintiff to provide 432 additional cars, or any other number of additional cars, nor has the Transit Commission made known any intention to make such an order.

Clarence M. Lewis.

Sworn to and subscribed before me this 12th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375; also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 780] State of New York,
County of New York,
Southern District of New York, ss:

Norman C. Hill, being duly sworn, says:

I am Chief of the Division of Valuations and Maintenance of the Transit Commission, and have been in the employ of the Transit Commission or its predecessors since 1913. I was connected with the Bureau of Valuation hereinafter mentioned and was and am familiar with the facts relating to the valuations, hereinafter mentioned, which were prepared by that Bureau.

In the affidavit of Henry T. Berry submitted in support of the motion herein for an interlocutory injunction there appears on pages 51 and 52 thereof a computation which

purports to be based in part on the original cost figures of the transit Commission's engineers for City-provided property for 1926 and 1927. The Commission's engineers did not prepare the figures referring to the Interborough Rapid [fol. 781] Transit Company property shown on page 51, nor the figures affecting the Manhattan Railway Company property shown on page 52, nor the figures under "Miscellaneous Interborough Items" shown on page 52.

The same affidavit purports to show on page 54 for the Manhattan (or Elevated) Division a computation based upon Transit Commission's engineers' figures of reproduction cost. These figures were not prepared by the engineers of the Transit Commission, and I do not know the figures of the Transit Commission's engineers on which this computation is supposed to be based. The Transit Commission's engineers have prepared no such figures of reproduction cost for 1927.

The same affidavit on page 54 purports to show for the Subway Division a computation based in part on Commission figures for City-provided property. These figures were not prepared by the engineers of the Transit Commission, and I do not know the figures of the Transit Commission's engineers on which this computation is supposed to be based.

The same affidavit on page 54 also purports to show for the Subway Division a computation based on the Transit Commission's engineers' figures of reproduction cost. The figures therein set forth are not the figures of the engineers of the Transit Commission. I am unable to say on what figures of the engineers of the Transit Commission they are supposed to be based.

The same affidavit purports to show for the Interborough system a computation based in part on Commission figures for property provided by the City. The figures therein set forth are not the figures of the engineers of the Transit [fol. 782] Commission. I am unable to say on what figures of the engineers of the Transit Commission they are supposed to be based.

The same affidavit on page 55 thereof purports to show for the Interborough system a computation based on Transit Commission's engineers' reproduction cost figures. The only figure therein appearing which I know to be taken from

the figures of the Transit Commission's engineers is the figure for "Value minimum present" for 1926. I do not know on what figures of the Transit Commission's engineers the other figures therein appearing are supposed to be based.

The same affidavit also purports to show on page 55 thereof for the Interborough system a computation based in part on the Transit Commission's engineers' original cost figures for City property. None of the figures therein appearing are figures of the Transit Commission's engineers. I am unable to state on what figures of the Transit Commission's engineers the figures therein appearing are supposed to be based.

The same affidavit also purports to show on page 56 for the Interborough system a computation based on Transit Commission's engineers' original cost figure. The figures therein appearing are not the figures of the Transit Commission's engineers, and I am unable to state on what figures of the Commission's engineers the figures therein appearing are supposed to be based.

The Transit Commission has never adopted for the property of the Manhattan Railway Company or the property of the Interborough Rapid Transit Company or of the City any valuation figures based on "fair value," "original cost," or "reproduction cost" or "investment."

[fol. 783] Such figures as were prepared by the Commission's Engineers in relation to the valuation of the Elevated and Subway properties operated by the Interborough Rapid Transit Company were prepared under the following circumstances:

By Chapter 134 of the Laws of 1921, the Legislature of the State of New York created the Transit Commission and charged it with the duty of preparing a plan of readjustment for the relief of the emergency thereby declared to exist, and for the improvement of transit in the City of New York. The same Act amended the Public Service Commission Law by adding thereto a separate Article VI relating to the formulation of such plan. Section 106 of the Public Service Commission Law as so amended provides in part as follows:

• • • Without limiting the authority and discretion of the commission, it shall consider the incorporation in the plan of provisions whereby the title to such railroads as are not already owned by the city and whose ownership thereby is deemed by the commission to be desirable may be vested in the city in return for a lease of such railroads by the city, and in the event of the incorporation of such provision in the plan the commission shall outline an arrangement whereby outstanding securities of the railroad companies may be exchanged for new securities and the valuation of the railroads, determined as hereinafter provided, amortized.

• • • • • • •

In connection with the preparation of such plan, the commission shall cause a valuation to be made of the property, other than franchises or going value, necessarily used in public service of the railroads it proposes to include therein. Such valuation shall be made with due regard to the estimated prospective earning capacity of the property [fol. 784] necessarily used in the public service at the rate or rates of fare that the company prior to the taking effect of this act was entitled to charge in view of the provisions of the contract or franchise under which the property is operated or held or of any lawful order in force fixing or regulating rates of fare and of the competition of other lines and with due regard to all other pertinent facts and conditions; but such valuation shall not in any case exceed the fair reconstruction cost of the property less depreciation. Such valuation shall be in such detail and shall include the elements of cost or values and shall be made in such manner as the commission may prescribe. Such valuation as finally determined by the Commission and incorporated in the contracts shall be the basis for all allowances to the railroad companies under the plan and for thereafter fixing the returns under the plan and the contracts entered into thereunder on the property so valued, anything in this chapter to the contrary notwithstanding. • • •

To aid in carrying out the duties thus imposed the Transit Commission organized a Bureau of Valuation headed

by John H. Madden, Valuation Engineer, now dead, and on February 15, 1922, the said Bureau of Valuation submitted a report to the Transit Commission signed by John H. Madden and Fred W. Lindars, Chief Accountant. This report covered the following data for practically all the street railroads within the City of New York for a period preceding 1922:

"Valuation of property used and not used in operation.

Based on Actual or estimated original cost.

Based on Cost to Reproduce New in pre-war period (1910 to 1914).

Based on Cost to Reproduce New January to July, 1921.

Valuation of property less accrued depreciation on straight line basis.

[fol. 785] Applied to Actual or estimated original cost.

Applied to Cost to Reproduce New pre-war period (1910 to 1914).

Applied to Cost to Reproduce New January to July, 1921.

An estimate of expenditures necessary to place the property of each company in first class operating condition.

Statements of capitalization, book value of property and significant financial data, for each system and company.

Detailed operating statistics for each company, over a period of the past 10 years.

Together with other relevant data and statistics respecting valuations and the past and the present operating conditions of the railroads."

For the Elevated property owned by the Manhattan Railway Company valuations were prepared on the following bases:

1. Actual or estimated original cost.
2. Cost to reproduce new in pre-war period.
3. Cost to reproduce new January to July, 1921.

In connection with these bases the accrued depreciation and an estimate of expenditures necessary to place the property in first class operating condition were prepared as of dates preceding 1922 as indicated above.

For the Elevated property owned by the Interborough Rapid Transit Company a valuation was prepared as of dates preceding 1922 on the following basis:

Actual cost taken from the figures of the Chief Engineer of the Transit Commission as reported by the Company.

[fol. 786] For this property there was an estimate of depreciation on the straight line basis.

For the City and Company-owned Subway property constructed and equipped under Contracts 1 and 2 and operated by the Interborough Rapid Transit Company there was a valuation at the original cost as reflected by the records in the files of the Commission.

For the City-owned Subway property constructed under Contract No. 3 and operated by the Interborough Rapid Transit Company the valuation was based on the original cost as shown by vouchers and substantiated by the records of the actual expenditures which entered into the completed work, subject to the determinations made by the Chief Engineer of the Commission as authorized by the terms of Contract No. 3. In this case also there was an estimate of accrued depreciation. These figures covered expenditures made both by the City and by the Company.

These estimates of actual and reproduction cost have never been accepted or adopted by the Transit Commission as its finding of actual or reproduction cost, and have never been used by it in the determination of the valuation of these properties for the purposes of section 106 of the Public Service Commission Law, or otherwise, and no such valuation has ever been made by the Commission.

Following the submission of this report by the Bureau of Valuation to the Transit Commission public hearings were held at which various interested parties had an opportunity to cross-examine Mr. Madden, the valuation engineer, and to produce valuations of their own or other evidence and argument in support of their contentions in respect to value. After the close of these hearings certain adjustments were [fol. 787] made by the engineers in the valuations to correct formal errors that they had discovered since the original tentative unofficial valuations had been set up, and to modify certain figures in the light of evidence and argument adduced by the companies. These revisions also included estimates of cost to reproduce the properties which were provided under Contracts Nos. 1, 2 and 3 and the Related Certificates.

The valuations so revised became known in the office records as "Final Revision of Valuations as of June 30, 1921." These revisions were never submitted formally to the Commission. These revised valuation figures were never adopted or accepted by the Commission for any purpose.

From time to time after the revisions were assembled these tentative unofficial valuations on various bases were brought up to more recent dates. The figures arrived at by similar methods were never presented formally to the Commission. These valuation figures as corrected and supplemented were never accepted or adopted by the Commission for any purpose.

The original Transit Commission, having failed to formulate any plan of readjustment that was acceptable to the Companies, the present Transit Commission, pursuant to the mandate contained in Article VI of the Public Service Commission Law, began early in 1927 to prepare for the formulation of a plan of readjustment as called for in the statute. In May, 1927, hearings in connection with such plan of reorganization were instituted by the Transit Commission and were continued to about the end of July. During the progress of that hearing certain tentative informal valuation figures prepared by the engineers of the Transit [fol. 788] Commission, as corrected and supplemented and brought down more nearly to date, were introduced as evidence. These proceedings, looking to the formulation of a plan of readjustment, are still in progress.

The valuation figures so introduced at these hearings have never been accepted or adopted by the Transit Commission for any purpose.

The report of the Bureau of Valuations submitted to the Transit Commission on February 15, 1922, contained the following:

"After a full consideration of all the facts as developed by the present investigation and bearing in mind that the plan under which the Commission is operating contemplates the acquisition of the property, it is our conclusion that a fair valuation for the existing property of companies other than that included under Contracts 1, 2, 3 and 4 and their Related Certificates would consist in allowing the origanal cost less the expenditures necessary to put the property in first-class operating condition.

Valuation of the property paid for by the Interborough Rapid Transit Co. as included under Contract 3 and similarly that paid for by the New York Municipal Railway Corporation under Contract 4, and also the property included under the certificates for extensions, additions, third tracking and reconstruction of the elevated structures, which accompany Contracts 3 and 4, should be based on the determination of cost by the Chief Engineer of the Commission, as provided in such contracts, with the deduction therefrom of the accrued depreciation also therein provided for. The property provided under Contracts 1 and 2 by the Interborough Rapid Transit Co. has also been appraised on this same basis.

It is our opinion that the cost so determined, based on accurate cost data, represents the fair reproduction cost referred to in the transit act.

[fol. 789] It is our opinion that there should be included in such valuation only the property now existent and suited for operation.

Land, buildings, power plants or other equipment not used or useful for operation should be excluded from the valuation and deemed to be assets of the company to be disposed of as it sees fit.

No track or roadway which has been abandoned and allowed to disintegrate so as not to be suitable for operation should be included in the valuation.

Based on the foregoing premises summaries have been prepared reflecting for each company the net amount of the valuation which is recommended for adoption.

It must be realized that the valuations are of the property as of June 30, 1921, and that the results should ultimately be brought to the dates of any contemplated settlement so as to adjust for retirements, replacements, additions and betterments, and also to provide for any fluctuations in the value of land, materials and supplies on hand and in the expenditures to place the property in first-class operating condition.

As before stated all valuations as herewith presented are based on the inventory of property, as of June 30, 1921, which was deemed to be used and useful for the operation of the railroads or systems as then constituted or as then capable of being operated. It was not within the pur-

view of this Report to segregate or discard in whole or in part any property of any company which might be designated as not necessary or needful in any plan developed for the revamping of the transit facilities so as to effect an economic unification of the present systems. The final statutory plan of the Commission is expected to embrace only such property as is to be acquired for such a unified system of transit and the valuations herewith will permit of the schedule to be prepared of the properties on any premises as therein adopted."

[fol. 790] I know of no subsequent recommendations made to the Transit Commission by the Bureau of Valuation.

Norman C. Hill.

Sworn to and subscribed before me this 12th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375; also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 791] United States of America,
State and County of New York,
Southern District of New York, ss:

Isidor Stinrad, being sworn, says:

I am connected with the Accounting Department of the Transit Commission as Chief of Division of Statistics and Accounts, and have been employed by the Commission for upwards of ten (10) years last past.

In November and December, 1927, there was a public hearing in progress before the Transit Commission on an application for additional cars which has not been decided and is still under consideration by the Commission. The Commission and the plaintiff were represented on that hearing by counsel who examined and cross-examined witnesses at considerable length. One of the witnesses called during the course of the hearing and recalled toward the

end of the taking of testimony was Henry T. Berry, Comptroller of the plaintiff company.

[fol. 792] The plaintiff was engaged in an effort to prove: (1) that no additional cars were needed or could be profitably used to improve the service and (2) that it did not and would not have in hand or available from its revenues the moneys for which to pay for the additional cars. In support of the latter contention the plaintiff offered in evidence the accompanying estimate, hereto attached marked Schedule "1," of the moneys that would be available for all purposes including the furnishing of such number of cars as might be ordered to be supplied.

Mr. Berry, on the stand, on December 15, 1927, stated on direct examination with respect to this exhibit:

"In the case of this estimate, that has been reviewed by the treasurer, by the vice-president, and by myself, and is the concensus of opinion of all of us that this fairly represents what may be stated in the way of cash receipts and outgo, up to the first of next July."

It will be noted that from this estimate, received in evidence December 14, 1927, it appeared that the cash available as of January 1, 1928, after payment of the interest on the funded debt on that date, and after deducting $695,612.50 representing a quarterly dividend on Manhattan Modified 5 per cent. stock, would be $1,130.77.

Mr. Berry was recalled to the stand on December 30, 1927, and was cross-examined upon that statement by Special Counsel for the Commission, and was then asked the following questions to which he gave the following answers:

"Q. Now, please look at this document, will you, and tell me whether you had anything to do with preparing that. That is Exhibit 58.

A. Yes.

[fol. 793] Q. Did you prepare it?

A. Not altogether, no.

Q. Was it prepared under your direction?

A. No.

Q. Did you revise it and approve it?

A. Yes.

Q. Now, in this document which has been offered in evidence on the cash working capital requirement, you made

the estimate yourself, didn't you?

A. Yes.

Q. And you say you now have a little over four million dollars, do you?

A. Yes.

Q. How much is it?

A. I do not know the exact figure.

Q. I want to know how much it is?

A. I can find it out for you. I have not it with me.

Q. How much is it over four and a half million?

A. I do not know right now. I would have to look it up.

Q. When was this Exhibit 58 prepared?

A. About two or three weeks ago.

Q. And in that Exhibit 58 you estimated that the cash on hand for January would be $1,130.77 instead of which——

A. At the close.

Q. Instead of which it is four and a half million?

A. At the close of December. Yes.

Q. Well, your estimate was pretty far out, wasn't it?

A. No. I do not think so.

Q. Well, it is pretty near the close of December?

A. Yes, it is, but very large payments have to be made.

Q. Let us see about that. You estimated you would have $1,130.77 left. Now let me see what your commitments for the 1st of January are? Have you them here?

A. Yes.

Q. Let me see them.

A. The interest on the five per cent. bonds——

Q. Let me see the list of them?

A. I have not the list of them. They are shown here in this statement.

Q. Well, let us see what they are for January. What are they? Interest on the five per cent. bonds?

A. $4,125,000.

Q. I do not quite see how you make that. There are [fol. 794] 148,000,000?

A. No, 160,000,000, in round figures.

Q. Part of those are in the sinking fund, aren't they?

A. Yes, but the interest is payable on them.

Q. I understand that. Well, five per cent of that is $8,000,000, isn't it?

A. Eight million or a little over eight million.

Q. Now, what else?

A. That is the principal item that is payable right now; that is payable tomorrow.

Q. And you cannot tell us what your bank balances are today, can you?

A. I have not it in front of me, no.

Mr. Untermyer: I think it is very important to have them."

Mr. Berry was asked in that connection how much money of the Company was then (on December 30, 1927) on hand; to which he made the following replies:

Q. Now you say that your bank balances now are about four and a half million, but you cannot tell us how much they are?

A. Yes.

Q. And you are the controller of the company?

A. Yes.

Q. When did you last know what they were?

A. Why, I see a statement frequently of what they are.

Q. Do you know what they were yesterday or the day before?

A. No.

Q. Do you know whether they are five million dollars?

A. No.

Q. You do not?

A. Yes.

Q. Do you know whether they are over five million dollars?

A. No.

Q. Do you know whether they are six million dollars?

A. I am sure they are not.

Q. You do not think they are six million?

A. No.

Q. You think they are somewhere between five and six?

A. No. I do not think so.

Q. But you do not know?

A. No. I do not know. I have said so.

[fol. 795] Q. The only item you have given of expenditures between now and the 1st of January is this item of interest on the fives, amounting to about four million dollars?

A. Yes. Of course there are other things.

Q. There are other receipts too?

A. Yes.

Q. Of $200,000 a day, aren't there?

A. Quite true.

Q. And if you have got between five and six million dollars cash and you are getting at the rate of $200,000 a day and you have to pay out four million dollars on the 1st of January, your estimate made here recently that you would only have $1,130 on the 1st of January is a way out, isn't it?

A. I do not think so.

Q. Well, if my figures, to which you have subscribed, are correct, it is way out by a million or two isn't it?

A. Yes, if your figures are correct.

Q. Well, I am speaking of your figures now. You say you cannot tell us whether your balances are between five and six million dollars?

A. I do not handle the cash.

Q. What is that?

A. I do not handle the cash.

Q. But as the controller you have to know what the cash on hand is, don't you?

A. Yes, I have the record of it.

Q. That is in your office?

A. The record is in my office.

Q. I did not ask you whether you took in the nickels or not. The treasurer does not do that either, does he?

A. He has charge of it.

Q. But you know just as much about the cash on hand or in bank as he does?

A. I ordinarily do, yes.

Q. And being the controller of this company you cannot tell us within a million dollars of how much cash you had on hand this week or any part of it, can you?

A. Not without consulting the records.

Q. I say you cannot within a million dollars?

A. Not without consulting my records, no.

[fol. 796] Q. At no time during the present month can you give us within two million dollars how much cash you had?

A. Yes, within two million.

Q. Well, at what time?

A. I would say around $3,000,000. I do not liike to testify to those figures without records in front of me so I can get them right.

Q. What do you mean by saying "About $3,000,000"? That is about what you have on hand now?

A. I said——

Q. Do you mean about three million dollars is what you have on hand now?

A. No. I testified I did not know what we have on hand right now. Those balances change very rapidly."

Special Counsel for the Commission thereupon insisted that he ascertain the exact amount of cash on hand.

When Mr. Berry returned it appeared that the cash balance of the Company as of December 30, 1927, was $5,566,528, before payment of $4,161,700 semi-annual interest on bonds due January 1, 1928.

It appears that, instead of $1,130, estimated by the plaintiff as the cash balance at January 1, 1928, the actual cash balance at that date was $1,115,000 (after allowance for full interest charges, including interest on bonds held in its own sinking fund and on other reacquired bonds). In addition the plaintiff on the same date had cash and securities of $1,558,000 which it stated was set aside for alleged Federal income taxes that had, I am informed and believe, never been assessed and for which no claim has ever been made by the Federal government.

I, called as a witness for the Commission, testified and estimated the cash available over the period covered by Schedule "1" in accordance with the assumptions set forth [fol. 797] in Schedule "2" hereto attached.

The actual cash and securities on hand at March 1, 1928, was $5,762,000 (of which $1,560,000 represents the so-called tax fund). My estimate for the amounts available for the same date, as shown on Schedule "2," was $5,262,000 (of which $1,558,000 represented the so-called tax fund), whereas the plaintiff's estimate, as shown on Schedule "1," was only $2,553,130.77. Including the plaintiff's reserve of $1,560,000, shown as a disbursement on its Exhibit, but

which had never been disbursed, the total would be only $4,113,130.77.

Isidor Spinrad.

Sworn to and subscribed before me this 12th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375; also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

(Here follows Schedule "1," marked side folio page 798)

[fol. 799] Addenda

Summary of Estimated Receipts and Disbursements

Receipts:		
October, 1927 (actual)	$5,936,588.33	
November, 1927	5,775,000.00	
December, 1927	6,423,750.00	
January, 1928	5,945,000.00	
February, 1928	5,640,000.00	
March, 1928	6,125,000.00	
April, 1928	5,960,000.00	
May, 1928	5,990,000.00	
June, 1928	5,725,000.00	
Total Receipts		$53,520,338.33
Disbursements:		
October, 1927 (actual)	$4,996,347.92	
November, 1927	5,322,276.00	
December, 1927	11,887,497.94	
January, 1928	4,408,000.00	
February, 1928	4,625,000.00	
March, 1928	5,773,815.00	
April, 1928	4,197,200.00	
May, 1928	4,795,460.00	
June, 1928	9,381,380.00	
Total Disbursements		$55,386,976.86
Deduct Extraordinary Items included:		
Reserve for Federal Taxes	$1,560,000.00	
Payments a/c Car Trust	1,300,000.00	
Advances to Construction Funds:		
A/c Contract No. 3	1,201,657.00	
A/c Signals	286,816.00	
		4,348,473.00
Remaining balance of disbursements for ordinary items		$51,038,503.86

(Here follows Schedule "2," marked side folio 800.)

[fol. 798]

Inter

Estimate of Cash Receipts and Disbursements Co

	October (Actual)	November	
Estimated Balance at the beginning of each month	$4,071,914 30	$5,012,154 71	
Estimated Receipts			
Passenger Revenue (including joint operation of Queensborough Lines)	$5,428,557 44	$5,300 000 00	
Reimbursements from Construction Funds	79,502 99	50,000 00	
Miscellaneous Receipts from Advertising Privileges, Sale of Power, Scrap, Rentals, Interest on Deposits and Securities, etc	428,527 90	425,000 00	
Interest on United States 4½% Treasury Notes due Dec. 15, 1927			
New York Rapid Transit Corporation, Power Adjustment			
Total Estimated Receipts	$5,936,588 33	$5,775,000 00	
Total	$10,008,502 63	$10,787,154 71	$
Estimated Disbursements			
Weekly Payrolls	$1,877,689 35	$2,185,000 00	
Semi-monthly Payrolls	365,391 11	365,000 00	
Coal	360,521 64	375,000 00	
Miscellaneous Supplies and Operating Expenses	660,073 30	575,000 00	
Interest			
I. R. T. Co. 5% Bonds			
I. R. T. Co. 5% Bonds			
I. R. T. Co. 7% Notes			
I. R. T. Co. 6% Notes			
I. R. T. Co. Equipment Trust Certificates			
Series "A"			
Series "B"			
Series "C"	51,300 00		
Manhattan Railway Company			
Consolidated Mortgage 4% Bonds			
Second Mortgage Bonds		90,460 00	
I. R. T. Equipment Trust Certificates			
Series "A"—Principal Payment			
Series "B"—Principal Payment			
Series "C"—Principal Payment	570,000 00		
City of New York			
Interest on City Bonds			
Rentals under Contract No. 1 and No. 2	521,398 33		
Ninth Avenue Franchise Tax	7,477 86		
Sinking Fund—City Bonds		575,000 00	
Quarterly Water Bills			
Real Estate and Franchise Taxes			
Man. Ry. Co.—last half 1927		825,000 00	
I. R. T. Co.—first half 1925			
Man. Ry. Co.—first half 1928			
Sinking Fund Payment			
I. R. T. Co. 5% Bonds			
Manhattan Dividend Rentals			
Modified Guarantee Stock			
7% Guarantee Stock			
Manhattan Railway Co.—Cash Rental			
Federal Taxes			
Man. Ry. Co. (Last Quarter 1926)			
Man. Ry. Co. (to June 30, 1927)			
Man. Ry. Co. (Additional 1924-1925)			
I. R. T. Co. (Last Quarter 1926)			
I. R. T. Co. (to June 30, 1927)			
I. R. T. Co. (Reserve 1924-25-26-27)			
Bond Interest Payments, including items collected at			

SCHEDULE "1".

terborough Rapid Transit Company

Covering Nine Month's Period Beginning October 1, 1927, and Ending June 30, 1928

December	January	February	March	April	May	June
$5,464,878 71	$1,130 77	$1,538,130 77	$2,553,130 77	$2,904,315 77	$4,067,115 77	$5,861,655 77
$5,640,000 00	$5,445,000 00	$5,165,000 00	$5,650,000 00	$5,485,000 00	$5,515,000 00	$5,250,000 00
50,000 00	50,000 00	50,000 00	50,000 00	50,000 00	50,000 00	50,000 00
425,000 00	450,000 00	425,000 00	425,000 00	425,000 00	425,000 00	425,000 00
33,750 00						
275,000 00						
$6,423,750 00	$5,945,000 00	$5,640,000 00	$6,125,000 00	$5,960,000 00	$5,990,000 00	$5,725,000 00
$11,888,628 71	$5,946,130 77	$7,178,130 77	$8,678,130 77	$8,864,315 77	$10,057,115 77	$11,586,655 77
$2,045,000 00	$2,210,000 00	$1,890,000 00	$2,050,000 00	$1,935,000 00	$2,365,000 00	$1,915,000 00
365,000 00	365,000 00	365,000 00	365,000 00	365,000 00	365,000 00	365,000 00
400,000 00	400,000 00	400,000 00	400,000 00	400,000 00	400,000 00	400,000 00
575,000 00	575,000 00	575,000 00	575,000 00	575,000 00	575,000 00	575,000 00
4,125,000 00						
						4,125,000 00
		1,170,000 00				
			280,000 00			
			8,400 00			
29,250 00						14,625 00
				34,200 00		
			813,660 00			
					90,460 00	
			280,000 00			
450,000 00						
	525,000 00			525,000 00		
	8,000 00			8,000 00		
30,000 00			30,000 00			30,000 00
				180,000 00		
					825,000 00	
950,000 00						950,000 00
695,612 50			695,612 50			695,612 50
76,142 50			76,142 50			76,142 50
			25,000 00			
102,056 91						
104,288 48						
	100,000 00					
22,376 82						
132,770 73						
1,560,000 00						

Man. Ry. Co. (Additional 1924 [illegible])								
I. R. T. Co. (Last Quarter 1926)			22,376 82					
I. R. T. Co. (to June 30, 1927)			132,770 73					
I. R. T. Co. (Reserve 1924-25-26-27)			1,500,000 00					
Bond Interest Payments, including items collected at the source								
State of New York								
Gross Earnings Taxes	415,105 43							
Manhattan Railway Company Capital Stock Tax	24,752 94							
New York Rapid Transit Corporation Monthly Adjustment	40,980 01	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00	
Advance to Construction Funds								
Acco int Contract No. 3	101,657 95	250,000 00	150,000 00	150,000 00	150,000 00	100,000 00	100,000 00	
Acco int Contract No. 3, New Signals		41,816 00	35,000 00	35,000 00	35,000 00	35,000 00	35,000 00	
Total Estimated Disbursements	$4,996,347 92	$5,322,276 00	$11,887,497 94	$4,408,000 00	$4,625,000 00	$5,773,815 00	$4,197,200 00	$4,7
Estimated Balance at Close of Each Month	$5,012,154 71	$5,464,878 71	$1,130 77	$1,538,130 77	$2,553,130 77	$2,904,315 77	$4,067,115 17	$5,8

Notes in Connection with Above Estimate of Cash Receipts and Disbursements

Passenger Revenue is estimated at 3% increase over corresponding months in 1926-1927, and includes entire revenue from joint operation of Queensborough Lines.
Payrolls are estimated at $480,000.00 per week, including week ending June 23, 1928, no provision being made for payrolls for week ended June 30, 1928 ($480,000), to be paid after July 1, 1928.
No provision is made for unliquidated accident liability.
No provision is made for any payment account of depreciation.
No provision is made for payment of I. R. T. Co. City Real Estate and Franchise Taxes in arrears amounting to approximately $1,000,000.00.

			22,376 82						
			132,770 73						
			1,560,000 00						
lected at									60,000 00
	415,105 43								
Tax	24,732 94								
Adjust-	40,980 01	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00	40,000 00
	101,657 95	250,000 00	150,000 00	150,000 00	150,000 00	100,000 00	100,000 00	100,000 00	100,000 00
		41,816 00	35,000 00	35,000 00	35,000 00	35,000 00	35,000 00	35,000 00	35,000 00
	$4,996,347 92	$5,322,276 00	$11,887,497 94	$4,408,000 00	$4,625,000 00	$5,773,815 00	$4,197,200 00	$4,795,460 00	$9,381,380 00
	$5,012,154 71	$5,484,878 71	$1,130 77	$1,538,130 77	$2,553,130 77	$2,904,315 77	$4,667,115 17	$5,861,655 77	$2,205,275 77

Notes in Connection with Above Estimate of Cash Receipts and Disbursements

over corresponding months in 1925-1927, and includes entire revenue from joint operation of Queensborough Lines.
, including week ending June 23, 1928, no provision being made for payrolls for week ended June 30, 1928 ($480,000), to be paid after July 1, 1928.
liability.
t of depreciation.
To City Real Estate and Franchise Taxes in arrears amounting to approximately $1,000,000.00.

[fol. 800]

Schedule "2"

Interborough Rapid Transit Co

Estimate of Cash Receipts and Disbursements Covering the Six Months'

	January	February
Estimated Balance at the Beginning of each Month	$2,673,000 00	$4,334,000 00
Estimated Receipts:		
Passenger Revenue	$5,529,000 00	$5,038,000 00
Reimbursements from Construction Funds	50,000 00	50,000 00
Miscellaneous Receipts from Advertising Privileges, Sale of Power, Scrap, Rentals, Interest on Deposits and Securities, etc.	450,000 00	425,000 00
Total Estimated Receipts	$6,029,000 00	$5,513,000 00
Total	$8,702,000 00	$9,847,000 00
Estimated Disbursements:		
Weekly Payrolls	$2,210,000 00	$1,890,000 00
Semi-monthly Payrolls	365,000 00	365,000 00
Coal	400,000 00	400,000 00
Miscellaneous Supplies and Operating Expenses	575,000 00	575,000 00
Interest:		
I. R. T. Co. 5% Bonds		
I. R. T. Co. 7% Notes		1,170,000 00
I. R. T. Co. 6% Notes		
I. R. T. Equipment Trust Certificates:		
Series "A"		
Series "B"		
Series "C"		
Manhattan Railway Company:		
Consolidated Mortgage 4% Bonds		
Second Mortgage Bonds		
I. R. T. Co. Equipment Trust Certificates—Series "A"—Principal Payment		
City of New York:		
Interest on City Bonds—Rentals under Contract Nos. 1 and 2	525,000 00	
Ninth Avenue Franchise Tax	8,000 00	
Quarterly Water Bills		
Real Estate and Franchise Taxes:		
I. R. T.—first half of 1925		
Manhattan Ry. Co.—first half of 1928		
Sinking Fund Payment—I. R. T. Co. 5% Bonds		
Manhattan Dividend Rental—7% Guarantee Stock		
Manhattan Railway Co.—Cash Rental		
Federal Taxes:		
Manhattan Ry. Co. (additional, 1924–1925)	100,000 00	
Bond Interest Payments, including items collected at the source		
Advance to Construction Funds:		
Account Contract No. 3	150,000 00	150,000 00
Account Contract No. 3—New Signals	35,000 00	35,000 00
Total Estimated Disbursements	$4,368,000 00	$4,585,000 00
Estimated balance at close of each month	$4,334,000 00	$5,262,000 00

Notes—Cash Balance at January 1, 1928, consists of $1,115,000 after allowing for total in
Company states is set aside for taxes.

Passengers Revenue is estimated on the basis of a 6% increase over amounts reported in cor

Disbursements exclude $1,390,000 dividend rental on Modified Guarantee Stock of Manhatt

Both Passenger Revenue and Disbursements are after adjustment on account of joint operat

All other items have been taken for this statement at the same amounts as shown in Compa

Schedule "2"

Interborough Rapid Tran

ash Receipts and Disbursements Covering the Six M

	January	February
of each Month	$2,673,000 00	$4,334,000
	$5,529,000 00	$5,038,000
Funds	50,000 00	50,000
ising Privileges, Sale		
st on Deposits and	450,000 00	425,000
	$6,029,000 00	$5,513,000
	$8,702,000 00	$9,847,000
	$2,210,000 00	$1,890,000
	365,000 00	365,000
	400,000 00	400,000
ng Expenses	575,000 00	575,000
		1,170,000
cates:		
nds		
ificates—Series "A"		
under Contract Nos.		
	525,000 00	
	8,000 00	
of 1928		
o. 5% Bonds		
Guarantee Stock		
ntal		
1924-1925)	100,000 00	
ng items collected at		
	150,000 00	150,000
gnals	35,000 00	35,000
	$4,368,000 00	$4,585,000
month	$4,334,000 00	$5,262,000

y 1, 1928, consists of $1,115,000 after allowing for t

on the basis of a 6% increase over amounts reported
0 dividend rental on Modified Guarantee Stock of M
ursements are after adjustment on account of joint
for this statement at the same amounts as shown in

Company

hs' Period, January 1, 1928, to June 30, 1928

	March	April	May	June
0	$5,262,000 00	$6,434,797 50	$8,318,597 50	$9,635,137 50
0	$5,736,000 00	$5,566,000 00	$5,597,000 00	$5,328,000 00
0	50,000 00	50,000 00	50,000 00	50,000 00
0	425,000 00	425,000 00	425,000 00	425,000 00
0	$6,211,000 00	$6,041,000 00	$6,072,000 00	$5,803,000 00
0	$11,473,000 00	$12,475,797 50	$14,389,597 50	$15,438,137 50
0	$2,050,000 00	$1,935,000 00	$2,365,000 00	$1,915,000 00
0	365,000 00	365,000 00	365,000 00	365,000 00
0	400,000 00	400,000 00	400,000 00	400,000 00
0	575,000 00	575,000 00	575,000 00	575,000 00
				4,125,000 00
0				
	280,000 00			
	8,400 00			
				14,625 00
		34,200 00		
	813,660 00			
			90,460 00	
	280,000 00			
		525,000 00		
		8,000 00		
	30,000 00			30,000 00
		180,000 00		
			825,000 00	
				950,000 00
	76,142 50			76,142 50
	25,000 00			
				60,000 00
0	100,000 00	100,000 00	100,000 00	100,000 00
0	35,000 00	35,000 00	35,000 00	35,000 00
0	$5,038,202 50	$4,157,200 00	$4,755,460 00	$8,645,767 50
0	$6,434,797 50	$8,318,597 50	$9,635,137 50	$6,792,370 00

l interest on 5% Bonds and $1,558,000 in cash and securities which the

corresponding months of previous year.

hattan Railway Co. for two quarters.

eration of Queensboro Lines with the N. Y. R. T.

mpany's Exhibit No. 58.

[fol. 801] STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

ISIDOR SPINRAD, being duly sworn, says:

I am connected with the Accounting Department of the Transit Commission as Chief of its Division of Statistics and Accounts and have been employed by the Commission and its predecessors for upwards of ten (10) years last past.

I am familiar with the financial reports filed by the plaintiff with the Commission.

The net income of the plaintiff, after including actual maintenance but before deduction for depreciation, for the fiscal years ended June 30, 1920, to 1927, inclusive, based [fol. 802] on its reports to the Commission, was as follows:

Fiscal year ended June 30	Subway Division	Manhattan Division	Total
1920	$3,568,421 50	D $5,268,501 96	D $1,700,080 46
1921	1,984,760 56	D 6,118,618 05	D 4,133,857 49
1922	2,741,371 66	D 5,302,038 99	D 2,560,667 33
1923	2,150,477 71	D 2,719,470 09	D 568,992 38
1924	3,359,259 73	D 3,718,285 54	D 359,025 81
1925	4,188,249 59	D 4,533,757 95	D 345,508 36
1926	6,569,573 03	D 4,125,878 35	2,443,694 68
1927	6,380,017 34	D 4,909,129 66	1,470,887 68

Isidor Spinrad.

Sworn to before me this 12th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375; also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 803] In the United States District Court

Schedule A to Affidavit of Samuel Untermyer

Interborough Rapid Transit Comany.

Petition to Transit Commission as to Increased Fares

James L. Quackenbush, Attorney for Interborough Rapid Transit Company, No. 165 Broadway, New York City.
William L. Ransom, of Counsel.

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[fol. 807] Interborough Rapid Transit Company, 165 Broadway

E. E. Starbard, Vice-President, Assistant to President

New York, February 1, 1928.

Department of Public Service, Metropolitan Division, Transit Commission, 270 Madison Avenue, New York, N. Y.

Dear Sirs: Interborough Rapid Transit Company, by E. E. Starbard, its Vice-President, hereby applies, under Section 29 of the Public Service Commission Law, for an order

granting permission to put in effect, upon not more than five days' notice after publication at stations and filing with the Commission, the following sheets:

I. R. T. Co. No. 2—Thirteenth Revised Sheet No. 1—Cancelling Twelfth Revised Sheet No. 1, effective January 21, 1928.

I. R. T. Co. No. 2—Original Sheet No. 2A.

I. R. T. Co. No. 2—Original Sheet No. 2B.

I. R. T. Co. No. 2—Second Revised Sheet No. 3A—Cancelling First Revised Sheet No. 3, effective September 15, 1925.

I. R. T. Co. No. 2—Second Revised Sheet No. 3A, Cancelling First Revised Sheet No. 3A, effective September 15, 1925.

[fol. 808] The proposed changes are intended to be published in schedule of Interborough Rapid Transit Company No. 2, Thirteenth Revised Sheet No. 1; Original Sheet No. 2A; Original Sheet No. 2B; Second Revised Sheet No. 3, and Second Revised Sheet No. 3A, and will revise and cancel Twelfth Revised Sheet No. 1 (effective January 21, 1928) and First Revised Sheet No. 3 and First Revised Sheet No. 3A (effective September 15, 1925).

Special Circumstances and Conditions upon Which Application is Based

This application is based upon the special circumstances and conditions hereinafter stated:

I. Interborough Rapid Transit Company (hereinafter designated as the "Interborough Company") is a domestic railroad corporation organized and existing under the Railroad Law and Chapter 4 of the Laws of 1891, as amended, having its principal office at No. 165 Broadway, Borough of Manhattan, City, County and State of New York. It operates and manages certain rapid transit railroads lying exclusively within the City of New York, parts of which are owned and leased to it by The City of New York, other parts of which are owned and leased to it by the Manhattan Railway Company (hereinafter designated as the "Manhattan Company", and still other parts of which are owned by the Interborough Company, all of which are parts of a

comprehensive system of elevated and subway rapid transit railroads. The aggregate length of such railroads operated by the Interborough Company is over 117 miles of route, and over 357 miles of single track.

New Rate Sheet Filed and New Rates Established by Interborough Rapid Transit Company Pursuant to Authority of Statute

II. The Interborough Company, pursuant to the right, authority and power conferred upon it, as it is advised by counsel and verily believes, by the provisions of the Public Service Commission Law and other law, to put into operation a new schedule of just and reasonable rates and [fol. 809] charges to be made by it for service, and to abrogate a rate theretofore established by it in its filed and published tariff schedule, has filed and published revised tariff sheets providing for a change of its fare from five cents per passenger to seven cents per passenger on its Manhattan Division (elevated lines) and from five cents per passenger to seven cents per passenger on its Subway Division, without prejudice to its right to adjust such fares upward or downward as conditions and costs of operation may require under actual experience with such rates.

Urgent Necessity for Increase in Fare and for Relief from Financial Stringency

III. It is urgently necessary that such increased fares go into effect forthwith for the following reasons, among others:

(1) The Interborough Company imperatively requires quick relief from its financial stringency, as appears more fully from the statements of receipts and expenditures and other pertinent facts, and for the purposes hereinafter set forth.

(2) The Interborough Company has been suffering for some years, and now is suffering daily, from continuing confiscation of property under the maximum rate of five cents per passenger, and, by such a fare limitation upon it, the property devoted by it to the service of the public is taken for public use without just compensation; it is

deprived of such property without due process of law, and it is deprived of the equal protection of the laws, all in contravention of the Constitution of the United States and the Constitution of the State of New York.

(3) The five-cent maximum fare charged by the Interborough Company on the rapid transit lines operated by it has been for a number of years, and is now, insufficient and inadequate to provide a fair return upon the property used by it and devoted to the public service, over and above all expenses of operation, including the cost of maintenance and taxes, and is unjust and unreasonable as well as confiscatory of the property used by the Company in the public service.

(4) The rate of return earned by it upon the property devoted by the Interborough Company to the public service, under the present fare, is not sufficient to support and maintain the credit of the Interborough Company and to [fol. 810] enable it to raise money necessary for the proper discharge of its public duties; as, for example, to sell at a reasonable discount its long term first mortgage bonds and secure thereby capital funds for the purpose of providing for new construction and equipment on the railroad lines operated by it.

(5) The Interborough Company requires additional revenue in order to meet reasonable and proper demands of its employees for improvement in wages and operating conditions; to provide and insure adequate and efficient service upon the lines operated by it; to increase the expenditures for maintenance, repair and replacement of construction and equipment; to meet the fixed charges upon additional investment required for construction and equipment; to meet the practical situation produced by various orders of the Transit Commission, made or announced as in prospect, which undertake to require and compel approximately $40,000,000 of additional capital expenditures by the Interborough Rapid Transit Company, with increased fixed charges thereon, and which would impose additional operating expenses, without assurance of increased volume of business and earnings, and which could not in fact be financed or carried out at the present time under the existing five cent fare; to make reservations for retirement

or depreciation of property; to make adequate and proper provision for unliquidated accident and damage liability incident to past operation, and to create out of current revenues an effective reserve to cover such liability currently; and to assure proper provision for surplus and contingencies as provided by the Public Service Commission Law and by the Contracts and Certificates of 1913.

The Utter Inadequacy and Confiscatory Effect of the Five-cent Fare on the Manhattan Division (Elevated Lines)

IV. Herein below is set forth a summary of the Interborough Company's estimate of the present value of the specified properties provided by the Interborough Company and devoted to the public service in the operation of Manhattan Division (elevated lines), the maximum amount of earnings from such operation actually available as a return thereon, and the deficiency in the actual earnings [fol. 811] below the reasonable and required return thereon.

The properties embraced in the summary consist, in the main, of the construction and equipment provided under the Elevated Railroad Extension and Improvement Certificates of 1913 and the property of the Manhattan Railway Company, exclusive of property necessarily removed in order to perform the work required under those Certificates; together with a pro rata proportion of the cost of materials and supplies, as shown by the Interborough Company's accounts and records, and of cash working capital (based on one month's operating expenses of the Manhattan Division). For the purpose of this computation, there has been deducted, without prejudice, from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for each of the other periods stated in the summary, without conceding the correctness or propriety of such a deduction.

The stated amounts of present value are exclusive of the cost of the records pertaining to the elevated lines; the increases in the value of land since 1921; the going value; the cost of portions of the elevated lines as they existed in March, 1913, which were replaced and superseded in the

making of the extensions and improvements thereon; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included, at original cost.

Manhattan Division

Computation Based on Company's Present-value Figures

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$212,193,515	$2,020,812	0.95	$16,975,481	$14,954,669
1922	191,566,893	3,012,439	1.57	15,325,351	12,312,912
1923	210,093,109	3,213,526	1.53	16,807,449	13,593,923
1924	212,189,743	3,586,458	1.69	16,975,179	13,388,721
1925	208,341,577	3,454,012	1.66	16,667,326	13,213,314
1926	208,514,309	3,936,397	1.89	16,681,145	12,744,748
1927	208,873,038	3,168,788	1.52	16,709,843	13,541,055

[fol. 812] The deficiency in earnings on the Manhattan Division (elevated lines), under the existing five-cent fare, below an 8% return upon such present value of the properties so used by the Interborough Company and devoted by it to the public service, for the years 1921 to 1927, inclusive, aggregates at least $93,749,342.

The following summary sets forth the corresponding computations upon the minimum present value of the elevated railroad properties, comprising the Manhattan Division, based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting the expenditures estimated by Commission engineers for reconditioning the property:

Manhattan Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	Minimum present value of	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$168,924,294	$2,020,812	1.20	$13,513,944	$11,493,132
1922	161,087,229	3,012,439	1.87	12,886,978	9,874,539
1923	175,048,910	3,213,526	1.84	14,003,913	10,790,387
1924	175,144,743	3,586,458	2.05	14,011,579	10,425,121
1925	175,199,577	3,454,012	1.97	14,035,966	10,561,954
1926	179,450,309	3,936,397	2.19	14,015,966	10,419,628
1927	179,777,038	3,168,788	1.76	14,382,163	11,213,375

Even upon the basis of such minimum present value of the elevated railroad properties, according to the estimates of reproduction cost thereof made by the Commission's engineers, the deficiency in earnings below an 8% return for the years 1921 to 1927, inclusive, aggregates at least $74,778,136.

If operating expenses were increased, as the result of wage increases, additional service and additional maintenance, to the extent hereinafter shown, and if additional fixed charges were incurred on account of additions and improvements ordered or threatened by the Transit Commission, as detailed in a subsequent table, the deficiency in earnings below an 8% return, indicated in the two foregoing computations, would be correspondingly greater.

[fol. 813] The Like Inadequacy and Confiscatory Effect of the Five-cent Fare on the Subway Division

V. Herein below is set forth a summary of the Interborough Company's estimate of the present value of the properties used and useful in the operation of the Subway Division of the Interborough Company and devoted to the public service, under Contracts Nos. 1, 2 and 3, including the property provided by the Interborough Company and by the City of New York, the maximum earnings from such operation available as a return thereon, and the deficiency in earnings below the reasonable and required rate of return thereon.

The properties covered by the estimate consist, in the main, of the construction and equipment provided under Contracts Nos. 1, 2 and 3, by the Interborough Company and by the City of New York, together with a pro rata proportion of the cost of materials and supplies as shown by the Interborough Company's books of account or records, and cash working capital based upon one month's operating expenses of the subway lines, the actual cost of the Belmont Tunnel in excess of the amount allowed as a part of the "Cost" under Contract No. 3, and such undistributed structural costs or overheads applicable to such properties as have virtually been conceded to be reasonable by the engineers of the Transit Commission. The estimate of the value of the property provided by the City of New York under Contracts Nos. 1, 2 and 3 is based prin-

cipally upon the estimate of reproduction cost thereof made by the engineers of the Transit Commission. For the purposes of the computation, there has been deducted from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for each of the other periods stated in the summary, without conceding the correctness or propriety of such a deduction.

The estimate of present value is exclusive of the cost of the records pertaining to the subway lines; the increases in the value of land since 1921; the going value; the value of franchises, and other intangible elements of value.

Subway Division

Computation Based on Company's Present-value Figures of Property Provided by it, and Commission Figures for City-provided property

	Present value company and city property at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$612,390,236	$13,807,622	2 25	$48,991,219	$35,183,597
1922	563,302,635	14,962,509	2 66	45,064,211	30,101,702
1923	651,394,242	14,432,382	2 22	52,111,539	37,679,157
1924	656,790,774	15,849,724	2 41	52,543,262	36,693,538
1925	659,775,428	16,950,434	2 57	52,782,034	35,831,600
1926	686,210,288	19,762,325	2 88	54,896,823	35,134,498
1927	689,920,610	19,453,973	2 82	55,193,649	35,739,676

The deficiency in earnings on the Subway Division, under the existing five-cent fare, below an 8% return upon such present value of the properties so used by the Interborough Company and devoted by it to the public service, for the years 1921 to 1927, inclusive, aggregates at least $246,363,768.

The following summary sets forth the corresponding computations of the minimum present value of the properties comprising the Interborough Subway Division based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property:

Subway Division

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	Minimum present value company and city property	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$586,659,314	$13,807,622	2.35	$46,932,745	$33,125,123
1922	552,369,593	14,962,509	2.71	44,189,567	29,227,058
1923	599,688,342	14,432,382	2.41	47,975,067	33,542,685
1924	604,713,774	15,849,724	2.62	48,377,102	32,527,378
1925	614,653,428	16,950,434	2.76	49,172,274	32,221,840
1926	648,111,288	19,762,325	3.05	51,848,903	32,086,578
1927	651,776,610	19,453,973	2.98	52,142,129	32,688,156

[fol. 815] Even upon the basis of such minimum present value of the subway properties, based upon the estimates of reproduction cost thereof made by the Commission's engineers, the deficiency in earnings below an 8% return, for the years 1921 to 1927, inclusive, aggregates at least $225,418,818.

If operating expenses were increased, as the result of wage increases, additional service and additional maintenance, to the extent hereinafter shown, and if additional fixed charges were incurred on account of additions and improvements ordered or threatened by the Transit Commission, as detailed in a subsequent table, the deficiency in earnings below an 8% return, indicated in the two foregoing computations, would be correspondingly greater.

Deficiency in Earnings upon Combined Rapid Transit System Properties—Subway and Elevated Divisions

VI. Although the elevated and subway rapid transit railroad lines operated by the Interborough Company have distinguishing characteristics of routes, construction, equipment, operating conditions and traffic, nevertheless they have been operated as, and constitute, a unified transportation system. They supplement each other in the facilities for transportation afforded to the public under the plan of comprehensive rapid transit improvements adopted by the Public Service Commission for the First District and approved by the City of New York, in 1913, under the so-called "Dual System of Rapid Transit." The dismemberment of this transportation system would result

in great inconvenience and loss to the public, by reason of separate operation as well as of the curtailment of essential and continuous service along routes using both elevated and subway lines or by transfer at interconnecting stations of the two divisions.

Through elevated railroad service is operated as follows: (1) on the Sixth and Ninth Avenue lines over the Jerome Avenue extension to the subway lines north of 167th Street to Fordham Road and Woodlawn; (2) on the Second Avenue line over the West Farms extension of the subway lines to Freeman Street; (3) on the Third Avenue line over the White Plains Road extension subway lines north [fol. 816] of Gun Hill Road to the terminal at East 241st Street; and (4) on the Second Avenue line from South Ferry via Queensboro Bridge and the Astoria branch of the Queensboro subway to Ditmars Boulevard, Astoria, and from South Ferry via Queensboro Bridge and the Flushing branch of the Queensboro subway to Willetts Point Boulevard, near Flushing, which connect the subway extensions with the elevated lines of the Manhattan Railway Company. At certain stations where the elevated railroad division and the subway division interconnect, passengers are permitted to transfer between the two divisions.

Such through service is provided in accordance with the intent of the City, as is shown, among other provisions, by Article IX of the Certificate of March 19, 1913, granted to the Interborough Company for Elevated Extensions, as follows:

"The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith, between the City and Interborough Rapid Transit Company, and over any extensions of such parts, and the Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads, *to the end that through service may be provided over such parts, over the Railroads and over the Manhattan Railroad.*" (Italics supplied.)

With the approval of the Public Service Commission for the First District and its successors, and as specifically provided and contemplated by Contract No. 3 (Art. XXXVIII), the plants for the generation, conversion and distribution of electrical energy originally designed and laid out for the operation of the subway and elevated lines separately, have been so joined and intermingled, to secure maximum efficiency and economy, that today the subway lines could not be operated without utilizing electrical power generated in the power house belonging to the Manhattan Company, and, on the other hand, the elevated lines could not be operated independently of the power plant provided for subway operation.

[fol. 817] Herein below are set forth the present value of the rapid transit railroad properties—both subway and elevated lines—the maximum amount of earnings available as a return thereon, the per cent. or rate of return actually earned, and the deficiency in earnings below the reasonable and required rate of return of 8% upon such present value.

The amount of such present value, as to Company property, is based upon estimates of reproduction cost made by engineers for the Interborough Company, and embraces the property provided by the Interborough Company under Contracts Nos. 1, 2 and 3, and the Elevated Extension and Improvement Certificates of 1913, and the original Manhattan Railway property (exclusive of property necessarily removed in order to perform the work required under said certificates), and, as to the property provided by the City of New York under Contracts Nos. 1, 2 and 3, is based principally upon estimates made by engineers of the Transit Commission; together with the cost of materials and supplies as shown by the Company records, cash working capital based upon one month's operating expenses, actual cost of Belmont Tunnel in excess of the amount allowed as a part of the cost of Contract No. 3, and certain items of undistributed structural costs or overheads aggregating $6,173,000, as set forth on Sheet No. 2 of Exhibit 40 of the 1927 transit investigation, the propriety of allowing which items is not disputed by the Transit Commission's engineers. For the purpose of the computation, there has been deducted from the reproduc-

tion cost the expenditures estimated by the Commission's engineers as of June 30, 1926, to be necessary to recondition the property, and this same figure has been deducted for each of the other years upon the assumption (without conceding its correctness) that such estimate would be fairly uniform throughout the period from 1921 to 1927, inclusive. The stated amounts of present value are exclusive of the cost of the Interborough Company's records; the increases in the value of land since 1921; the going value; the accumulated deficits in the preferential; the cost of portions of rapid transit properties as they existed in March, 1913, which were replaced and superseded in the reconstruction of the Manhattan Railroad; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included at original cost.

[fol. 818] The summary of the present value of rapid transit properties above described, the amount of the actual earnings available as return, the per cent. of return actually earned, and the deficiency in earnings below a fair return on such present value, is as follows:

Interborough System

Computation Based on Company's Present-value Figures of Property Provided by the Companies, and on Commission Figures for City-provided Property

	Present-value company and city property at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below an 8% return at least
1921	$824,583,751	$15,828,434	1.92	$65,966,700	$50,138,266
1922	754,869,528	17,974,948	2.38	60,389,562	42,414,614
1923	861,487,351	17,645,908	2.05	68,918,988	51,273,080
1924	868,980,517	19,436,182	2.24	69,518,441	50,082,259
1925	868,117,005	20,404,446	2.35	69,449,360	49,044,914
1926	984,724,597	23,698,721	2.65	71,577,968	47,879,247
1927	989,793,648	22,622,761	2.52	71,903,492	49,280,731

The deficiency in earnings below an 8% return upon such present value of the rapid transit railroad properties for the years 1921 to 1927, inclusive, aggregates at least $340,113,111.

It should be noted that the above amounts, computed as available for return on property, in the respective years, were determined without making any allowance for reserves for depreciation and for unliquidated accident and damage claims and other contingencies.

The following summary sets forth the corresponding computations of the minimum present value of the rapid transit railroad properties, including the subway properties and the elevated properties, based principally upon estimates of the reproduction cost made by engineers of the Transit Commission, together with working capital, and after deducting expenditures estimated by Commission engineers for reconditioning the property.

[fol. 819] Interborough System

Computation Based on Transit Commission's Engineers' Reproduction Cost Figures

	Minumum present value of company and city property as above	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$755,583,608	$15,828,434	2.09	$60,446,689	$44,618,255
1922	713,456,822	17,974,948	2.52	57,076,546	39,101,598
1923	774,737,252	17,645,908	2.28	61,978,980	44,333,072
1924	779,858,517	19,436,182	2.49	62,388,681	42,952,499
1925	789,853,005	20,404,446	2.58	63,188,240	42,783,794
1926	827,561,597	23,098,731	2.86	66,204,928	42,506,207
1927	851,553,648	22,622,761	2.72	66,524,292	43,901,531

Even upon the basis of such minimum present value of the rapid transit railroad properties, according to the estimates of reproduction thereof made by the Commission's engineers, the deficiency in earnings below an 8% return, for the years 1921 to 1927, inclusive, aggregates at least $300,196,956.

For the purpose of illustrating the wide margin by which the five-cent fare is inadequate to allow a fair return upon even the actual investment in the rapid transit railroad properties used by the Interborough Company in the service of the public, and without waiving any right to earn a fair return upon the present value of such properties, there is set forth herein below a computation of the original cost of the above specified rapid transit railroad properties, on the subway lines and the elevated lines (for the Company-provided property), as shown by the books of account of the Interborough Company and/or the Manhattan Company; and for the City-provided property as determined by the engineers of the Transit Commission), together with materials and supplies and cash working capital as above stated; the per cent. of return actually earned thereon, and the deficiency in earnings below the required rate of return of 8%:

(fol. 820) Interborough System

Computation Based on Companies' Investment and Transit Commission's Engineer's Original Cost Figures for City Property

	Investment	Earnings available as a return	Per cent of return actually earned on such investment	Earnings required for 8% return on such investment at least	Deficiency in earnings below 8% return at least
1921	$473,295,413	$15,828,434	3.34	$37,863,633	$22,035,199
1922	478,445,039	17,974,948	3.76	38,275,603	20,300,655
1923	485,113,378	17,645,908	3.64	38,809,070	21,163,162
1924	499,480,479	19,436,182	3.89	39,958,438	20,522,256
1925	510,681,474	20,404,446	4.00	40,854,518	20,450,072
1926	519,422,209	23,698,721	4.56	41,553,776	17,855,055
1927	523,409,419	22,622,761	4.32	41,872,754	19,249,993

Interborough System

Computation Based on Transit Commission's Engineers' Original Cost Figures

	Original cost of company and city property as above	Earnings available as a return	Per cent of return actually earned on such cost	Earnings required for 8% return on such cost at least	Deficiency in earnings below 8% return at least
1921	$429,017,190	$15,828,434	3.69	$34,321,375	$18,492,941
1922	435,664,506	17,974,948	4.13	34,853,168	16,878,220
1923	443,129,675	17,645,908	3.98	35,450,374	17,804,466
1924	458,326,750	19,436,182	4.24	36,666,140	17,229,958
1925	469,637,773	20,404,446	4.34	37,571,022	17,166,576
1926	476,437,748	23,698,721	4.97	38,115,020	14,416,299
1927	480,424,959	22,622,761	4.71	38,433,997	15,811,236

Upon the basis of such investment the deficiency in earnings below an 8% return for the years 1921 to 1927, inclusive, aggregates at least $141,576,392.

Again, it should be noted that the above amounts, computed as available for return on the investment, in the respective years, were determined without making any allowance for reserves for depreciation and for unliquidated accident and damage claims and other contingencies.

Reducing the above computation of the investment to the incontestable basis furnished in the calculations of "original cost" based principally upon estimates made by engineers of the Transit Commission, the resultant amounts, corresponding to the amounts set forth in the preceding summary of deficiency in earnings, are as follows:

(fol. 821) The deficiency in earnings below an 8% return upon such original cost, even as calculated by the Commission's engineers, for the years 1921 to 1927, inclusive, aggregates at least $117,799,696.

Additional fixed charges on account of improvements and additions ordered or threatened by the Transit Commission, additional cost of service, maintenance and additional wages, as more fully elsewhere herein set forth, will produce a deficiency in earnings below an 8% return correspondingly greater than that shown in each of the three foregoing computations.

Upon no possible hypothesis as to the value of the property used by the Interborough Company on the rapid transit railroads have the earnings under the five-cent fare been adequate to meet the operating costs and to provide a return for fixed charges and compensation for the use of the property; and such inadequacy continues now, and will continue to a substantially greater degree the additional operating costs and fixed charges were incurred.

Manhattan Railway Company's Organization under the Rapid Transit Act of 1875, and Its Succession to Other Elevated Railroads

VII. The Manhattan Railway Company (hereinafter referred to as the "Manhattan Company") was incorporated on or about December 29, 1875, pursuant to the provisions of the Rapid Transit Act, Chapter 606 of the Laws of 1875, with authority to construct, maintain and operate certain elevated railroads along routes laid out and designated by the Rapid Transit Commission duly acting under the authority of that Act.

Pursuant to agreement on or about August 1, 1884, the New York Elevated Railroad Company (successor by conveyance to the West Side Elevated [Patented] Railway Company [of New York City], formerly the West Side & Yonkers Patented Railway Company), and the Metropolitan Elevated Railway Company (formerly The Gilbert Elevated Railway Company) became merged with the Manhattan Railway Company, and on or about April 1, 1891, the Suburban Rapid Transit Company (successor to the New York, Fordham and Bronx Railway Company) became merged with the Manhattan Railway Company; and, by virtue of such mergers and the several acts and agreements in [fol. 822] connection therewith, the Manhattan Railway Company became vested with all rights, franchises, consents, privileges and property of those companies, including

the ownership and operation of certain elevated railroads in the Boroughs of Manhattan and The Bronx, New York City, constructed by the companies so merged, or by the latter, including the various railroad lines on the Manhattan Division described in the Tariff Schedule of the Interborough Company above mentioned.

Lease of Elevated Railroads by Manhattan Railway Company to Interborough Rapid Transit Company

VIII. On or about January 1, 1903, the Manhattan Railway Company duly executed a lease of all its rights franchises, consents and property in the elevated railroads to the Interborough Company, which became effective April 1, 1903, and runs for a period of 999 years from November 1, 1875; and, by virtue of the aforesaid acts, agreements and leases, the Interborough Company, as lessee, entered into the possession of and has since been engaged in the operation and management of the elevated railroads in the Boroughs of Manhattan and The Bronx, New York City.

Rental Payable under Manhattan Railway Lease

IX. By the terms of such lease, the lessee (Interborough Company) paid to the lessor (Manhattan Company), as rental, prior to the 1922 Readjustment, the following:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Company	$1,627,320 00
Interest upon Second Mortgage Bonds of the Manhattan Company	180,920 00
Cash Rental	35,000 00
7% Guaranteed Dividend Rental on $60,000,000 of Manhattan Railway Company Stock	4,200,000 00
Total	$6,043,240 00

[fol. 823] Incidental to the Interborough-Manhattan Readjustment Plan of 1922, agreements were made: (a) With the Manhattan Company, increasing the amount paid annually as cash rental to $50,000; and (b) with the holders of over 90% of the outstanding capital stock of the Manhattan Company, whereby, as to such stock, the guaranteed divi-

dend rental rate of 7% per annum was reduced to 3% for the year ending June 30, 1923, 4% for the year ending June 30, 1924, and 5% thereafter, with the further provision that payment at such reduced rates should be made, cumulatively, only if and when earned either by the Interborough system as a whole, or by the Manhattan leased lines, in accordance with a formula contained in such agreements. For the year ending June 30, 1927, the revised rental so payable was as follows:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Company	$1,627,320 00
Interest upon Second Mortgage Bonds of the Manhattan Company	180,920 00
Cash rental	50,000 00
7% dividend rental on certain stock of the Manhattan Company not participating in the plan	303,898 00
5% dividend rental on the remainder of Manhattan Company stock participating in the plan	2,782,858 00
Total	$4,944,996 00

The Plan of Readjustment was adopted with the full concurrence and approval of the Transit Commission.

Fare Provisions in Excess of Five Cents Applicable to Elevated Railroads, Contained in Franchises or in Regulatory Statutes

X. The history of the fare provisions pertaining to the elevated railroads may first be outlined as follows:

By Chapter 489 of the Laws of 1867, authorizing the West Side & Yonkers Patented Railway Company (later changed to West Side [Patented] Railway Company [of New York City], and subsequently succeeded by New York Elevated Railroad Company) to proceed with the construction of an [fol. 824] elevated railroad in the Counties of New York and Westchester, it was authorized and provided, in Section 8 thereof, that—

"The said company shall be authorized to demand and receive from each passenger within the limits of the City of New York the rates of fare not exceeding, for any distance less than two miles, five cents; for every mile or fractional part of a mile in addition thereto, one cent. Provided that when said railway is completed and in operation between Battery Place and the vicinity of the Harlem River the said company may, at its option, adopt a uniform rate not exceeding ten cents for all distances upon Manhattan Island; and may also collect said last-named rate for a period of five years from and after the passage of this act."

By Chapter 885 of the Laws of 1872, incorporating The Gilbert Elevated Railroad Company (later changed to the Metropolitan Elevated Railway Company) for the purpose of constructing an elevated railway through the streets of the City of New York to be designated by the Board of Rapid Transit Commissioners, The Gilbert Elevated Railway Company was authorized to collect and receive not exceeding ten cents for any distance less than four miles and for additional distances two cents per mile or any fraction or part of a mile, but between the hours of 5 and 8 A. M. and 5 and 8 P. M. said cars and trains shall be run in which the fare shall not exceed one-half of the above-named rate.

The articles of incorporation of the Manhattan Railway Company, December 29, 1875, pursuant to the Rapid Transit Act (Chapter 606 of the Laws of 1875), authorize and provide for a rate of fare for any distance under five miles not to exceed ten cents, and not to exceed two cents per mile for each mile or fraction of a mile in excess of a mile over five miles, until the fare shall amount to, but not to exceed, fifteen cents for a through passage from and between the Battery, or any point to the north thereof, and the intersection of the Third Avenue and Harlem River, and from and between the Battery, or any point to the north thereof, and the High Bridge (running upon whether the easterly or the westerly side of the City), not to exceed seventeen cents for a through passenger. For the entire distance, or any [fol. 325] part of it, from and between the Battery and either East or West 59th Street, it was provided that the fare shall not exceed ten cents; but in what are designated

as "commission" cars or trains to be run during certain hours "for the accommodation of the public and of the laboring classes, the rate of fare shall not exceed five cents from and between the Battery or any point to the north thereof, and either East or West 59th Street, and shall not exceed five cents for any distance not exceeding five miles, and shall not exceed seven cents for a through passenger from and between the Battery or any point to the north thereof and the Harlem River, and shall not exceed eight cents for a through passenger on any of said 'commission' trains or cars from and between the Battery, or any point to the north thereof, and the High Bridge."

The articles of association of the New York, Fordham & Bronx Railway Company, prescribed October 10, 1881, by the Board of Commissioners pursuant to the Rapid Transit Act of 1875, authorize and provide for a maximum rate of fare of ten cents per passenger for conveyance over all or any portion of the route of the Company, except during "commission" hours, for which the rate was fixed at five cents per passenger.

The articles of association for the Suburban Rapid Transit Company, prescribed May, 1880, by the Commissioners under the Rapid Transit Act of 1875, authorized and fixed a maximum rate of fare for any distance between 129th Street and the Bronx River of ten cents per passenger, except during "commission" hours, for which the rate was fixed at six cents.

Section 229 of the Railroad Law (Laws of 1910, Chap. 481; formerly Rapid Transit Act of 1875, Laws of 1875, Chap. 606, provides, in part, as follows:

"§ 229. Powers.—Subject to the provisions of the public service commissions law, every such corporation shall have power, in addition to the powers conferred by the general and stock corporation laws and by subdivisions two, five and seven of section eight of this chapter:

1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compensation therefor."

[fol. 826] By Chapter 743 of the Laws of 1894, entitled "An Act to facilitate travel upon elevated railroads in the City of New York," it was enacted:

"Section 1. Any passenger upon the Manhattan elevated railway who has paid the fare required for passage from any point on said railway east of Broadway, between the Battery and One hundred and Twenty-ninth Street, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, on the suburban rapid transit railway or on any railway owned or operated by the Manhattan railway company, within the city of New York, in connection with said Manhattan elevated railway from One Hundred and Twenty-ninth Street, or other termini of the lines of said Manhattan elevated railway south of the Harlem river, to any station on the route of said suburban rapid transit railroad, or such other elevated railroad as may be operated by the Manhattan railway company north of the Harlem river, without the payment of additional fare; and any passenger on the suburban rapid transit railroad, or any elevated railway owned or operated by the Manhattan railway company in connection with the Manhattan elevated railroad, within the city of New York, running southward to One Hundred and Twenty-ninth street, or other termini of the Manhattan railroad, who has paid the fare required on said suburban rapid transit railroad to One Hundred and Twenty-ninth Street in the city of New York, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, over the Manhattan elevated railway to any station on its route east of Broadway, between One Hundred and Twenty-ninth street and the Battery, without the payment of additional fare."

[fol. 827] The City of New York, as Owner and Lessor of Rapid Transit Railroads, Acts in a Proprietary Capacity, and Such Railroads Are Subject to All the Regulatory Incidences of an Ordinary Railroad

XI. The City of New York built, acquired and owns certain rapid transit railroads and certain equipment used thereon, in the City of New York, and has leased the same for operation by the Interborough Company, or the latter's assignors, at a specified rental, and for a specified term, and containing various terms, under or in connection with certain written agreements known, respectively, as Contract No. 1, Contract No. 2, and Contract No. 3.

The Interborough Company has been advised by counsel, and verily believes, that it has been judicially determined by the highest Court, as well as by other Courts, of the State of New York, that, so far as the construction, operation and leasing of those rapid transit railroads are concerned, the City of New York is a railroad corporation; that they were built by and belong to the City of New York in a proprietary capacity, and not in a governmental capacity; that the City of New York is authorized to lease its railroad, either for a specified sum of money or a specified proportion of income, earnings or profits, or it may operate the road itself and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers, subject to the requirement contained in Section 30 of the Rapid Transit Act of 1891, that in the event of such operation the rates of fare so fixed "shall be adjusted, fixed and readjusted always with a view to securing as nearly as may be sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation;" that such rapid transit railroads are a business enterprise the same as if they were owned by an ordinary railroad corporation, and that, as such, the operation of the railroads and the charges thereon are subject to the exercise of the regulatory powers of the State to the extent and in the manner provided by law.

[fol. 828] The Interborough Company has further been advised by counsel, and verily believes, that it has also been judicially determined by such courts that the subject of rapid transit for the City of New York has, for many years, been a matter of public interest, affecting not only the people of that city, but of the whole State; that rapid transit has been, and is, generally regarded as a State affair; that all of the legislation bearing on the subject has for many years recognized that a duty rested upon the Legislature to provide for rapid transit, such duty to be

performed by itself or by an agent designated for the purpose, and that it was a function which the State, in its sovereign capacity, had a right to exercise irrespective of the City authorities, since it concerned the whole State just as much as the maintenance of highways or the management of other public utilities.

Construction and Lease of Manhattan-Bronx and Brooklyn-Manhattan Rapid Transit Railroads by City of New York to Interborough Rapid Transit Company (or Its Assignors)

XII. On or about February 21, 1900, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners for The City of New York, entered into a contract, known as Contract No. 1, with John B. McDonald for the construction by him, at the expense of the City, and for the lease to him for operation for a term of years, of a certain railroad known as the Manhattan-Bronx Rapid Transit Railroad, along a route from a point near the Federal Post Office, facing the City Hall Park, in the Borough of Manhattan, and extending under Lafayette Street, Fourth Avenue, 42nd Street and Broadway, to and into the Borough of The Bronx, with an agreement on his part to equip, maintain and operate the same during said term. The equipment so supplied is the property of the contractor, subject to the City's right to purchase at the end of the term. The contract has from time to time been modified and supplemented.

On or about July 21, 1902, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners for the City of New York, and with the consent and approval of the Board of Estimate and Apportionment of the City of New York, entered into a contract, known as [fol. 829] Contract No. 2, with the Rapid Transit Subway Construction Company for the construction by it, at the expense of the City, and for the lease to it for a term of years, of a certain railroad known as Brooklyn-Manhattan Rapid Transit Railroad, connecting at the southerly end of the said Manhattan-Bronx Rapid Transit Railroad, so as to form a continuous railroad, over a route running southerly from the Post Office in the Borough of Manhattan, under the East River, and then to the Flatbush Avenue

Station of the Long Island Railroad, in Brooklyn, with an agreement on its part to equip, maintain and operate the same during said term. The equipment so supplied is the property of the contractor, subject to the City's right to purchase at the end of the term. The contract has from time to time been modified and supplemented.

On or about July 10, 1902, and August 10, 1905, John B. McDonald and the Rapid Transit Subway Construction Company, respectively, assigend, with the written consent of the Board of Rapid Transit Railroad Commissioners, to the Interborough Company, so much of Contract No. 1 and Contract No. 2 as applied to the lease of the railroads. On or about July 11, 1911, so much of Contract No. 1 as applied to construction was duly assigned to Rapid Transit Subway Construction Company. On or about January 30, 1913, so much of Contract No. 1 and so much of Contract No. 2 as applied to construction were respectively duly assigned to the Interborough Company.

Rental Payable to City of New York under Leases of Contracts Nos. 1 and 2

XIII. Contract No. 1 contained an agreement for the lease by the City to the contractor of the railroad for a term of fifty years, at a rental to be paid by the contractor to the City, consisting, in general, of (1) an annual sum equal to the annual interest payable by the City upon all bonds which shall be issued by it in order to provide means for construction; and (2) a further annual sum equal to one per cent. upon the whole amount of the said bonds, with certain abatements during the first ten years.

Contract No. 2 contained an agreement for the lease by the City to the contractor of the railroad, at a rental to be paid by the contractor to the City, consisting, in general, of (1) an annual sum equal to the annual interest [fol. 830] payable by the City upon all bonds issued by it in order to provide means for construction; (2) a further annual sum which shall be equal to one per cent. upon the whole amount of the said bonds, with certain abatements during the first ten years; and (3) a further annual sum equal to the amount of the annual interest payable by the City upon bonds issued to provide means to pay for the acquisition of rights of way.

Construction, Equipment and Lease of Rapid Transit Railroad Extensions—Contract No. 3

XIV. On March 13, 1913, the City of New York, acting by the Public Service Commission for the First District, entered into a contract with the Interborough Company (therein referred to as "the Lessee") for the construction by the City, and the equipment, maintenance and operation by the Lessee, of certain additional rapid transit railroads, along routes known, respectively, as Seventh Avenue-Lexington Avenue Line, Eastern Parkway Line, Steinway Tunnel Line, and White Plains Road Line.

Contract No. 3 provided, among other things, for the construction by the City of the railroad under separate construction contracts, a contribution by the Lessee toward the cost of construction thereof, the equipment of the Railroad by the Lessee, at its own expense, and the lease by the City of the Railroad and the Equipment to the Lessee, for operation in conjunction with the Existing Railroads and Existing Equipment (under Contract No. 1 and Contract No. 2) for a single fare, and for a term beginning January 1, 1917, and expiring December 31, 1965 (subsequently extended to December 31, 1967), subject, however, to earlier termination as therein provided. The original terms of the leases under Contract No. 1 and Contract No. 2 were modified and synchronized with the expiration of the lease of the Railroad under Contract No. 3.

[fol. 831] Rental Payable to City of New York under Lease of Contract No. 3

XV. Contract No. 3 provided that the Lessee should also pay, so long as the Existing Railroads were operated in conjunction with the Railroad under the lease, as additional rental under Contract No. 1 and Contract No. 2, an amount equal to one-eighth of one per cent. upon all bonds issued by the City since January 1, 1910, or thereafter issued up to the date of the beginning of the lease for the purposes of construction under Contract No. 1 and Contract No. 2.

As and for "Rental" to be paid under the lease, the contract provided:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid and in further consideration of the covenants and agreements by the Lessee to modify the term or terms of Contract No. 1 and Contract No. 2, upon the commencement of operation of the portions of the Railroad specified in Article XLVII, the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads,"

the amount of which should be determined as follows:

From the revenue, the Lessee should deduct in the order named: Rentals under Contracts Nos. 1 and 2, for the full modified terms of the leases; Other rentals payable by the Lessee; Taxes; Operating expenses, exclusive of maintenance; Maintenance, to an amount equal to twelve per cent. of the revenue, exclusive of depreciation; Depreciation fund charges; Existing average income from the operation oft he Existing Railroads of $6,335,000 per an- [fol. 852] num; six per cent. per annum on the Lessee's contribution toward the cost of construction of the Railroad and the cost of equipment of the Railroad, to cover, also, the amortization within the term of the lease of such contribution and such cost; the annual interest payable by the Lessee for Additional Equipment, together with one per cent. per annum of the cost for amortization; the annual interest payable by the Lessee upon the Lessee's share of the cost of construction of Additions, together with one per cent. per annum for amortization; 8.76 per cent. per annum on the portion of the City's cost of construction of the Railroad, exclusive of Additions; the annual interest actually payable upon the City's share of the cost of construction of Additions, together with one per cent. of such share of amortization; one per cent. of the

revenue into a contingent reserve fund; fifty per cent. of the remainder each to the City and the Lessee.

Certificate for Elevated Additional Tracks and Extensions

XVI. Contemporaneously with the execution of Contract No. 3, on March 19, 1913, the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment of the City of New York, duly granted to the Manhattan Railway Company and to the Interborough Company, respectively, the right to construct certain additional tracks, facilities and extensions to the elevated railroads, the same to be constructed, maintained and operated by and at the expense of the respective grantees. The rights under the certificate to the Manhattan Company were formally added to the property leased to the Interborough Company.

Compensation Payable to City for Elevated Railroad Additional Tracks and Extensions

XVII. The Certificate for Additional Tracks, so granted to the Manhattan Company, provided that, as compensation, there should be payable by the Manhattan Company to the City, annually, from the gross receipts of each station served by express trains upon each line of the railroads, a sum equal to two per cent. of the excess of such gross receipts over the gross receipts of the same station [fol. 833] for the year ending June 30, 1911, and that such compensation should be readjusted at the end of twenty-five years and thereafter at intervals of twenty years.

The Certificate for Elevated Railroad Extensions, so granted to the Interborough Company, provided that, as compensation, there should be payable by the Interborough Company to the City, out of the pooled net profits upon all elevated lines operated by the Interborough Company, in excess of the average annual net profits of the existing Manhattan Railroad for the two years ending June 30, 1910, and June 30, 1911, one half of the amount remaining of the excess of net profits after deducting therefrom the rental for additional tracks, taxes, rentals payable to the Manhattan Company, operating expenses, maintenance, depreciation, average of net profits of Manhattan Railroad, interest and amortization of bonds for Railroads or addi-

tional tracks, interest on bonds for power houses, etc., and interest and amortization of cost of additions.

Upon the expiration of the full term of either authorization, the plant and property constructed pursuant to the certificate, except Additions, should become the property of the City without other or further compensation.

Separate and Unconditional Consent Given by City of New York under Section 18, Article III, of State Constitution

XVIII. Separate from the Contracts Nos. 1, 2 and 3 and the certificates for elevated railroad extensions and third tracking, the City of New York unconditionally granted its consent, under Section 18, Article III of the Constitution of the State of New York, to the construction and operation of the railroads therein described.

Further Statutory Provisions as to Rate of Fare

XIX. In March, 1913, and before and since, it was provided by Section 26 of the Public Service Commission Law, that

"All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to [fol. 834] be rendered in connection therewith, as defined in section two of this chapter, *shall be just and reasonable* and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter." (Italics supplied.)

By Section 28 of the Public Service Commission Law, every common carrier was, and is, authorized and required to file with the Commission having jurisdiction, and to print and keep open to inspection, schedules showing the rates, fares and charges for the transportation of passengers and property within the State, and the rules and regulations applicable thereto.

By Section 29 of the Public Service Commission Law, it was, and is, provided that, unless the Commission otherwise orders, no change shall be made in any rate, fare or charge, which shall have been filed and published by a

common carrier in compliance with the requirements of the chapter, except after thirty days' notice to the Commission and publication for thirty days, and that the Commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication.

Section 49, subdivision 1 of the Public Service Commission Law, provided, and provides, for the fixing of rates by the Commission, after a hearing and determination that the rates are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable.

The Rapid Transit Act contained the following provision relative to municipal railroads (originally numbered Section 63 and since renumbered Section 58):

"Any railroad or railroads, so constructed by and at the city's expense shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city or by the public service commis-[fol. 835] sion" (former Sec. 63, as added by Laws of 1894, Chap. 752; Sec. 9, and amended by Laws of 1895, Chap. 519; Sec. 30, and Laws of 1909, Chap. 498, Sec. 19, and renumbered by Laws of 1915, Chap. 604).

The Rapid Transit Act contained the following provision relative to contracts for equipment, maintenance and operation of municipal railroads:

"§ 27. Contract for Equipment, Maintenance and Operation of Road.—* * *

3. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval; provided, that in case different parts of a road shall be

constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the public service commission may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the commission may be enabled to make a single operating contract or lease of the entire road" (former Sec. 34-a, as added by Laws of 1906, Chap. 472; Sec. 6, and amended by Laws of 1909, Chap. 498; Sec. 10, Laws of 1910, Chap. 504, and Laws of 1912, Chap. 226, Secs. 6-14).

The Rapid Transit Act, in its provisions relating to extensions, etc., of non-municipal railroads, contains no authorization or requirement for the fixing of a rate of fare applicable to extensions or additional tracking of railroads not municipally owned and operated.

[fol. 836] Section 57 of the Railroad Law (Laws of 1910, Chap. 481; formerly Railroad Law of 1890, Sec. 37, as amended by Laws of 1892, Chap. 676) provided:

"§ 57. Rates of Fare.—Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile: * * *

5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents."

Provisions in Leases and Certificates as to Rate of Fare

XX. Contract No. 1 of February 21, 1900, between the City of New York and John B. McDonald, provides in "Chapter III.—The Lease," as follows:

The Contractor shall during the term of the lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon

each train, and may collect from each passenger in such car a reasonable charge for such additional convenience furnished him, provided that the amount to be charged therefor and the character of such additional convenience shall from time to time be subject to the approval of the Board."

Contract No. 2 of July 21, 1902, between the City of New York and the Rapid Transit Subway Construction Company, provides, in "Chapter III.—The Lease," as follows:

"The Contractor shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the [fol. 837] sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional conveniences furnished him, provided that the amount to be charged therefor and the character of such additional conveniences shall from time to time be subject to the approval of the Board."

The foregoing provisions of Contract No. 1 and Contract No. 2 fixing a five-cent rate of fare were wholly superseded by the provisions of Contract No. 3 fixing the rate of fare to be charged in the operation of new and existing railroads as one complete system, as hereinafter set forth.

Contract No. 3 of March 19, 1913, between the City of New York and the Interborough Rapid Transit Company, contains the following provisions, in "Part Third.—The Lease":

Chapter IV, under the title "Additions" (Article LXX), provides, in part, as follows:

"The principal object of the City in making this contract is to secure for the public convenience an adequate, comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the Existing Railroads. By the foregoing provisions of the Lease, the Lessee has covenanted, among other things, to operate the Railroad and the Existing Railroads carefully and skilfully, according to the highest standards of railway operation; to supply adequate Equipment; to run trains so as to furnish adequate service; to

use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. These covenants on the part of the Lessee are among the principal moving considerations to the City in making this contract, and any breach thereof will entitle the City to the remedies provided in this contract."

[fol. 838] Chapter III, under the title "Character of Service, Rate of Fare, etc." (Article LIX), provides as follows:

"The Lessee shall operate the Railroad and the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) or (1) any part or parts of the Railroad, and (2) any part or parts of the Existing Railroads and (3) between any part or parts of the Railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare."

Chapter II, under the title "Rental" (Article XLIX), provides, in part, as follows:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid and in further consideration of the covenants and agreements by the Lessee to modify the term or terms of Contract No. 1 and Contract No. 2, upon the commencement of operation of the portions of the Railroad specified in Article XLVII, the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined

during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads."

[fol. 839] Chapter I, under the title "Length of Term, etc." (Article XLVII), provides, in part, as follows:

"The City hereby leases the Railroad and the Equipment to the Lessee, for operation in conjunction with the Existing Railroads and Existing Equipment for a single fare."

Chapter III, under the title "Character of Service, Rate of Fare, etc." (Article LXII), provides as follows:

"The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but not more."

The Elevated Extension Certificate of March 19, 1913, granted to the Interborough Company, provides:

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction."

The Additional Track Certificate of March 19, 1913, granted to the Manhattan Railway Company, contains no provision whatever fixing a rate of fare to be charged thereon.

[fol. 840] Fare Provisions in Subway Extension Contracts and Elevated Railroad Extension Certificate Subject to Regulatory Authority

XXI. The Interborough Company is advised by counsel and verily believes, that Contract No. 3 of March 19, 1913, for the construction and lease of subway extensions and certificate of the same date for elevated extensions, were each executed by the Public Service Commission for the First District, acting for and in behalf of the City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891 as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enactment of the Public Service Commission Law, by Chapter 429 of the Laws of 1907, and the revision and amendment thereof by Chapter 480 of the Laws of 1910, and the acts supplemental thereto and amendatory thereof. The Public Service Commission Law conferred power, and prescribed the manner of the exercise thereof, to regulate and fix reasonable rates of fare to be charged upon all subway, elevated and other street railroads in the City of New York. Contract No. 3 and the elevated extension certificate were executed pursuant to the authority of Chapter 4 of the Laws of 1891 as amended; were approved by the Board of Estimate and Apportionment, as aforesaid, acting exclusively in the exercise of its statutory function as fiscal supervisor of the City of New York; are wholly statutory in character, and do not, nor does any part thereof, constitute the constitutional consent of the local authorities of the City of New York to the construction and operation of the railroads therein provided for. The constitutional consents of the City of New York to the construction and operation of the several railroads authorized by the said certificate and Contract No. 3 were granted separately and apart from the certificate and contract, in the form of resolutions adopted by the Board of Estimate and Apportionment and approved by the Mayor, acting as the duly constituted local authorities of the City of New York; and were not granted upon any condition whatsoever fixing the rates of fare to be charged in the operation of the railroads thereby consented to. The rates, fares and charges chargeable by the Interborough Company for the transportation of persons upon its subway and elevated railroads, or any part

[fol. 841] thereof, are not, in any case, fixed as a condition of a constitutional consent of the local authorities to the construction or operation of any part of said railroads.

The Interborough Company is further advised by counsel, and verily believes, that the rapid transit railroads described in Contracts Nos. 1, 2 and 3 belong to the City of New York in its proprietary capacity, the same as if they were owned by an ordinary railroad corporation, and are subject to regulation at all times by such power as the State possesses.

The Interborough Company is also advised by counsel, and verily believes, that the rate regulatory provisions of the law entered by implication into the terms of the leases, agreements and authorizations covering the subway and elevated rapid transit railroads; that they formed part of the obligations of those instruments, and that they were notice to the parties thereto that those instruments were coupled with a provision that the Legislature, in the exercise of its powers, either itself, or acting through another, might regulate the rates thus fixed, and particularly, with the provision of the statute that a common carrier, such as the Interborough Company, was empowered to abrogate the same as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service, upon notice, filing and publication as provided by law.

Summary of Actual Revenues, Expenses and Income from Operation of Rapid Transit Railroad Properties, 1921-1927

XXII. The following summaries set forth the actual revenues, expenses and income in the operation by the Interborough Company of the rapid transit railroads, in each of the years ending June 30, 1921, to 1927, both inclusive; the income deductions, including rentals paid by the Interborough Rapid Transit Company under the leases from the Manhattan Company and the City of New York; the amounts vailable as return on the respective properties; and the balance of such income:

[fol. 842]

Year Ended June 30, 1921

	Manhattan	Subway	System
1. Gross Income	$3,768,565 27	$13,142,159 06	$16,910,724 33
Less			
2. Manhattan Cash Rental	$35,000 00	$	$35,000 00
3. Interest on Investment of Depreciation Reserve		48,689 17	48,689 17
4. Amortization of Debt Discount and Expense	853 22		853 22
5. Interest on Unfunded Debt	124,692 68	141,035 33	265,638 01
6. Other Rent Deductions	483,550 02	25 00	483,575 02
7. Excess Maintenance	524,243 37	*855,212 52	330,969 15
8. Total	$1,168,249 29	$965,463 02	$502,786 27
9. Balance	$2,600,315 98	$13,807,622 08	$16,407,938 06
10. Additional Manhattan Income Taxes	579,504 02		579,504 02
11. Available for Charges on Company and City Property	$2,020,811 96	$13,807,622 08	$15,828,434 04
12. City Rental under Contracts Nos. 1 and 2		2,435,768 09	2,435,768 09
13. Available for Charges on Company Property	$2,020,811 96	$11,371,853 99	$13,392,665 95
Charges			
14. Interest on Bonds (Rental)	$1,808,252 67	$2,435,768 09	
15. Manhattan Dividend Rental	4,200,000 00		
16. Interest on 5% Bonds	1,354,992 96	6,545,787 37	
17. Interest on 7% Notes	886,666 71	1,252,623 13	
18. Sinking Fund on 5% Bonds	469,021 69	1,588,682 93	
19. Interest on 6% Notes			
20. Interest on Equipment Trust Certificates			
21. Total	$8,718,934 03	$11,822,861 52	$20,541,795 55
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $6,118,618 05	$1,984,760 56D	$4,133,857 49
23. Deduct Additional Manhattan Income Taxes	579,504 02		579,504 02
24. Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $6,698,122 07	$1,984,760 56D	$4,713,361 51
Passengers carried	374,293,051	639,385,780	1,013,678,831

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

[fol. 843]

Year Ended June 30, 1922

	Manhattan	Subway	System
1. Gross Income	$4,705,567 27	$14,412,834 54	$19,118,401 81
Less			
2. Manhattan Cash Rental	$35,000 00	$	$35,000 00
3. Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4. Amortization of Debt Discount and Expense	839 57		839 57
5. Interest on Unfunded Debt	215,487 67	111,857 78	327,345 45
6. Other Rent Deductions	336,790 58	18,452 25	355,242 83
7. Excess Maintenance	522,654 16	*728,784 30	206,130 14
8. Total	$1,110,771 98	$549,674 27	$561,097 71
9. Balance	$3,594,795 29	$14,962,508 81	$18,557,304 10
10. Additional Manhattan Income Taxes	582,356 51		582,356 51
11. Available for Charges on Company and City Property	$3,012,438 78	$14,962,508 81	$17,974,947 59
12. City Rental under Contracts Nos. 1 and 2		2,482,633 04	2,482,633 04
13. Available for Charges on Company Property	$3,012,438 78	$12,479,875 77	$15,492,314 55
Charges			
14. Interest on Bonds (Rental)	$1,808,240 00	$2,482,633 04	
15. Manhattan Dividend Rental	4,200,000 00		
16. Interest on 5% Bonds	1,394,492 91	6,627,832 79	
17. Interest on 7% Notes	1,013,122 08	1,488,310 82	
18. Sinking Fund on 5% Bonds	480,979 29	1,622,360 50	
19. Interest on 6% Notes			
20. Interest on Equipment Trust Certificates			
21. Total	$8,896,834 28	$12,221,137 15	$21,117,971 43
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $5,302,038 99	$2,741,371 66D	$2,560,667 33
23. Deduct Additional Manhattan Income Taxes	582,356 51		582,356 51
24. Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $5,884,395 50	$2,741,371 66D	$3,143,023 84
Passengers carried	348,517,216	644,975,474	993,492,690

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

Bol. 8441 — Year Ended June 30, 1923

		Manhattan	Subway	System
1	Gross Income	$4,647,353.94	$14,431,112.88	$19,078,466.82
	Less			
2	Manhattan Cash Rental	$50,000.00	$	$50,000.00
3	Interest on Investment of Depreciation Reserve		48,800.00	48,100.00
4	Amortization of Debt Discount and Expense	105,586.61	70,314.32	175,900.93
5	Interest on Unfunded Debt	269,293.88	27,239.03	296,532.91
6	Other Rent Deductions	584,820.41	*747,022.89	437,197.52
7	Excess Maintenance			
8	Total	$1,009,700.90	$1,393.54	$1,008,431.36
9	Balance	$3,637,653.04	$14,432,382.42	$18,070,035.46
10	Additional Manhattan Income Taxes	424,126.81		424,126.81
11	Available for Charges on Company and City Property	$3,213,526.23	$14,432,382.42	$17,645,908.65
12	City Rental under Contracts Nos. 1 and 2		2,584,034.93	2,584,034.93
13	Available for Charges on Company Property	$3,213,526.23	$11,848,347.49	$15,061,873.72
	Charges			
14	Interest on Bonds (Rental)	$1,808,240.00	$2,584,034.93	
15	Manhattan Dividend Rental	1,710,000.00		
16	Interest on 5% Bonds	1,403,267.18	6,628,823.16	
17	Interest on 7% Notes	936,680.69	1,366,395.28	
18	Sinking Fund on 5% Bonds	496,389.76	1,639,661.55	
19	Interest on 6% Notes	2,545.50	62,600.13	
20	Interest on Equipment Trust Certificates		389.66	
21	Total	$6,357,123.13	$12,281,904.71	$18,639,027.84
22	Balance After Actual Maintenance (Item 9 less Item 21)	D $2,719,470.09	$2,150,477.71D	$568,992.38
23	Deduct Additional Manhattan Income Taxes	424,126.81		424,126.81
24	Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $3,143,596.90	$2,150,477.71D	$993,119.19
	Passengers carried	348,524,709	676,650,431	1,025,175,131

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

[Fol. 843]

Year Ended June 30, 1924

		Manhattan	Subway	System
1	Gross Income	$5,412,361 73	$16,159,213.23	$21,571,592.96
	Less			
2	Manhattan Cash Rental	$50,000 00	$	$50,000 00
3	Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4	Amortization of Debt Discount and Expense			
5	Interest on Unfunded Debt	68,726 26	109,816 89	178,543 15
6	Other Rent Deductions	238,485 27	26,174 40	264,659 67
7	Excess Maintenance	1,305,487 15	124,715 49	1,430,202 64
8	Total	$1,662,698 68	$309,506 78	$1,972,205 46
9	Balance	$3,749,663 05	$15,849,724 45	$19,599,387 50
10	Additional Manhattan Income Taxes	163,205 16		163,205 16
11	Available for Charges on Company and City Property	$3,586,457 89	$15,849,724 45	$19,436,182 34
12	City Rental under Contracts Nos. 1 and 2		2,610,999 06	2,610,999 06
13	Available for Charges on Company Property	$3,586,457 89	$13,238,725 39	$16,825,183 28
	Charges			
14	Interest on Bonds (Rental)	$1,808,240 00	$2,610,999 06	
15	Manhattan Dividend Rental	2,723,877 00		
16	Interest on 5% Bonds	1,438,169 21	6,628,823 15	
17	Interest on 7% Notes	954,919 96	1,291,500 00	
18	Sinking Fund on 5% Bonds	524,471 75	1,646,084 64	
19	Interest on 6% Notes	18,270 67	242,637 87	
20	Interest on Equipment Trust Certificates		70,420 00	
21	Total	$7,467,948 59	$12,490,464 72	$19,958,413 31
22	Balance After Actual Maintenance (Item 9 less Item 21)	D $3,718,285 54	$3,359,259 73D	$ 359,225 81
23	Deduct Additional Manhattan Income Taxes	163,205 16		163,205 16
24	Balance After Actual Maintenance and Additional Manhattan Income Taxes	D $3,881,490 70	$3,359,259 73D	$522,280 97
	Passengers carried	359,410,056	714,933,187	1,074,343,243

D—Deficit.

[fol. 846]

Year Ended June 30, 1925

	Manhattan	Subway	System
1. Gross Income	$5,094,860 61	$17,228,355.58	$22,323,216.19
Less			
2. Manhattan Cash Rental	$50,000 00	$	$50,000 00
3. Interest on Investment of Depreciation Reserve		48,800 00	480,800,00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	21,529 10	65,733 15	87,262 25
6. Other Rent Deductions	216,605 45	23,806 24	240,411 69
7. Excess Maintenance	1,352,713 83	139,581 84	1,492,295 67
8. Total	$1,640,848 38	$277,921 23	$1,918,769 61
9. Balance	$3,454,012 23	$16,950,434 35	$20,404,446 58
10. Additional Manhattan Income Taxes			
11. Available for Charges on Company and City Property	$3,454,012 23	$16,950,434 35	$20,404,446 58
12. City Rental under Contracts Nos. 1 and 2		2,644,905 28	2,644,905 28
13. Available for Charges on Company Property	$3,454,012 23	$14,305,529 07	$17,759,541 30
Charges			
14. Interest on Bonds (Rental)	$1,808,240 00	$2,644,905 28	
15. Manhattan Dividend Rental	3,065,310 00		
16. Interest on 5% Bonds	1,442,138 87	6,628,823 15	
17. Interest on 7% Notes	1,084,361 70	1,291,500 00	
18. Sinking Fund on 5% Bonds	570,995 37	1,646,084 63	
19. Interest on 6% Notes	16,724 24	381,449 04	
20. Interest on Equipment Trust Certificates		169,422 66	
21. Total	$7,987,770 18	$12,762,184 76	$20,749,954 94
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,533,757 95	$1,188,249 59D	$3,345,508 36
Passengers carried	352,723,553	736,820,672	1,089,544,225

D—Deficit

[fol. 847]

Year Ended June 30, 1926

	Manhattan	Subway	System
1. Gross Income	$5,410,960.19	$19,683,229.17	$25,094,198.36
Less:			
2. Manhattan Cash Rental	$50,000.00	$.....	$50,000.00
3. Interest on Investment of Depreciation Reserve	.....	48,800.00	48,800.00
4. Amortization of Debt Discount and Expense	.....	.....	.....
5. Interest on Unfunded Debts	27,771.92	41,539.07	69,310.99
6. Other Rent Deductions	240,453.27	5,567.25	246,020.52
7. Excess Maintenance	1,156,347.50	*175,092.00	981,345.50
8. Total	$1,474,572.69	$79,095.68	$1,395,477.01
9. Balance	$3,936,396.50	$19,762,324.85	$23,698,721.35
10. Additional Manhattan Income Taxes	.....	.....	.....
11. Available for Charges on Company and City Property	$3,936,396.50	$19,762,324.85	$23,698,721.35
12. City Rental under Contracts Nos. 1 and 2	.....	2,655,186.26	2,655,186.26
13. Available for Charges on Company Property	$3,936,396.50	$17,107,138.59	$21,043,535.09
Charges:			
14. Interest on Bonds (Rental)	$1,808,240.00	$2,655,186.26	
15. Manhattan Dividend Rental	3,066,486.00		
16. Interest on 5% Bonds	1,445,243.54	6,628,823.15	
17. Interest on 7% Notes	1,088,456.20	1,290,617.04	
18. Sinking Fund on 5% Bonds	631,949.12	1,821,804.16	
19. Interest on 6% Notes	21,899.99	504,999.37	
20. Interest on Equipment Trust Certificates	.....	291,321.84	
21. Total	$8,062,274.85	$13,192,751.82	$21,255,026.67
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,125,878.35	$6,569,573.03	$2,443,694.68
Passengers carried	346,204,574	784,280,073	$1,130,484,647

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

[fol. 848]

Year Ended June 30, 1927

	Manhattan	Subway	System
1. Gross Income	$5,035,275 70	$19,455,499 61	$24,490,775 31
Less			
2. Manhattan Cash Rental	$50,000 00	$	$50,000 00
3. Interest on Investment of Depreciation Reserve		48,800 00	48,800 00
4. Amortization of Debt Discount and Expense			
5. Interest on Unfunded Debt	17,482 43	39,452 84	56,935 27
6. Other Rent Deductions	228,717 91	3,739 20	232,457 11
7. Excess Maintenance	1,570,287 08	*90,465 88	1,479,821 20
8. Total	$1,866,487 42	$1,526 16	$1,868,013 58
9. Balance	$3,168,788 28	$19,453,973 45	$22,622,761 73
10. Additional Manhattan Income Taxes			
11. Available for Charges on Company and City Property	$3,168,788 28	$19,453,973 45	$22,622,761 73
12. City Rental under Contracts Nos. 1 and 2		2,655,569 01	2,655,569 01
13. Available for Charges on Company Property	$3,168,788 28	$16,798,404 44	$19,967,192 72
Charges			
14. Interest on Bonds (Rental)	$1,808,204 00	$2,655,569 01	
15. Manhattan Dividend Rental	3,096,726 00		
16. Interest on 5% Bonds	1,457,159 47	6,640,807 15	
17. Interest on 7% Notes	1,082,562 93	1,280,222 33	
18. Sinking Fund on 5% Bonds	611,809 92	1,764,185 74	
19. Interest on 6% Notes	31,389 62	517,346 88	
20. Interest on Equipment Trust Certificates		215,825 00	
21. Total	$8,077,917 94	$13,073,956 11	$21,151,874 05
22. Balance After Actual Maintenance (Item 9 less Item 21)	D $4,909,129 66	$6,380,017 34	$1,470,887 68
Page figures carried	359,019,000	814,626,576	1,173,646,576

* Expenditures under 17% of the Revenue on the Subway.
D—Deficit.

[fol. 849] Prospective Capital Expenditures and Increases in Operating Expenses and Fixed Charges

XXIII. As of October 1, 1927, the known obligations of the Interborough Company to complete Equipment, Contract No. 3, to meet the instalments still due on cars heretofore purchased, and to provide the signals on local tracks to be installed prior to June 30, 1930, for which there are no capital funds available, are payable as follows:

	During fiscal year ending			
	Prior to June 30, 1928	June 30, 1929	June 30, 1930	Total
To complete Equipment, Contract No. 3	$1,201,657	$1,217,918	$	$2,419,575
Installment on Cars	1,300,000	1,020,000	670,000	2,890,000
Signals	286,816	410,000	480,000	1,176,816
	$2,788,473	$2,647,918	$1,950,000	$6,486,391

If the Transit Commission issues, as it has been announced it will do, an order to the Interborough Company to furnish 432 additional subway cars and makes effective the order already issued to lengthen all of the subway local platforms, the estimate of the additional capital obligations is as follows:

305 motor cars at $23,000 each	$7,015,000
127 trailer cars at $14,500 each	1,841,000
Total cost of 432 motor and trailer cars	$8,856,000
The Company's Superintendent of Motive Power estimates that even though we should cease to supply power to the surface lines, the additional power equipment required in connection with these cars would cost	2,000,000
Total cost of cars and necessary power	$10,856,000
Cost of the Company's one-half of the construction of the platform extension work	7,265,000
Cost of 382 cars to provide ten-car local trains	9,000,000
Cost of other equipment including power machinery on account of the platform extension work	8,000,000
Total requirements for 432 additional cars, lengthening of all subway local platforms and the provision of additional cars and other equipment in connection therewith	$35,121,000
Estimated cost of subway signals to be installed after June 30, 1930	4,345,000
Total	$39,466,000

This result is based upon separate estimates of the requirements for lengthening of local platforms and for the provision, prior to the completion of that work, of 432 ad-

ditional cars. If the two projects should be considered [fol. 850] together, there may be effected a reduction in the total estimated cost as shown, possibly as much as $8,000,000 depending upon the total number of cars required, and the provision for additional power.

In addition, there is a further requirement, under an existing order of the Transit Commission, for the installation of signals, in 1936 and 1937, on local tracks on the elevated lines at an estimated cost of $6,960,000, for which the Interborough Company has no funds provided.

The foregoing additional capital expenditures (including the funding of certain improvements paid for out of earnings prior to October 1, 1927) will necessarily increase the Interborough Company's interest and amortization charges, as follows:

1929—Funding of cost of additions and improvements made from earnings to October 1, 1927		$4,500,000
Estimated capital expenditures for existing obligations, October 1, 1927 to June 30, 1928		2,788,000
Estimated cost of 432 cars and the necessary power		10,856,000
Total for 1929		$18,144,000
Rounded out at	$18,000,000	
Interest and sinking fund thereon	1,080,000	
1930—Estimated capital expenditure for existing obligations		2,648,000
Total for 1930		$20,792,000
Rounded out at	$21,000,000	
Interest and sinking fund thereon	1,260,000	
1931—Estimated capital expenditures for existing obligations		1,050,000
Cost of company's one-half of the construction of the platform extensions		7,265,000
Estimated cost of equipment in connection with platform extension work after allowing $8,000,000 for possible duplication		9,000,000
Estimated cost of signals after June 30, 1931		11,395,000
Manhattan Division	$6,960,000	
Subway Division	4,345,000	
Total for 1931		$49,412,000
Rounded out at	$49,000,000	
Interest and sinking fund thereon	2,940,000	

The known facts afford no ground for expecting that the prices of material and the wages paid for labor by the Interborough Company will, on the whole, be reduced from those now prevailing. On the contrary, there will be required increases in operating expenses for the following major items and amounts:

[fol. 881]

	First annual period			Second annual period			Third annual period		
	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total	Manhattan Division	Subway Division	Total
Additional wages	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000	$1,600,000	$2,400,000	$4,000,000
Additional service	540,000	2,220,000	2,760,000	567,000	2,700,000	3,267,000	567,000	2,700,000	3,267,000
Additional maintenance	500,000	500,000	1,000,000	500,000	500,000	1,000,000	500,000	500,000	1,200,000
Total	$2,640,000	$5,120,000	$7,760,000	$2,667,000	$5,600,000	$8,267,000	$2,667,000	$5,600,000	$8,267,000

Summary of Increased Operating Expenses and Fixed Charges

	First annual period	Second annual period	Third annual period
Operating expenses	$7,760,000	$8,267,000	$8,267,000
Interest and sinking fund	1,080,000	1,260,000	2,940,000
Total	$8,840,000	$9,527,000	$11,207,000

Confiscatory Effect and Unconstitutionality of Five-cent Rate of Fare

XXIV. The maximum rate of five cents now chargeable by the Interborough Company has been for more than seven years, and now is, and will be, insufficient to yield a reasonable compensation for the service rendered, and during said period has been, and now is, and will continue to be, unjust, unreasonable and confiscatory of this Company's property, and has been, and is, and will continue to be, insufficient and inadequate to provide a fair return upon the fair and reasonable value of the properties actually used by the Company in the public service in its operation and devoted to the public service, and the enforcement of such maximum fare of five cents contravenes the guarantees of the Fourteenth Amendment of the Constitution of the United States, and of Section 6 of Article I of the Constitution of the State of New York.

The return received by the Company from the existing maximum rate of fare chargeable by it, has not been, and is not now, sufficient to maintain and support the credit of the Interborough Company and to enable it to secure capital [fol. 852] funds for the purpose of providing for new construction and equipment, either through the sale at a reasonable discount of its long term first mortgage bonds or of any other marketable security.

It will be impossible for this Company to procure necessary additional capital because of the narrow margin by which the present fixed charges of the Company are presently, and in the near future will be, earned under existing traffic conditions on a five-cent fare; because of action taken or threatened by or on behalf of the Transit Commission to impose requirements for additional expenditures by this Company aggregating ultimately nearly $40,000,000, and because of the unascertainable effect on this Company's opera-

tions and earnings of the opening of the new municipal subway system.

Because of the failure of the net revenue received by the Interborough Company from the operation of the aforesaid rapid transit railroad lines to yield a fair or reasonable average return on the value of the property used and useful in the service, the Interborough Company has been unable, and at the existing rate of fare will be unable, to make proper reservation out of its income for surplus and contingencies.

Unforeseen Conditions Which Have Supervened to Render the Five-cent Fare Inadequate, Unreasonable, Confiscatory, and Invalid.

XXV. In order to carry out the single comprehensive plan of 1913 for the improvement and extension of municipal and non-municipal rapid transit railroads, and with the knowledge and approval of the Public Service Commission for the First District or of its successors, the Interborough Company formulated and adjusted its capital obligations and fixed charges incidental thereto, in order to provide the necessary funds with which to carry out such plan and the obligations incurred thereunder by the Interborough Company. In and by such plan it was contemplated that the revenues to be derived from the operation of the enlarged system of rapid transit railroads would be sufficient to meet certain charges incurred by the City of New York and the [fol. 853] Interborough Company, and to provide a fair and reasonable return upon the investment in the properties provided by the City of New York and the Interborough Company; but, after the execution of the contract and certificates, owing to radical economic changes produced by the World War, which were wholly unforeseen by the parties to the instruments at the time of their execution, the expenses of operating the rapid transit railroads vastly increased and the value of the five-cent rate of fare fixed by the Contract No. 3 and certificates became greatly impaired, and, since the beginning of the operation of the enlarged system of rapid transit railroads, and for an indefinite future period of the operation of the railroads, has failed, and will continue to fail, to be sufficient to defray the several charges and provide the return which it was expressly con-

templated by the Contract No. 3 and certificates should be defrayed and provided from year to year during the term of the lease to the Interborough Company and the grant of rights to it and the Manhattan Company.

Circumstances Showing Complete Change of Material Conditions Since Making of Leases Containing Fare Limitations

XXVI. Since March of 1913 there has been a complete change in many factors pertinent to the stipulations then deemed to be proper and in the public interest and vitally affecting the reasonableness and propriety of the continuance of the fare limitations inserted in the rapid transit railroad leases then consummated and in the elevated extension certificate then granted. Certain of these changes and conditions have come about by affirmative act and changed policy of the City of New York, contrary to the contemplation and purposes for which the said leases and limitations were accepted and entered into by the Interborough Company. Those of a more general character will first be referred to herein:

(A) A new price level has followed in the wake of the World War. Wages have increased at least one hundred per cent., and the cost of materials still more. The general level of commodity prices rose to more than one hundred per cent., and now is about seventy per cent., higher than in 1913. The price of practically everything which the Inter- [fol. 854] borough Company has to buy has been advanced accordingly. The Federal, State and municipal taxes for the year ended June 30, 1927, were approximately thirty-five per cent. greater in amount than for the year 1913. The purchasing power of the nickel and the dollar has greatly decreased; the cost of money for all capital purposes of the Interborough Company has greatly increased. The Interborough Company is receiving, for the essential transportation service which it renders at 1928 costs of wages, materials, taxes, and carrying charges on new capital, a rate of fare with a purchasing power fixed in 1913, according to 1913 wages, costs and conditions. The Courts and Commissions have repeatedly taken judicial notice of these changes and of the consequent necessity that the rates and prices

paid for public services shall reflect present costs and the present purchasing power of the dollar.

Lincoln Gas Co. v. City of Lincoln, 250 U. S. 256, 268.
Matter of Evens (City of Binghamton) v. Public Service Commission, 246 N. Y. 224.
McCardle v. Indianapolis Water Co., 272 U. S. 400, 410-412, and cases cited.

The manifest disposition of the United States Supreme Court, the New York Court of Appeals, and the various Special Statutory Courts in the Southern and Eastern Districts of New York, has been to take cognizance of what has transpired in the economic life of America since 1913, and to construe the applicable law in such a manner as to preserve the means of reasonable modernization and adaptation as to rate provisions of pre-war contracts which involve or affect the rendition of essential public services. Assumption of the continued immutability of rate provisions of such agreements made before the present price level has prevented vital improvements in public services and provoked most serious local consequences.

(B) The making of the 1913 leases and contracts clearly contemplated that the municipal entity which, as a proprietor and railroad corporation, leased railroad properties owned by it to the Interborough Company for operation for the period therein fixed would not itself become an operator of competing rapid transit properties and an active competitor of the lines leased to the Interborough Company by agreements, some of which contain the five-cent fare limitation. At least, it was contemplated that the City should not become a competitor of the Interborough Company's [fol. 855] rapid transit service except in the manner, and upon the contingencies and payments, provided for in the 1913 agreements, viz., the "recapture" by the City of indicated portions of the routes, payment therefor to the Interborough Company on a stipulated basis, and subsequent municipal operation on a basis which would be substantially non-competitive with the lines remaining for operation by the Interborough Company. Nevertheless, without such "recapture" and payment, vast municipal funds and diligent municipal efforts are being devoted, at the present time, to the building of new rapid transit lines proposed to

be operated by the City of New York, in its proprietary capacity, and with the advantage of exemptions enjoyed by it, in competition with the subway and elevated lines leased to the Interborough Company. It has been conservatively estimated that the City's new Eighth Avenue Subway, projected and started subsequently to 1913 and contrary to the underlying plan of the 1913 agreements, will take from the existing lines of the Interborough Company at least 110,000,000 passengers per year, thereby further reducing its net earnings from the five-cent fare and rendering such stipulated fare still more inadequate and confiscatory, all by affirmative and wilful act of the City of New York.

(C) This imminence of municipal competition, with the certainty of further diminution and destruction of the Interborough Company's already inadequate revenues and net earnings, is no remote or conjectural prospect. The Transit Record for December, 1927, and January, 1928, published by the Board of Transportation of the City of New York, gives the progress of work on construction contracts, respectively, as of November 30, 1927, and December 31, 1927. Omitting the Brooklyn and Queens contracts and the 53rd Street Line, the following table shows the progress of work on the different sections of the municipal Eighth Avenue Subway. The existing West Side subway line of the Interborough Company and the proposed competing line of the City are close together; they cross at Columbus Circle, are a block apart southward to 8th Street, where they again cross and continue southwardly, a block apart, to lower Manhattan, thus traversing practically the entire length of Manhattan Island.

It will be observed that from Bank Street, in lower Manhattan, northward to and beyond 207th Street, the sections are from seventy-nine per cent. to ninety-eight per cent. completed as of December 31, 1927. As the last part of any construction contract is a restoration of sub-surface struc- [fol. 856] tures and pavement, these percentages mean that the structure itself is so substantially completed that tracklaying could practically have been started some time ago, with the possibility of at least a "shuttle" operation within a short time, furnishing service from the vicinity of Dyckman Street to a point even below 18th Street. The City's own table, showing the substantial completion of its competing municipal railroad, follows:

Rt.	Sec.	Contractor	Limits	Per cent of cost completed November 30,1927	Per cent of cost completed December 31,1927
101	3-4	Rosoff Sub. Const. Co.	Church St.-6th Ave., Park Place to 3rd St.	29	33
102	1	Moranti & Raymond, Inc.	8th Ave., Bank to 18th St.	79	81
102	2	Geo. H. Flinn	8th Ave., 18th to 28th St.	92	94
102	3	Rosoff Sub. Const. Co.	8th Ave., 28th to 38th St.	84	86
102	4	C. H. Locher	8th Ave., 38th to 48th St.	83	85
102	5	Heyman & Goodman, Inc.	8th Ave., 48th to 58th St.	88	91
102	6	Frederick L. Cranford, Inc.	8th Ave.-Central Park West, 58th to 68th St.	83	85
78	1	J. F. Cogan Co.	Central Park West, 68th to 79th St.	87	88
78	1-A	A. A. Johnson Corp.	Central Park West, 79th to 89th St.	88	90
78	2	T. A. Gillespie Co.	Central Park West, 88th to 101st St.	93	95
78	2-A	Rosenthan Eng. Contr. Co.	8th Ave. Central Park West, 101st to 111th St.	82	83
78	3	Heyman Goodman Co.	8th Ave., 111th to 122nd St.	96	97
78	3-A	Rosoff Sub. Const. Co.	St. Nicholas Ave., 122nd to 132nd St.	95	95
78	4	George J. Atwell	St. Nicholas Ave., 132nd to 141st St.	91	92
78	4-A	LaRocca Const. Corp.	St. Nicholas Ave., 141st to 149th St.	65	69
78	5	Rodgers & Hagerty	St. Nicholas Ave., 149th to 160th St.	94	94
78	6	Rodgers & Hagerty	St. Nicholas Ave.-Broadway, 160th to 173rd St.	89	90
78	6-C	Slattery Eng. & Const. Co.	Broadway, 173rd to 177th St. (an insignificant spur)	35	45
78	7	Michael Del Balso	Ft. Washington Ave., 174th to 183rd St.	85	87
78	8	Silas B. Mason	Ft. Washington Ave., 183rd St. to Overlook Terrace	95	96
105	1	Arthur McMullen Co.	Broadway, Overlook Terrace to Cummings	93	94
105	2	Silas B. Mason	Broadway, Cummings to 211th St.	91	92
105	3	D. C. Serber	207th St., Broadway to 10th Ave. (except one section which is 69 per cent completed)	97	98

[fol. 857] (D) The anomalous, unjust and oppressive policy of the City of New York thus appears clearly from the following, and suggests strongly the propriety that the changed circumstances and conditions, and the affirmative acts of the City itself, should also be deemed to liberate the Interborough Company from the fare limitations contained in the 1913 lease and certificate and to enable the Interborough Company to meet the new conditions confronting its business enterprise:

(1) In its proprietary capacity, the City launches a program of active competition with the lines leased to and operated by the Interborough Company, and is employing vast public funds obtained from the taxpayers for that purpose, threatening further inadequacy of revenues and net earnings;

(2) In the exercise of the State's regulatory powers, the Transit Commission is insisting that the Interborough Company purchase 432 additional cars for use on its subway lines and install signals upon the local tracks of both subway and elevated lines (the direction to the latter effect having been accepted by the Company); and in its proprietary capacity, the City is insisting and requiring that the Interborough Company extend the subway local platforms and provide the additional rolling-stock and extension of power facilities incidental thereto; which vast additions and extensions to the operating properties of the Interborough Company would require it to raise approximately $40,000,000 of new capital therefor; such additions and extensions being unwarranted by the Company's present revenues and operating conditions, as well as burdensome, when the City's approaching competition is considered; and

(3) In its proprietary capacity, the City is insisting upon the continuance, in 1928 and thereafter, of the rate of fare fixed and adjusted according to 1913 wages, costs and conditions.

The City thus introduces into the situation, in 1927 and 1928, a municipal competition unintended in 1913, but insists nevertheless that its competitor shall make vast capital expenditures despite inadequate revenues and earnings, and insists, furthermore, that its competitor shall be further

[fol. 858] hampered and crippled by being compelled to continue the fare fixed on the basis of 1913 costs and conditions, when no municipal competition was intended. A railroad corporation, or other proprietor, which has leased its lines and properties to an existing railroad enterprise may not change its mind and policy, build new and competing lines to be operated by itself, and nevertheless continue to dictate the capital expenditures of its lessee and control the policy of its lessee as to rates of fare.

XXVII. Concerning the municipal policies above summarized, and with the carrying out of which the Company is threatened, it may be said, in the language of the United States Supreme Court (Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 591-592), that they evince

"an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them."

The same Court has held that public service companies need not suffer "daily confiscation" from the enforced continuance of inadequate rates or confiscatory limitations on rates.

Banton v. Belt Line Ry., 268 U. S. 413, 415-417;
Oklahoma Gas Co. v. Russell, 261 U. S. 290, 293;
Pacific Telephone Co. v. Kuykendall, 265 U. S. 196, 204-205.

The decisions describe the position of this Company; by this application, it asks early relief from such daily confiscation.

Seven-cent Fare Established Pursuant to Law

XXVIII. A rate of fare of seven cents per passenger, on each the Subway Division and the Manhattan Division operated by the Interborough Company, will constitute no more than a just and reasonable rate of fare on each division,

respectively, and will yield no more than a fair and reasonable return upon the value of the properties actually used by it in the public service in its operation and devoted to the public service, and no more than a reasonable compensation for the service so rendered.

[fol. 859] The Interborough Company has, therefore, by action duly taken by its directors and officers, in pursuance of the authority and powers conferred by law, fixed, determined and established a fare of 7 cents per passenger as the rate hereafter to be charged and collected, instead of a fare of five cents from each passenger, upon each the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the Company, and has accordingly filed, published and posted tariff sheets establishing such fare of seven cents per passenger. By reason of all of the special circumstances and conditions hereinbefore stated, it is deemed proper that special permission be granted to put such rate of fare in effect on less than thirty days' notice.

Wherefore the Interborough Rapid Transit Company respectfully applies to your honorable Commission, pursuant to the powers which have been vested in you by law, to approve the said Thirteenth Revised Sheet No. 1 to I. R. T. No. 2, Original Sheet No. 2A, Original Sheet No. 2B, Second Revised Sheet No. 3, and Second Revised Sheet No. 3A, cancelling Twelfth Revised Sheet No. 1 (effective January 21, 1928) and First Revised Sheet No. 3 and First Revised Sheet No. 3A (effective September 15, 1925); and that you grant permission to the Interborough Company to put the said tariff sheets into effect upon not more than five days' notice after publication at stations and filing with the Commission.

Dated New York, February 1, 1928.

Interborough Rapid Transit Company, by E. E. Starbard, Vice-President.

[fol. 860] State of New York,
County of New York, ss:

E. E. Starbard, being duly sworn, deposes and says that he is the officer above named, and that he has read the

foregoing application and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein specifically stated as on information and belief, and as to such matters he believes it to be true.

E. E. Starbard.

Subscribed and sworn to before me this 1st day of February, 1928. Arthur G. Peacock, Notary Public, Queens County. Certificate filed in N. Y. Co. (Notarial Seal.)

[fols. 861, 862]

In United States District Court

[Titles omitted.]

Affidavits on Behalf of Defendant City of New York in Opposition to Motion Before Statutory Court for Interlocutory Injunction

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[fol. 863] State of New York,
County of New York,
Southern District of New York, ss:

George P. Nicholson, being duly sworn, deposes and says:

I am the Corporation Counsel of the City of New York, one of the defendants in the above-entitled action; I have read the complaint herein verified February 14, 1928, the petition verified February 25, 1928, the affidavits of Ralph Norton, Earl E. Starbard, Henry T. Berry, William E. Gorsuch and Charles E. Williams, each verified February 25, 1928, in support of the application and motion herein.

[fol. 864] The City of New York appears specially on this application and motion to challenge the jurisdiction

of the court to grant such application and motion, on the ground

(1) That the complaint verified February 14, 1928, upon which this application and motion are based, does not set forth a cause of action within the scope of Article XIV of the United States Constitution.

(2) That the Supreme Court of the State of New York has acquired prior jurisdiction over the subject matter of this action in two actions and a proceeding instituted in that court by the defendants City of New York and Transit Commission on February 14, 1928.

(3) That the provisions of Section 380 of the United States Code (Section 266, Judicial Code) prohibit the granting of a stay or injunction in any court of the United States to restrain the execution of a statute or an order, where a suit shall have been brought in a court of the State having jurisdiction thereon to enforce said statute or order, in which suit in the State court a stay has been granted, pending the determination of such suit by that court.

(4) That the beginning and pendency of the actions and special proceeding in the State Court automatically stays this action.

Appearing for the purposes above named, I beg leave to set forth the following in answer to the allegations of the original complaint, verified February 14, 1928, the petition verified February 25, 1928, and the various affidavits attached to said petition.

Nature of the Interlocutory Injunction Applied For

The petition herein prays:

1. For an order enjoining and restraining, pending the final order in this action and until the further order of this [fol. 865] Court, the defendants constituting the said Transit Commission, and The City of New York, and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and

any and every person acting or attempting to act under and by virtue of the authority of the acts of the Legislature of the State of New York, orders, directions, tariff schedules, contracts or certificates, or of either of them, or of any other provision of law, referred to in the complaint herein:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division, of not more than five cents per passenger, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise:

(2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, tariff schedules, contracts or certificates, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, a fare per passenger in excess of five cents;

(3) From in any way enforcing, or attempting to enforce, against the plaintiff the orders made by the said Transit Commission, relating to the construction of subway platform extensions;

(4) From making or in any way enforcing, or attempting to enforce, against the plaintiff any order by the Transit Commission requiring the plaintiff to provide 432 or other substantial number of additional cars for operation on the said subway lines;

(5) From in any way enforcing the order or direction of the said Transit Commission of February 10, 1928, relat-[fol. 866] ing to the payment of expenses of the rate suit, or any other order or direction by it or by the defendant The City of New York, or bringing or prosecuting any action or proceeding to seize or take possession of the

properties used or operated by the plaintiff in or in connection with said Rapid Transit Railroads, or to take over the operation of the same, or to prevent the application of the revenues therefrom, or otherwise preventing or deterring the plaintiff from testing the validity of said rates or fares and the acts, orders, regulations and provisions relative thereto;

(6) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or direction or the said Contracts Nos. 1, 2 and 3 and related certificates, against the plaintiff; or by mandamus, injunction summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts or certificates or any of them, in so far as they or any of them impose a maximum rate of fare of five cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven cents per passenger, or any rate in excess of five cents per passenger, upon the said rapid transit railroads, or upon each the Manhattan Division and the Subway Division;

(7) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, any rate which it may lawfully charge or receive; any provisions of said acts, orders, regulations, contracts or certificates, or any regulations prescribed thereunder, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

[fol. 867] Nature of the Temporary Stay Applied for

A temporary stay is also asked for as follows:

II. And, in view of the fact that irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted herein, for a temporary restrain-

ing order against the said defendants and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions, tariff schedules, contracts or certificates, or either of them, or of any other provision of law, until the hearing and determination of the application for an interlocutory injunction herein, from doing all or any of the acts hereinabove described.

The plaintiff further prays that a statutory court be convened in accordance with the provisions of Section 380 of the United States Code (Sec. 266 of the Judicial Code) and that the application be set down for a hearing at the earliest practicable time.

As to the first Preliminary Objection That the Complaint Does Not Allege a Cause of Action

For the purpose of opposing this application and motion, I will attempt to do nothing more than point out the most obvious defects appearing on the face of the complaint in order to show the Court that it does not set forth a cause of action and answer the various affidavits in so far as they purport to allege facts. No attempt has been made to deal with the many conclusions of law that constitute so large a part of the moving papers.

[fol. 868] The Complaint

The complaint in this action, verfied February 14, 1928, sets forth five alleged causes of action. It comprises 92 printed pages. Attached to the complaint are certain exhibits or schedules comprising 30 additional printed pages. It is replete with arguments, conclusions, quotations from statutes, assertions of alleged law, references to publications in the press and extraneous and immaterial matter. The statements of alleged fact are so interwoven with this extraneous and immaterial matter that it is difficult to spell out the real theory of the action. With respect to this, the Bill of Complaint violates the rules of pleading requiring conciseness, accuracy and clearness (Hodgman

vs. Atlantic Refining Co., 274 Fed. 104) and is subject to the same criticism as the complaint in Martin vs. Brown, 282 Fed. 717 at 719, as to which the Court said:

"The bill is unnecessarily long, and Equity Rule XXV (198 Fed. XXV, 115 C. C. A., XXV) has not been sufficiently in the mind of the pleader. It contains statements of law, argumentative expressions, and allegations of mere business transactions, the wisdom of which it is not proper for the court to pass upon. Statements of this kind are condemned under the rules."

First Cause of Action

Under the first alleged cause of action it is claimed that the rate of fare chargeable by the plaintiff on the elevated railroads operated by it is "unreasonable, inadequate and confiscatory." (Paragraph XVII.)

There are 24 paragraphs covering 31 printed pages in the first alleged cause of action. It contains a recital of the history of the Manhattan Railway Company; the lease of [fol. 869] its lines to the plaintiff; the capitalization of the plaintiff and of the defendant Manhattan Railway Company; the rental payable by the plaintiff under its lease of the Manhattan lines; references to certain statutes, special and general, said to fix the rate of fare, and various conclusions of the plaintiff as to the adequacy of said rate of fare.

Among the facts alleged by the plaintiff is one contained in paragraph XVI, subdivision (G) that the last tariff schedule filed by it was dated August 15, 1925, to become effective September 15, 1925, provided for a fare of five cents on the Manhattan division which comprises all the elevated lines operated by the plaintiff.

The plaintiffs allegations with respect to the elevated lines are misleading and to a degree untrue.

First. They are so framed as to convey the idea that Chapter 743, Laws of 1894 covered the entire elevated system.

An examination of Ch. 743, L. 1894 will show that that act only fixed a fare of five cents upon lines "east of Broadway," south of the Harlem River in connection with lines

running north from the Harlem River (129th Street), whether those known as the "Suburban Rapid Transit Railroad" or "such other elevated railroad as may be operated by the Manhattan Railway Company, north of the Harlem River."

Second. They make no reference to the fact that whatever fare provisions existed prior to 1913 on the elevated system, were superseded by the provisions of the Elevated Extension Certificate of 1913.

Paragraph VI of the Elevated Extension Certificate submitted herewith (Exhibit E) sets forth in full the five-
[fol. 870] cent fare provision. Such fare clause and the effect of it is discussed in connection with the second cause of action.

It is apparent from this that the fare provision of the Certificate covered all the elevated lines of the Manhattan Railway Company and superseded all previous fare provisions whether contained in statutes or tariff schedules filed by the plaintiff.

There is no allegation contained in the first cause of action that the plaintiff ever sought by an application to the Transit Commission or by the filing of revised tariff schedules to increase the fare above the five cent rate fixed and contained in the tariff schedule which plaintiff filed in 1925.

Assuming, without admitting, the truth of the plaintiff's allegations in this cause of action with respect to the inadequacy of the five-cent fare on the elevated railroads operated by it and assuming without admitting the truth of every other allegation contained in that cause of action, I say that no cause of action whatsoever has been set forth.

The plaintiff cannot make out a prima facie cause of action with respect to the elevated lines by alleging "half truths," which would have the result of leading the Court into making false assumptions.

Second Cause of Action

The plaintiff's second alleged cause of action has to do with the fare chargeable by it on the elevated lines under

and pursuant to the provisions of a certificate of extension granted by the Public Service Commission for the First District (the predecessor of the present Transit Commission) on March 19, 1913. In paragraph XXVI of the second cause of action, plaintiff alleges that such a certifi- [fol. 871] cate was granted to it "with the approval of the Board of Estimate and Apportionment of The City of New York"; and in paragraph XXIX plaintiff sets forth that said extension certificate contained a clause reading as follows:

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more * * *."

In paragraph XXX plaintiff alleges that the fare provisions contained in said elevated railroad extension certificate are subject to regulatory authority. I deny this allegation and say that the fare fixed by that certificate can only be changed by consent of the parties.

Section 24, Subdivision 4, of the Rapid Transit Act under which this Certificate was made provides in part as follows:

"4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time with the consent of such person, firm or corporation, be modified by the commission." [fol. 872] I say further, that not only was the fare chargeable on the extensions fixed by said certificate but the fare

chargeable on the entire system of elevated railroads operated by the plaintiff was fixed at five cents by the contract which resulted from the granting and acceptance of the said extension certificate. That is plain from the fare clause. It limited the fare to five cents not only on the extensions but also on the "Manhattan Railroad" which is defined in first paragraph of page 3 of the certificate (Exhibit E) as meaning all the railroads operated by the plaintiff under its lease from the Manhattan Railway Company.

I deny the allegation contained in paragraph XXVIII of the Complaint to the effect that the constitutional consent of the City of New York to the construction and operation of the elevated railroads authorized by said extension certificate was granted separately from the said elevated extension certificate and unconditionally.

Submitted herewith (Exhibit K) is the resolution of the Board of Estimate and Apportionment adopted March 18, 1913, which is the consent of the City granted pursuant to Section 18 of Article III of the State Constitution to the construction and operation of the railroads authorized by the elevated extension certificate. The certificate itself is made part of the resolution and each and every of the terms of said certificate attach to and are made part of the consent.

In Paragraph XXXI of the Complaint plaintiff sets forth certain "unforeseen conditions which have supervened to render the five-cent fare inadequate, unreasonable, confiscatory and invalid as to the plaintiff's elevated lines." I say that, assuming without admitting the truth of the conclusions thus set forth, the adequacy or inadequacy of the five-cent fare with respect to said elevated railroads cannot [fol. 873] be considered or adjudicated by this Court because of the contract which the plaintiff itself alleges and sets forth fixing the rate of fare at five cents.

In Paragraph XXXII the plaintiff alleges that a fare of seven cents per passenger on each the Subway Division and the Manhattan Division operated by it constitutes no more than a just and reasonable rate of fare on each division and will yield no more than a fair and reasonable return upon the value of the properties actually used by it in the public service and no more than a reasonable compensation for the service so rendered. Assuming, without admitting, the truth of these allegations, I say that whether such fare of

seven cents would be a reasonable fare or otherwise is irrelevant and immaterial in that the fare on said Manhattan Division is fixed by the contract resulting from the granting and acceptance of the said elevated extension certificate containing the fare limitation of five cents, as set forth in paragraph XXIX of the Complaint. With respect to the reasonableness of the fare of seven cents on the Subway Division, I say that no allegations whatever, upon which such a conclusion could be based are contained in the second cause of action and that such fare is fixed at five cents by the provisions of a contract known as Contrat No. 3, as more fully set forth in answering the plaintiff's third cause of action.

In Paragraph XXXIII of the Complaint, plaintiff alleges that as a common carrier subject to the provisions of the Public Service Commissions Law and in pursuance of the authority and powers conferred by law, it

"fixed, determined and established the rate of fare of seven cents per passenger as the rate hereafter to be charged and [fol. 874] collected instead of a fare of five cents from each passenger upon each the Manhattan division and the Subway division of the rapid transit railroad lines operated by the Company and accordingly filed, published and posted certain tariff sheets issued February 1, 1928, and effective March 3, 1928."

It further alleges that the Transit Commission took no action whatever rejecting said tariff sheets when tendered for filing under the provisions of the rules and regulations of the Commission although a publication of said tariff sheets not in accordance with these "regulations," might be considered by the Commission sufficient cause for rejecting such schedules. The plaintiff further alleges that by virtue of the provisions of the Public Service Commissions Law and particularly Section 33 thereof, it is prohibited under penalty from charging a greater or lesser fare than the fare of seven cents specified in the said tariff schedules.

I say with respect to these allegations that according to plaintiff's own contentions it has lawfully fixed a fare of seven cents on its Manhattan Division and Subway Division and that it is required by law to charge such rate under pain of penalty. This contention is elaborated upon by plaintiff

in Paragraph XXXIV. This paragraph refers to an application made by the plaintiff to the Transit Commission under Section 29 of the Public Service Commission Law for permission to put the said tariff sheets into effect as to each the Subway division and Manhattan division upon not more than five days' notice after publication at stations and filing with the Commission; which petition although filed with the Commission on February 1, 1928, was neither granted nor denied by the Commission during the said five-day period.

[fol. 875] With respect to plaintiff's allegations in paragraph XXXIV I point out that nowhere does plaintiff allege that any order rejecting said tariff schedules was made by the Transit Commission up to the time this complaint was verified (February 14, 1928) and that according to plaintiff's own contentions as contained in paragraph XXXIII the seven-cent fare was lawfully established by it and that it would be required under penalty imposed by law to charge that rate.

The plaintiff is here contending that there is a federal question arising under the Fourteenth Amendment of the Constitution of the United States in that contrary to its provisions it is being deprived of its property without due process of law. The Fourteenth Amendment provides in part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law".

Notwithstanding the plaintiff's contention that by some law of the State it is being deprived of its property without due process of law it does not under this cause of action allege or set forth any law of the state (except by realleging the paragraphs of the first cause of action which had to do only with certain elevated lines) fixing a fare which might be held confiscatory. The only specific provision of law which the plaintiff refers to under this cause of action is not one fixing a rate which might be confiscatory but is one which

according to its own contentions gives the plaintiff the right to fix a seven cent fare. I say, therefore, that there is no cause of action alleged in paragraphs XXV to XXXIV of the complaint which purport to set forth the plaintiff's second cause of action.

[fol. 876] Third Cause of Action

The third alleged cause of action comprises twenty-one paragraphs (XXXVI to LVI), covering 34 printed pages with many subdivisions and tabulations, conclusions and immaterial matters.

As in the first two causes of action, allegations of fact have been so interwoven and confused with comments, observations and conclusions that it is difficult if not impossible to properly segregate or answer them without repeating them at length. Merely for the purpose of showing that no allegations are made which would constitute a cause of action, I will reply to these paragraphs.

Paragraphs XXXVI to XXLI purport to set forth the history of the Contracts Nos. 1, 2 and 3 for the construction by the City at its own cost of the present subway system, the leasing of the same to the plaintiff, the provisions of the contracts with respect to fare, the building of Additions, character of service and divisions of revenues and profits. The sum total of these allegations is:

1. That contracts Nos. 1 and 2 were made with certain predecessors of plaintiff for the construction of the original subway lines at City cost.

2. That said contracts contained also leases to the contractors for the operation of the said original subways for certain periods.

3. That said leases fixed and provided a single five-cent fare.

4. That the fare provisions of said leases (contracts 1 and 2) were superseded by the provisions of Contract 3.

5. That Contract No. 3 was entered into with plaintiff on March 19, 1913.

6. That "the principal object of the City in making this contract is to secure for the public convenience an adequate,

comfortable and rapid system of passenger transportation in the portions of New York which will be served by the Railroad and the existing railroads."

[fol. 877] 7. That "the Lessee shall operate the Railroad and the existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given as required by the Commission under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) or (1) in part or parts of the Railroad, and (2) any part or parts of the Existing Railroads and (3) between any part or parts of the railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare."

I do not deny any of the allegations with respect to the above matters, except the allegation that the fare provisions of Contract No. 3 superseded the fare provisions of Contracts Nos. 1 and 2. The fare provision of Contract No. 3 did not supersede the provisions of the previous contracts, but continued and enlarged the obligations of the original fare provisions to the extent that the lease of 1913 covered additional railroads. The plaintiff's allegations otherwise plainly indicate the facts with regard to the making of these contracts and the agreement of the parties with respect to the fare. For the convenience of the Court Contract No. 3 is submitted herewith (Exhibit D).

In paragraph XLII plaintiff alleges that the consent of the City required by Section 18, Article III of the State Constitution to the construction and operation of the railroads comprised within the system covered by Contracts 1, 2 and 3 was granted *unconditionally*. I deny this allegation and say that the consitutional consent of the City for [fol. 878] the purpose stated was granted upon and subject to all the terms and conditions contained in said contracts. Submitted herewith (Exhibit L) is a copy of the resolution of the Board of Estimate and Apportionment which constitutes the constitutional consent of the City to

the operation of the railroads leased to the plaintiff under Contract No. 3.

The contract is made part of the resolution of consent and all the terms and conditions of said contract are thus made terms and conditions of the consent.

In paragraph XLIII plaintiff alleges that the fare provisions in said Contracts 1, 2 and 3 are subject to the regulatory power of the State, either directly or through a Commission and that the Courts of the State have so determined. Plaintiff fails, however, to allege that it made any application to the Commission under Section 49 of the Public Service Commission Law (except in 1920 and 1922 later discussed) which would invoke the regulatory power of the Commission.

Furthermore plaintiff fails to cite or refer to any case or decision in or of the Courts of this State holding that the Commission has power to regulate the fare fixed in Contracts Nos. 1, 2 or 3.

While the allegations referred to are mere conclusions on the part of plaintiff and not allegations upon which a cause of action could be based, I deny each of them emphatically and specifically. In no case or action have the Courts of this State decided the question as to the power of the State directly or through a Commission to regulate, change or modify the fare fixed in Contracts 1, 2 and 3. On the other hand I say that the Court of Appeals in Admiral Realty Co. vs. The City, 206 N. Y. 110, has distinctly held that the City [fol. 879] had a right to contract with the plaintiff for the fixation of a "single five-cent fare." Other cases will be cited in the brief.

Paragraph XLIV sets forth certain allegations with respect to "unforeseen conditions which have supervened to render a five-cent fare inadequate, unreasonable, confiscatory and invalid." Without conceding the truth of any of the allegations contained in this paragraph I say that the conditions referred to, or the supervening thereof, are immaterial, irrelvant and without force or effect in this situation which involves a fare fixed by a contract unalterable except by agreement of the parties.

Paragraph XLV, Subdivision A, sets forth further allegations of a similar nature to those contained in Paragraph XLIV, and I dismiss them with the same comment.

Subdivision B of paragraph XLV sets forth that as a result of the alleged change in price levels, etc., the fare on rapid transit railways and street surface railroads throughout the United States have been substantially advanced since 1913 "despite" franchise limitations. Plaintiff attaches a table naming certain cities in which it is alleged increases have been permitted. Plaintiff fails to allege, however, whether such fare increases, if made, were made without the consent of the municipalities or even that these municipalities had ever prescribed a franchise rate. In any event the statement of alleged fact contained in Subdivision B of Paragraph XLV are irrelevant, immaterial and without force or effect in a situation which involves a fare fixed by a contract unalterable except by agreement of the parties.

[fol. 880] Subdivisions C and D of Paragraph XLV are long statements to the effect:

1. That when the 1913 contracts were made it was contemplated that the City would not become a competitor of the plaintiff, except possibly through the recapture of portions of plaintiff routes and subsequent municipal operation thereof on a basis which would be substantially non-competitive with plaintiff's remaining lines;

2. That the City is now building new rapid transit lines to be operated by it in its "proprietary capacity" with certain advantages which plaintiff does not enjoy, and that the proposed new Eight Avenue System now under construction will deprive plaintiff of at least 110 million passengers per year thereby reducing its net earnings.

In answer to these allegations I respectfully refer the Court to the provisions of Contract No. 3 including the lease contained therein. There is no word or phase in such contract which would indicate any intention upon the part of the City to grant to the plaintiff any exclusive right or franchise to operate subways in the City of New York. On the other hand, by the express provisions of that contract and lease the City reserved the right pursuant to the provisions of the Rapid Transit Act to recapture the lines constructed under the contract and the plaintiff agreed, upon the City's demand to modify the original Contracts, 1 and 2 so that the City could recapture certain portions of the

routes constructed under those contracts in substitution for certain portions of the routes constructed under Contract No. 3. The whole purpose of this provision was to permit the City to acquire for operation, either by it or by any other contractor to whom the City might grant the privilege, an entire east side system or an entire west side system in the Borough of Manhattan rather than the sys- [fol. 881] tem comprised partly of east side lines and partly of west side lines which were constructed under Contract No. 3. The exercise of the City's right to recapture either an east side or a west side system would place the City immediately in the position of a competitor of the plaintiff. Moreover, it could not have been contemplated in 1913 when Contract No. 3 was made that it would be thereafter unnecessary to construct additional subways in the City and it is plain from the provisions of the contract that it was not contemplated, if additional subways were constructed that this plaintiff must be the operator of them.

The City's experience prior to 1913 had demonstrated that transportation facilities had not kept pace with the population, which was increasing by leaps and bounds. The plaintiff's officials understood the situation as well as anyone, and its present contention that no more subways should be built because they would take passengers from its now heavily congested lines is absurd.

In subdivision E of paragraph XLV plaintiff refers to the "anomalous, unjust and oppressive" policy of the City which would "suggest strongly the propriety of the changed circumstances and conditions, and the affirmative acts of the City itself, should also be deemed to liberate the plaintiff from the fare limitations contained in the 1913 lease and certificate." To indicate the "policy" of the City so characterized, plaintiff again refers to the "program of active competition" and to certain acts of the Transit Commission in "insisting that the plaintiff purchase 432 or other substantial number of additional cars for use on the subway lines and install signals upon the local tracks of both subway and elevated lines, and further that the City, in its "proprietary capacity," is insisting and requiring [fol. 882] that the plaintiff extend the subway local platforms and provide the additional rolling stock and extension of power facilities incidental thereto; with vast addi-

tions and extensions to the operating properties of the plaintiff which would require it to raise approximately $40,000,000 of new capital therefor. The allegations of subdivision E are extended and elaborated upon in subdivisions F and G in which latter subdivision the plaintiff again refers to the expenditure forced upon it by the City of upwards of $40,000,000 for improvements.

There are no allegations contained in any of the subdivisions of Paragraph XLV upon which a good cause of action could be based. Neither the alleged increase in price levels, the fare increases in other cities, nor plaintiff's own views with respect to the impropriety of competition with its lines, have any force or effect or even relevancy with respect to the question of the legality of a five-cent fare fixed by contract.

In Paragraphs XLVII, XLVIII and XLIX the plaintiff goes into detail with respect to the forced expenditures amounting to upwards of "$40,000,000," referred to in Paragraph XLVI.

Paragraph XLVII has to do particularly with an order made by the Transit Commission on April 21, 1926, requiring the plaintiff to extend certain station platforms. The plaintiff estimates the cost of this work including additional equipment and power machinery at $24,265,000 (Paragraph LI, subd. B). Although plaintiff does refer (page 61) to the fact that on December 31, 1927 the platform extension order of April 21, 1926 was modified by the Transit Commission so that plaintiff should only be required to lengthen platforms at four stations, plaintiff does not allege nor call the attention of the Court to the [fol. 883] fact that the said modifying order of December 31, 1927 contained a provision that the order would be withheld as to all the other stations.

The orders of April 21, 1926 and December 31, 1927 are included in plaintiff's moving papers being exhibits H and I thereof. I call the attention of the Court to the fact that the original order of April 21, 1926 required the extension of 79 platforms at 47 stations, while the amended order applies to only 8 platforms at 4 stations. Notwithstanding the fact that 90 per cent of the work involved in the original order has been eliminated, the plaintiff still includes the

entire $24,265,000, among its "early prospective requirements" page 67).

I believe that the purpose of the plaintiff to misrepresent its true situation to the Court is evidenced by the facts above set forth. It is further evidenced by the allegations contained in paragraph XLIX of the Complaint in connection with its tabulation of "Early Prospective Requirements" (p. 67). This paragraph refers to a hearing by the Transit Commission on a date unnamed at which threats were said to have been made that an order would be issued requiring the plaintiff to purchase 432 new cars. These threats of which there is no proof were alleged to have been made by special counsel to the Commission "in the public press." Plaintiff does not allege that any order was made and I say that none was in fact made. The plaintiff (p. 63) alleges that "such threatened order, if made * * * would be unauthorized."

In the tabulation of "Early Prospective Requirements" (p. 67), plaintiff again alleges that it will have to provide capital to the amount of $10,856,000 for the purchase of these 432 cars and the additional power equipment under an "order" which has never been made.

[fol. 884] The plaintiff significantly fails to allege or knowingly suppresses the fact that the application for 432 additional cars was vigorously contested by it before the Transit Commission, that many public hearings were held at which plaintiff through its counsel introduced a vast amount of testimony (herein referred to and made part hereof) and that no decision has ever been made by the Commission nor has it been intimated that any would be made.

In paragraph XLV, subdivision E (2) of Complaint plaintiff further alleges that "in the exercise of the State's regulatory powers the Transit Commission is insisting that the plaintiff * * * install signals upon the local tracks of both subway and elevated lines (the direction to the latter effect having been accepted by the plaintiff)." In its table of "Early Prospective Requirements" (p. 67) plaintiff alleges that it will be required to provide capital for this work to the extent of $4,345,000. Plaintiff does not attach a copy of this order of the Commission which it

"accepted" but for the information of the Court I attach a copy of such order to this affidavit (Schedule 1).

It appears from this order which the plaintiff accepted that the work of installing signals is to be done in sections and over a period of nine years expiring on June 30, 1937. This would negative any allegation of the plaintiff therefore that the expenditure involved is in early prospect.

The plaintiff's allegations with respect to the imminent and forced expenditure of "upwards of $40,000,000," for the extension of station platforms, purchase of new cars and installation of signals do not accord with the facts as hereinabove set forth. Even if they were true, which they are not, they would not constitute acts of "oppression" on the part of defendants, City of New York and Transit [fol. 885] Commission, nor would they constitute grounds for the increase of the five-cent fare fixed and contained in contracts unalterable except by agreement of the parties.

In Paragraph XLVI, subdivision A, of Complaint plaintiff alleges:

1. The making of an application on May 28, 1920, to the Public Service Commission (predecessor of the Transit Commission) for an increase of fare on its subway lines.

2. The dismissal of that application by the Commission for lack of jurisdiction.

3. The application by plaintiff for a rehearing.

4. The denial of such application.

For the information of the Court a copy of this order is attached (Schedule 2). The reason why it was denied as set forth therein is that the Commission was without jurisdiction to fix a rate of fare different from that fixed by Contract No. 3."

In subdivision B of the same paragraph the plaintiff alleges:

1. The making of an application on March 22, 1922, to the Transit Commission for a temporary increase of fare on the subway and Manhattan divisions.

2. The denial of that application for lack of jurisdiction.

A copy of the Commission's order of denial is attached (Schedule 3). It also was denied for lack of jurisdiction.

In subdivision C of paragraph XLVI the plaintiff alleges that by reason of the said orders, the Public Service Commission and Transit Commission, respectively, have construed the provisions of the Public Service Commission Law so as to limit the plaintiff to the fare of five cents on [fol. 886] its subway and elevated lines and to compel the plaintiff to charge not in excess of such fare.

The plaintiff does not allege that it ever instituted proceedings in any court of this State to review or set aside the said orders of the Commission. I am, however, informed that the plaintiff did institute a certiorari proceeding in the Appellate Division, Supreme Court, First Department, to review the order of the Public Service Commission made in 1920, but that it abandoned the prosecution of such proceeding and discontinued the same.

The annexed affidavit of M. Maldwin Fertig sets forth the facts with respect to this matter. These facts are set forth for the purpose of showing merely that the plaintiff has ignored two opportunities to obtain a determination in the courts of this State with respect to the power of the Commission to regulate the fare chargeable by it without in any way conceding or admitting that the denial of applications made in 1920 and 1922 would justify an application to this Court in 1928 to have the fare set aside as confiscatory, even if the Commission had wrongfully denied them.

In further disregard of the facts with respect to its own failure to obtain a legal adjudication as to the Commission's powers, the plaintiff now asserts (Paragraph XLIII) that the fare chargeable by it on the subway and elevated lines is subject to regulation by the Transit Commission and that the courts of this State have so held.

Paragraphs XLVII, XLVIII and XLIX above discussed contain nothing in the way of allegations of fact which would tend to constitute a cause of action.

[fol. 887] In Paragraph L of Complaint, plaintiff sets forth certain tabulations said to contain the estimated "Present Value" of properties "used and useful" in the operation of the subway division, the "Earnings Available as a Return," the "Percent of Return Actually Earned on Such Value," the "Earnings Required for 8% Return at Least" and the "Deficiency in Earnings Below 8% Return at Least."

I invite the attention of the Court to the fact that all of the property valued as above is owned by the City, although some of it has been provided at the cost of plaintiff. I say further that whatever may be the true valuation of the properties in question or whatever the actual facts may be with respect to available earnings as return thereon, these figures are irrelevant and immaterial and of no force or effect for the purpose of indicating the adequacy or otherwise of the five-cent fare fixed in contracts, by way of return on the plaintiff's investment and that said contracts are unalterable except by agreement between the parties. Notwithstanding this, deponent feels that these conclusions, which are elaborated in the affidavits submitted by the plaintiff herein, should not go unchallenged. Attached hereto is an affidavit of John Bauer in which they are discussed and controverted.

In Paragraph LI of the Complaint, plaintiff sets forth tables, some of which have been previously referred to, purporting to show the "Early Prospective Requirements of the Plaintiff for Increases in Operating Expenses and Fixed Charges" and "Increased Operating Expenses of the Plaintiff in Immediate Prospect."

The principal requirements are made up of the alleged $40,000,000 previously discussed, which is not required and [fol. 888] would in any event be a capital expenditure provided for by the contract, certain funding and interest charges and items of "Additional Wages," that have not been allowed, "Additional Service" and "Additional Maintenance." As to the last three items no facts or particulars are alleged. The correctness of the plaintiff's allegations in respect to its other immediate or prospective expenditures may also be judged by the test applied to the $40,000,000 expenditure. In any event, assuming the truth of all these allegations, I say they have no bearing upon the adequacy or inadequacy of the five-cent fare fixed by contract as aforesaid.

In paragraph LII plaintiff alleges the confiscatory effect (at least during 1926 and 1927) of the five-cent fare. These allegations are mere conclusions and even if true, which I deny, would not result in rendering such five-cent fare "unconstitutional" or in violation of the provisions of the 14th Amendment, United States Constitution, for the rea-

son that said fare is fixed by contracts unalterable except by agreement of the parties.

In Paragraph LIII plaintiff realleges the allegations of Paragraphs XXXII to XXXIV of the Complaint. These paragraphs have been heretofore discussed under the second cause of action. Notwithstanding that plaintiff (in said paragraphs so realleged) alleges that it has "fixed, determined and established" the seven-cent fare "in pursuance of the authority and powers conferred by law" by the filing and posting of the tariff schedules and that it is prohibited from charging any other fare, it further alleges in Paragraph LIV that if it did charge such seven-cent fare, it would be at once "subjected to a multiplicity of suits" as well as to "prosecution for the fines and penalties prescribed by the Public Service Commission Law" and would [fol. 889] be involved in the "risk of absolute ruin" and the "entire destruction and confiscation of its property by reason of the enormous fines to which it would be exposed."

I invite the attention of the Court to the absolute inconsistency and unsoundness of these allegations. If, as alleged in paragraphs XXXII to XXXIV, it has a legal right to charge seven cents and moreover would be penalized if it did not charge such fare, how could it, as alleged in paragraph LIV, be subjected to any penalties or involved in any risks by charging such fare? On the other hand, if it could be penalized for charging more than five cents, as alleged in paragraph LIV, on the ground that it was charging an unlawful fare, what becomes of plaintiff's allegations in paragraphs XXXII to XXXIV that it has legally established a seven-cent fare? The utter fallacy of the theory on which plaintiff has based this action is made apparent by its own allegations.

With respect to the third cause of action I repeat what has already been said with respect to the second cause of action, to wit, that the plaintiff, although here on the theory that by some law of the State it is being unlawfully deprived of its property, the only specific provisions of law to which it refers (except the Act of 1894, affecting certain elevated lines and which has already been discussed), are those which not only do not fix a five-cent fare, but which, according to plaintiff's contentions, authorize a seven-cent fare (Paragraph LIII realleging Paragraphs XXXII to XXXIV).

Fourth Cause of Action

The fourth alleged cause of action pertains not only to the first three causes but also to the fare chargeable on the Subway Division and Manhattan Division considered as a unified operation.

[fol. 890] Apart from its reallegation of paragraphs I to LVI plaintiff's fourth alleged cause of action is composed mainly of conclusions.

Paragraph LVIII refers to certain schedules (A to G) which set forth with respect to the Subway and Manhattan Divisions the gross income, interest, amortization and maintenance charges and taxes for the years 1921 to 1927 inclusive.

Paragraph LXIV is a reiteration of statements contained in previous paragraphs making vague references to threats of "recapture" and "seizure" of the plaintiff's lines, or to the institution of legal proceedings to preserve the five-cent fare. While none of these statements with respect to recapture or seizure, even if true, would bring the action within the provisions of the Fourteenth Amendment, I do not desire that they go unchallenged. The plaintiff does not allege when or where the threats of seizure of the plaintiff's lines were made. I allege on information and belief that no threat to seize the lines or properties of the Company has ever been made by any official of the City, by any member or official of the Transit Commission.

In this connection I direct the attention of the Court to the provisions of Chapter 7 of Contract No. 3, which provide for the City taking back the railroad and properties leased under Contract No. 3.

Article LXXXIX of said contract provides:

"In case of default of the Lessee in paying the rental herein provided or in case of the failure or neglect of the Lessee faithfully to observe, keep and fulfill any of the conditions, obligations and requirements of the lease, the City by the Commission upon thirty (30) day's notice to the Lessee of its intention so to do may:

(1) Serve notice of such default upon the Lessee directing the Lessee to cure the default within ninety (90) days.

[fol. 891] If there shall be any dispute as to the fact of default or as to the remedying thereof the Lessee may apply to the Court. If the default be not remedied within such time or within such further time as may be provided by the Commission or by the Court, the City shall thereafter be at liberty to enter upon and as the agent of the Lessee and operate the Railroad and Equipment and Existing Railroads and Existing Equipment at the rate of fare and in the manner provided in the lease for the remainder of the term or to enter into a contract subject to the same conditions with some other person, firm or corporation to operate the Railroad and Equipment and Existing Railroads and Existing Equipment as the agent of the Lessee for such period of time as the City may elect * * *."

It is apparent from the provisions of the contract that the City could not enter upon the Railroad or oust the plaintiff therefrom by reason of any default without first giving the plaintiff thirty (30) days' notice of such default and giving it a further opportunity to remedy such default within ninety (90) days. It is further apparent that in case of dispute as to the fact of the default the plaintiff would have its day in court with respect to such matter.

In view of these provisions it is apparent that the allegations of the plaintiff as to the threatened seizure of its lines are without basis in fact and are made solely to persuade the Court that the plaintiff is in some danger of being deprived of its property in violation of its rights.

Paragraph LXV refers to the method of unified operation of subway and elevated lines and the results which it is claimed would follow dismemberment of the system. Paragraph LX sets forth estimates of the value of the [fol. 892] subway and elevated properties and allegations as to earnings available as a return thereon particularly with relation to the 8 per cent. return to which plaintiff claims to be entitled even including a return to it on the City-owned property. Paragraph LXI sets forth allegations with respect to the insufficiency of the five-cent fare even to pay a return on actual investment in the entire property owned, not by the plaintiff, but by the City. Upon the basis of the figures so furnished plaintiff proceeds to

the conclusion set forth in Paragraph LXIII that the five-cent fare is confiscatory and unconstitutional.

The defendants, The City of New York and Transit Commission, having appeared on this motion for the sole purpose of challenging the jurisdiction of this Court to grant either the injunction or temporary stay applied for, I submit that it would seem unnecessary until the question of jurisdiction has been passed upon to examine in detail the facts alleged by the plaintiff in its fourth cause of action for the purpose of answering them at length. It would be a physical impossibility for said defendants within the time allowed for the filing of answering affidavits to make the investigations which would be necessary in order to even verify the correctness of the long tabulations of figures annexed to the complaint.

Even assuming the correctness of these figures and the propriety of the conclusions which the plaintiff draws from them deponent says they have no relevancy, force or effect in connection with the question now before the Court. If, as defendants contend, the fare on the subway and elevated lines is fixed at five cents by reason of a contract unalterable except by agreement of the parties the various ques-[fol. 893] tions raised by the plaintiff under the fourth cause of action must be disregarded.

Said defendants do not, however, concede the correctness of the figures and computations set forth in the fourth cause of action or do they concede the propriety of the conclusions drawn therefrom even if such conclusions had any force or effect as allegations, which of course they have not.

Nevertheless for the purpose of showing the Court that these figures, computations and conclusions whatever their relevancy may be, do not indicate the true situation with respect to the five-cent fare or the sufficiency thereof, I have had prepared and attach hereto the affidavit of John Bauer, a financial expert of experience, denying all these conclusions and summarizing the real situation with regard to the five cent fare on the subway and elevated railroads.

With respect to the fourth cause of action I reiterate the statements heretofore made with respect to the second and third causes, to wit: that while failing to point out any statute fixing a five-cent fare (again excepting Ch. 743, L.

1894) it expressly realleges the provisions of Sections 28 and 29, P. S. C. Law, which its claims authorizes the seven-cent fare.

As stated above the plaintiff realleges under the fourth cause of action all the previous paragraphs of the complaint including Paragraphs XXXII, XXXIII and XXXIV which set forth the plaintiff's claim with respect to its lawful establishment of the seven-cent fare and the re-allegation of which immediately destroys the theory upon which the action is based.

Fifth Cause of Action

In the fifth alleged cause of action (Paragraph LXV) the plaintiff realleges Paragraphs I to LXI. The remaining [fol. 894] paragraphs of this cause of action are a series of statements referring to alleged orders, threats, newspaper articles and conclusions of the plaintiff which are mainly repetitions of similar statements previously set out in the complaint and which are without legal value, force or effect.

I reiterate my previous statement that no "threats" have been made against this plaintiff by anyone to the effect that its lines or property may be seized nor has any attempt been made "to deter and prevent the plaintiff and its directors and officers from exercising their lawful, corporate right to procure an orderly determination of the matters and things set out in this complaint and their lawful remedy of resort to the Courts to obtain an adjudication as to the said confiscatory rate of fare of five cents." On the other hand, I say that the City and the Transit Commission instituted actions in the State Courts for the very purpose of enabling this plaintiff to obtain an orderly determination of all these matters. Instead of accepting the City's invitation the plaintiff has applied to the District Court for injunctions to restrain the City and the Transit Commission from prosecuting these actions. It comes with ill-grace, therefore, from the plaintiff to say that these defendants have attempted to deter it from obtaining a proper adjudication as to its rights.

Outside of the fact that it realleges paragraphs I to LXI, there are no allegations of fact contained in the fifth alleged

cause of action. With respect to the realleged paragraphs, they have been sufficiently answered in this affidavit.

I insist that no cause of action whatever has been alleged under the fifth cause of action.

[fol. 895] To summarize what has been set forth above, I say:

1. That the one statute alleged in the complaint fixing a rate of fare, is Chapter 743, Laws of 1894, and that only applies to certain east side lines of the elevated division; and has been superseded by Contract (the Elevated Extension Certificate).

2. That by reason of that contract and of Contracts Nos. 1, 2 and 3, the fare now chargeable on the Subway and Elevated systems are now fixed by contracts unalterable except by agreement.

3. That by reason of these facts, the plaintiff has not stated any cause of action within the scope of Article XIV, U. S. Constitution, nor any cause of action cognizable by a Federal Court.

Affidavit of Ralph Norton

The first eighteen paragraphs of the affidavit of Ralph Norton sworn to on February 25, 1928, are devoted to setting forth an alleged summary of the scope of the original complaint and prayer for relief. As these matters have already been answered in connection with the complaint itself, there need be no repetition.

In Paragraph 19, however, the affiant Norton sets up certain new matter with respect to the application which the plaintiff made to the Commission on February 1, 1928. For the first time in this litigation, the claim or suggestion is made that the application presented to the Commission on February 1, 1928, was a "petition" under the provisions of Section 49 of the Public Service Commissions Law. The plaintiff is apparently seeking to disaffirm the position which it strongly asserted in the original complaint, to-wit: that the application was only under Section 29.

It is only necessary to refer to Paragraphs XXXII to [fol. 896] XXXIV of the Complaint to ascertain the plaintiff's position with respect to the nature of the application:

1. That as a matter of right it had filed certain revised tariff sheets on February 1, 1928, "establishing such a fare of seven cents per passenger," to take effect March 3, 1928 (paragraph XXXIII).

(The only provision of the Public Service Commissions Law authorizing common carriers to file revised tariff schedules is section 29.)

2. That on February 1, 1928, plaintiff duly filed an application to the said Transit Commission under Section 29 of the Public Service Commissions Law in accordance with the well-established practice of the Transit Commission and the Public Service Commission asking that the said Transit Commission, pursuant to the powers vested in it by law, approve the said" tariff sheets "and that it grant permission to the plaintiff to put the said tariff sheets into effect as to each Subway and Elevated Division upon not more than five days' notice." (Paragraph XXXIV.)

There is no allegation in paragraph XXXIII or XXXIV of the complaint, or even an intimation that the plaintiff applied or intended to apply, under Section 49, for an exercise of the Commission's regulatory powers. The position of the plaintiff was, as it alleged:

First, that the seven-cent fare was "no more than a just and reasonable rate of fare" (Paragraph XXXII).

Second, that it had lawfully "fixed, determined and established" such fare by filing of the revised sheets (Paragraph XXXIII), and

Third, that the only application which it made or intended to make was for a special permission to put the rate into effect five days after the filing of schedules rather than [fol. 897] thirty days thereafter. (Paragraph XXXIV.)

The inconsistency of plaintiff's present claim becomes further apparent from a reading of the first and second subdivisions of Paragraph 19 (folios 82 and 83) of the Norton affidavit, where it is said:

"As stated above and as shown in the original complaint in this action, the plaintiff had already made two applications to the Transit Commission and its predecessor under

section 49 of the Public Service Commissions Law, for relief from the inadequate five cents fare, with the result that in each instance the Commission had determined that, under section 49, it had no jurisdiction or power to grant relief from the five cents fare and had determined that this inadequate fare must be continued.

In my opinion, this ruling was erroneous in law and the plaintiff was not required to present such an application again to the Commission, before appealing to this Court for relief from the confiscatory effect, not only of the provisions of the statute which directly imposed upon the Interborough Company such a fare, but also of the orders and the determinations of the Commission, under powers delegated to it by the Legislature, which operated to continue such limitations and which deny to the plaintiff that relief which the State's regulatory plan had vested it with the power and duty to grant."

Notwithstanding these statements, the plaintiff through the affiant, Norton, now comes into this Court and says that the plaintiff did, on February 1, 1928, apply under Section 49. A reading of the application itself as quoted in the Norton affidavit (folios 86 and 87) will remove any doubt to to what section the plaintiff did apply under. It provides at the outset that the plaintiff "applies under Section 29 of the Public Service Commissions Law." The prayer for relief reads that the plaintiff "applies * * * pur-
[fol. 898] suant to the powers vested in you by law." The words "by law" as used here could not by any reasonable interpretation be held to apply to anything but Section 29 under which the plaintiff expressly applied.

The present contention of the plaintiff manifestly is in the nature of an after thought and is made for the purpose of having it appear that the order of the Commission of February 14, 1928, was an exercise of the Commission's regulatory power and in some way fixed or limited the fare chargeable by plaintiff.

In paragraph 20 of the Norton affidavit (folio 89), it is said that "when definite statements began to appear in the public press" that the Transit Commission and its legal advisors "proposed to disregard the statutory procedure

and its quasi judicial duty," the plaintiff through its General Counsel addressed a communication to the Commission dated February 8, 1928, which is set forth in full in the affidavit. This was plainly a self serving document, sent for the purpose of making a record to be used in the prematurely begun action in this Court. It gave notice of plaintiff's intention to bring "the undisputable facts before a tribunal which may not disclaim the power and jurisdiction which today is yours."

This letter while again expressly claiming (folio 96) that the plaintiff had only invoked the jurisdiction of the Commission under Section 29, requested (folio 98) that "you will definitely take jurisdiction of our rates and proceed upon any proper complaint to determine the facts" and further "counsel for the company will be glad to attend before you and arrange for the presentation of our contentions and proofs" If this was intended to be an appli-[fol. 899] cation for a hearing under Section 49, it certainly fell short of the mark. No mention of Section 49 is made in the letter, the only reference to any sections being to 28 and 29.

The Commission did not order a hearing with reference to the revised tariff sheets for the reason that they fixed and provided an unlawful fare. No hearing was necessary to determine this matter. The application did not request a hearing, it being the plaintiff's own position that it had a lawful right to fix a seven-cent fare and the only condition precedent to the actual collection of the fare was the filing of a revised tariff schedule to take effect automatically after 30 days, or with the special permission of the Commission, after five days.

The order of the Transit Commission of February 14, 1928, and the opinion of Commissioner Godley upon which it was made, plainly indicate that the Commission did not construe the filing of the schedules or the accompanying application for short notice as an application for the exercise of the Commission's regulatory power under Section 49. A copy of Commissioner Godley's opinion is attached to the answering affidavit of Clarence M. Lewis (as Schedule 1, thereof). The "special session" (Norton affidavit, folio 104) at which the order was made, was in no sense a hearing or intended to be one. It was an executive session

of the Commission for the transaction of its routine business.

In Paragraph 21 of the Norton affidavit it is set forth that "the very earnest request above quoted with the very definite warning that it would be the Commission's refusal to accord a hearing 'which transfers future consideration of those fares to another tribunal' was never acceded to by the Transit Commission" but that thereafter The City and the Commission proceeded to institute suits in the State [fol. 900] Court to compel the observance of the five-cent fare.

The comment is made that the Commission in concert with the City had refused to accord to the Company the hearing "such as is expressly provided for by section 29 and section 49, subdivision 1 of the Public Service Commission Law." It is hardly necessary to repeat my previous statement with respect to the failure of the plaintiff to apply under section 49 or to the fact that the Commission was under no obligation and had no right to hold a hearing under section 29 pursuant to which the application was made.

The statement is also made (Norton affidavit, folio 103) that the result of the Commission's action was to make it impossible for the plaintiff to apply for a rehearing or to institute certiorari proceedings in the State Court for a review of the determination. In view of the fact that the plaintiff had previously in 1920 and 1922 refused to take advantage of two opportunities to prosecute certiorari proceedings in the State Court where definite orders had been made after hearing held under section 49, this protestation on the part of the plaintiff is not made in good faith and emphasizes its purpose to confuse the issue, which has been made so evident throughout this controversy.

In paragraph 23 of the Norton affidavit under the heading "Fare limitations summarized" the affiant sets forth

(1) That it is limited to the 5-cent fare by Chapter 743 of the Laws of 1894 with respect to the elevated railroads.

The effect of this Act has already been discussed with respect to similar allegations made in the complaint. It was shown in the first place that it only applied to certain of [fol. 901] the elevated lines and in the second place that it

has been superseded by a contract voluntarily entered into by the plaintiff, to-wit: the Elevated Extension Certificate.

(2) The provisions of the Public Service Commission Law which require the publication and filing of traffic schedules and prohibits changes in fares except upon notice; the orders of the Public Service Commission made pursuant thereto and the tariff schedules filed by the plaintiff prior to February 1, 1928, fixing the 5-cent fare.

The provisions of the Public Service Commission Law with respect to the filing and publication of tariff schedules (sections 28 and 29) do prohibit changes except after notice. It is the plaintiff's contention, however, that it properly gave such notice and thereby lawfully put the 7-cent fare into effect. The only order of the Public Service Commission with respect to these tariff schedules was that of February 14, 1928, which rejected them as being unlawful and which rejection the plaintiff contends was improper. As to the schedules filed prior to February 1, 1928, limiting the plaintiff to a 5-cent fare it may be said that if the plaintiff is correct in its assertion that the schedule filed on February 1, 1928, was a lawful one it properly displaced and superseded the previously filed schedules and rendered them ineffective.

(3) The limitation as to fare contained in the Elevated Extension Certificate granted to the plaintiff on March 19, 1913.

It is true as affiant Norton contends that this Certificate does limit the fare on the elevated system to five cents and I say in answer thereto that by accepting that certificate with that limitation the plaintiff has bound itself by a contract to the five-cent fare and for that reason, even were the rate confiscatory, no case would be made within the scope [fol. 902] of the Fourteenth Amendment, U. S. Constitution.

The plaintiff now claims that the Rapid Transit Act under which this certificate was granted contained no authority for prescribing a rate of fare. For the convenience of the Court I attach hereto a transcript of section 24 of the Rapid Transit Act under which this certificate was granted.

(Schedule 4.) I also refer the Court to the certificate itself (Schedule 5) and call the attention of the Court to the fare clause contained therein which has already been quoted herein at length.

It is apparent from this provision that whatever fare the plaintiff previously had the right to charge on the elevated railroads, whether fixed by statute or filed schedule, was superseded by the fare fixed in this certificate. It expressly limits the plaintiff to a fare of five cents not only on the "Railroads" being the extensions authorized by that certificate but also on the "Manhattan Railroad" which comprised all of the lines owned by the Manhattan Railway Company and leased to the plaintiff. For a definition of the term "Manhattan Railroad" the Court is respectfully referred to the first paragraph on page 3 of the Certificate (Exhibit E).

(4) The provisions of Contract No. 3 which fixed the rate of fare of five cents on the subway division.

Although the affiant Norton does not question the power of the Commission to fix the rate of fare in this contract he does claim that it is required to fix such fares "as are reasonable" and "best suited to the public interest." For the convenience of the Court a correct transcript of Section 27 of the Rapid Transit Act is attached hereto (Schedule [fol. 903] —), in order to show the power of the Commission to fix the fare. The Contract No. 3 itself has also been submitted (Exhibit D), for the purpose of showing the provisions thereof with respect to fare.

Here again I agree with the affiant Norton that Contract No. 3 is a limitation on the fare chargeable by plaintiff. I, repeat, however, the statement set forth immediately above that that limitation is one of contract and even were the rate confiscatory it would give rise to no action under the Fourteenth Amendment.

(5) The power delegated by the State Legislature to the Transit Commission to prescribe reasonable rates after a hearing notwithstanding that other or different rates are prescribed by statute, franchises or contracts other than rates stipulated in constitutional consents granted before the said Commission and its predecessors were created,

which power the Commission has unlawfully refused to exercise.

As to this I say that while the Transit Commission has been empowered to regulate rates fixed in statutes and in certain franchises it has never been empowered to regulate th rate fixed and provided either in the elevated extension certificate or in Contract No. 3 and therefore the Commission could not have unlawfully refused to exercise a power which it did not possess. Norton's statement with respect to the Commission's power is argument merely and will be answered in the brief.

(6) The power delegated by the Legislature to common carriers to establish rates by the filing of tariff schedules in the manner prescribed by statute notwithstanding that other or different rates have been prescribed by statute contracts or franchises.

Although this has been classed by the affiant Norton among the "limitations" upon plaintiff, it would seem to be directly the contrary, if, indeed, as plaintiff contends and [fol. 904] affirms, the common carriers had such power. Paragraphs XXXII to XXXIV, Complaint.)

(7) The orders made by the Public Service Commission and the Transit Commission in 1920 and 1922 denying the applications of the plaintiff for an increase in rates and so requiring it to observe the 5-cent rate.

It would seem unnecessary to repeat what has already been said several times that the plaintiff had the opportunity to test the validity of these orders in the state courts and failed to take advantage thereof. In any event the denial in 1920 and 1922 of an application for fare increase would hardly justify the putting into effect in 1928 of an increased fare on the theory that the existing fare in 1928, was confiscatory. This is evidenced by the attached affidavit of M. M. Fertig from which it appears that for the two years immediately preceding the 1920 application the net revenues of the plaintiff totalled $2,923,325, while for the two years prior to the 1928 application the net revenues totalled $12,684,122.

(8) The denial by the Transit Commission of legislative or administrative relief compelling the observance of the five-cent rate and preventing the compensatory rate.

If the affiant Norton is referring to the denials of 1920 and 1922 that matter has been sufficiently answered above. If he is referring to the "denial" on February 14, 1928, it can only be said that that was not the denial of legislative relief. What the affiant means by administrative relief cannot be comprehended. The Commission's only power to grant relief is legislative in character and can only be exercised within lawful limits.

In paragraph 24 the affiant Norton refers again to the action of the defendant City of New York and Transit [fol. 905] Commission in instituting the actions in the State Courts as the culmination of their "threatened enforcement" of the five-cent fare limitation. If the plaintiff is bound by the five cent fare limitation as the defendants The Transit Commission and City contend, there is nothing unlawful in either of them doing what they have done, to wit: institute proceedings to protect the legal rights of The City.

Section 9 of the Rapid Transit Act and Section 57 of the Public Service Commission Law made this action mandatory upon the Transit Commission. Neither the officials of the City nor the members of the Transit Commission could have done less than they have done without neglecting the duties and obligations which have been imposed upon them by law and their own oaths of office.

Affidavit of Henry T. Berry.

The affidavit of Henry T. Berry, Comptroller and Chief Accounting officer of plaintiff, is made for the purpose of showing the inadequacy of the present five-cent fare.

It contains allegations with respect to:

1. The proportion of the properties in the system provided by the Manhattan Railway Company, The City of New York and the plaintiff with certain alleged valuations thereof on the basis of reproduction cost;

2. The outstanding capitalization and securities of the plaintiff and the Manhattan Railway Company;

3. The rental paid to The City of New York under Contracts 1 and 2 for the years ending June 30, 1926, and June 30, 1927;

[fol. 906] 4. The rentals payable by the plaintiff under the Manhattan Railway lease;

5. The actual revenues, operating expenses and fixed charges on the entire system operated by the plaintiff for the year ending June 30, 1926, and June 30, 1927;

6. The investment in property provided by the Manhattan Railway Company, The City of New York and the Plaintiff;

7. The inadequacy of the revenues under the five-cent fare based on reproduction cost;

8. The effect of the present rate limit to curtail the plaintiff's credit for raising additional capital.

9. The prospect of requirements of the plaintiff for increase in operating expense and fixed charges;

10. The change in price level between 1913, 1926-1927;

11. The irreparable damage threatened to the plaintiff.

In view of the existing contracts between the plaintiff and The City of New York which preclude this Court from passing upon the inadequacy of the five-cent fare as in violation of Article 14 of the United States Constitution, all the allegations set forth in the affidavit of affiant, Berry, are irrelevant and immaterial and have no force or effect. Even if this were not the case, I say, that the allegations of the affiant Berry, with respect to the inadequacy of such five-cent fare do not set forth the true situation of the plaintiff with respect to the matter. For the purpose of showing the inadequacy of the five-cent fare, the affiant Berry has set up a rate base, which is grossly excessive and does not represent the true value of the properties involved, and, furthermore, has applied the earnings and revenues under [fol. 907] the five cent fare in a manner which is erroneous and misleading.

The affidavit of John Bauer, attached hereto, points out the fallacy of the contentions made on behalf of the plain-

tiff by the affiant, Berry, and sets forth the true situation with respect to the value of the properties, the financial situation of the plaintiff and the adequacy of the five-cent fare.

The allegations of the affiant, Berry, with respect to the prospective requirements of the plaintiff for increases in operating expenses and fixed charges are a repetition of what has already been set up in the complaint itself and have already been answered by the deponent in connection with the complaint.

Affidavits of Earl E. Starbard, William S. Gorsuch, and Charles E. Williams

The three affidavits of the persons named above, are all intended to support and substantiate the affidavit of Mr. Berry and in answer to such affidavits deponent respectfully refers the Court to the affidavit of John Bauer, hereto attached.

As to the Second, Third, and Fourth Preliminary Objections

The second preliminary objection of the defendant The City of New York and Transit Commission to the present applications for an interlocutory injunction and stay is that the Supreme Court of the State of New York acquired prior jurisdiction over the subject matter of the action through the institution of that Court of two actions to restrain the plaintiff (defendant in said actions) from enforcing the seven cent fare as it threatened and proposed to do by reason of the filing of the revised tariff schedules on Feb- [fol. 908] ruary 1, 1928, and further through the institution by the Transit Commission of a proceeding under Section 57 of the Public Service Commission Law for a mandamus to compel the plaintiff to charge a five cent fare, and for an injunction to restrain its charge of the seven cent fare. A copy of the complaint in the action instituted by the City is submitted here with (Exhibit J).

Both of these actions and the special proceeding were instituted by the service upon the within plaintiff of summons and complaint or petition on February 14, 1928, within a few hours after the Bill of Complaint in the within action was served upon the defendants, City of New York and

Transit Commission. With the said complaints and petition there were served upon the plaintiff herein orders to show cause at a Special Term of the Supreme Court, New York County, returnable on February 20, 1928, why injunctions pendente lite should not be granted restraining this plaintiff from putting said seven cent fare into effect. Temporary stays were also granted pending the hearing and determination of those motions.

No stay was granted on the filing of the within Bill which would have restrained the City or the Transit Commission from taking any steps or instituting any suits in the State Courts. Three days after the said actions had been instituted, however, and while the temporary stay granted by the State Courts were in force and effect, the plaintiff herein on February 17th, 1928, at 8.20 p. m., obtained from Mr. Justice Winslow at Yonkers, N. Y., an order to show cause upon an ancillary Bill of Complaint said to have been filed "herewith," in the office of the Clerk of the United States District Court for the Southern District of New York, restraining the Transit Commission and the City from further [fol. 909] prosecuting the actions and proceedings instituted by them on February 14, 1928.

This order to show cause was returnable at a Special Term of this Court for Motions on February 21, 1928, the day after the orders to show cause obtained by the City and the Transit Commission were returnable in the State Court. On February 21, 1928, the said defendants appeared specially before Judge Bondy in said Special Term of this Court, and by their counsel Samuel Untermyer, Esq., challenged the jurisdiction of the Court to grant the temporary injunction applied for on various grounds which are referred to in the affidavit of Mr. Untermyer.

The second, third and fourth preliminary objections urged herein are that even a statutory Court has no power under Section 380 of the United States Code (Section 266, judicial Code) to grant an injunction to restrain the execution of a statute or order where a suit had been brought to enforce such statute or order and a stay granted in a State Court, and that the pendency of such suit automatically stays this action.

The second, third and fourth preliminary objections involving mainly questions of law will be discussed in the brief to be submitted herein.

The Application for Injunction Should Be Denied

I urge, therefore, that the plaintiff herein, not having set forth in the complaint any cause of action of federal cognizance, the petition herein made for an interlocutory injunction, and the motion for a temporary stay should be denied.

I further urge that the State courts having acquired prior jurisdiction over the subject matter of this action, in which courts the present plaintiff may obtain all the relief which it could obtain in this court, the petition and motion herein should be denied.

[fol. 910] I further urge that even if this Court decides that the complaint sets forth a cause of action within the cognizance of this court, and that this Court has acquired prior jurisdiction, this Court should not, as a matter of discretion, grant the injunction and stay now applied for, but that the status quo should be maintained until the issues herein have been finally tried and disposed of.

I urge that regardless of the final outcome of such action, the granting of such an injunction and stay pendente lite would work irreparable injury to the almost four million persons who daily use the lines of plaintiff as a necessary means of transportation between their homes and their places of employment or business; that it would be impracticable and almost impossible to work out any plan of rebate or reimbursement that would preserve the rights of such a large number of persons pending the trial of an action which would necessarily cover a long period of time; that an additional charge of two cents to every one of these four million riders would mean a large sum of money, approximately $80,000 per day; that even assuming the truth of plaintiff's allegations with respect to the inadequacy of its present fare, it has not and cannot show that it is in such dire need of financial relief as would justify this Court in imposing such an enormous burden day in and day out, upon the travelling public.

I further urge that the collection of such increased fare pending the trial and determination of the issues involved herein would cause controversies, disputes, public disorder and disturbances to the injury and damage of the said defendants which would greatly overbalance any injury or damage that might be caused to the plaintiff herein even

if its allegations with respect to the inadequacy of the fare were true and that as a matter of discretion this Court should deny the interlocutory injunction and temporary [fol. 911] stay herein applied for.

George P. Nicholson.

Sworn to before me this 12th day of March, 1928. Walter E. Dunn, Notary Public, Kings Co. No. 16, Reg. No. 8014; New York Co. Clerk's No. 8; New York Co. Register's No. 8009; Bronx Co. Clerk's No. 1; Bronx Co. Register's No. 2801; Queens Co. Clerk's No. 97. Certificate filed in Richmond County. Commission expires March 30, 1928.

[fol. 912] SCHEDULE 1

At a meeting of the Transit Commission held at its office No. 270 Madison Avenue, in the Borough of Manhattan, City of New York, on the 29th day of June, 1927.

Present: John F. Gilchrist, chairman; Louis C. Godley, Charles C. Lockwood, Commissioners.

Case No. 2864

Extract from June 29, 1927, Minutes of Transit Commission

In the Matter of the Hearing on Motion of TRANSIT COMMISSION as to the Adequacy and Safety of Signal System and Signal Equipment and Methods Now Used and Operated on the Local Tracks of Subway and Elevated Lines Operated by the INTERBOROUGH RAPID TRANSIT COMPANY and as to the Necessity and Propriety of Installing Automatic Signals and Automatic Train Stopping Devices Thereon.

Whereas, This Commission on May 13, 1927, on its own motion adopted an order herein ordering that a hearing be held before the Commission on June 1, 1927, in respect to the safety and adequacy of the signal system and signal equipment and methods now used or operated on the local tracks of the subway and elevated lines operated by the Interborough Rapid Transit Company and as to the propriety, necessity and the ways and means of installing automatic

signals, with automatic train stopping devices on said local tracks of the subway and elevated lines and as to the type and character of such system to be adopted, if the same [fol. 913] is found to be reasonably required for the safe and efficient operation of trains over said lines, and

Whereas, Notice of said hearing was given to Interborough Rapid Transit Company on May 17, 1927, and on June 1, 1927, such hearing was adjourned to subsequent dates to, and including June 28, when Interborough Rapid Transit Company appeared by James L. Quackenbush, Arthur C. Peacock, of counsel, and

Whereas, In the judgment of this Commission the signal system now used on the express tracks requires an adaptation in order to permit of full and efficient operation on the local tracks of the subway and the elevated roads, and

Whereas, This Commission desires that the signals or control which it believes in the interest of safety should be installed should be of a type to allow maximum operation of trains, and

Whereas, Interborough Rapid Transit Company is willing to commence the development of such a signal system and

Whereas, In the judgment of this Commission the development and installation of some system of signalling or control especially on the local tracks of the subway and the tracks of the elevated roads will be in the interest of safety of operation

Now Therefore It Is

Ordered, That in pursuance of authority and jurisdiction vested in this Commission under and by virtue of the Public Service Commission Law and in pursuance of the provisions contained in Contract No. 3 the said Interborough Rapid Transit Company is hereby ordered and directed to install a satisfactory signal system or control, approved by the [fol. 914] Chief Engineer of this Commission, on the following lines within the following times:

To be completed by June 30, 1928:

All lines in Queens County from easterly terminals thereof to tunnel.

To be completed by June 30, 1929:

Westchester Avenue Line, Portal to West Farms-W. 180th St.

To be completed June 30, 1930:

Jerome Avenue Line—from Portal (157th St.) to Woodlawn Road.

To be completed by June 30, 1931:

(a) White Plains Road Line—from Gun Hill Road to 241st Street.
(b) Pelham Bay Park Line—from Portal to Pelham Bay Park.

To be completed by June 30, 1932:

(a) Broadway Line—from Dyckman Street to 242d Street.
(b) White Plains Road—from East 180th Street to Gun Hill Road.
(c) Livonia Avenue, Brooklyn—from Portal to New Lots Avenue.

To be completed by June 30, 1933:

Sixth Avenue Elevated Lines from Rector Street to 53d Street and Ninth Avenue.

To be completed by June 30, 1934:

Second Avenue Elevated from Chatham Square to 129th Street.

To be completed by June 30, 1935:

Ninth Avenue Elevated from South Ferry to 157th Street.

To be completed June 30, 1936:

Third Avenue Elevated Line, from South Ferry and City Hall to Bronx Park-Webster Avenue Line extension—
162d Street Extension.
143d Street Extension.
West Farms Connection.

[fol. 915] To be completed June 30, 1937:
Subway Local Lines:
Lexington Avenue—East Side Lines:
(a) Portal (157th Street-) to South Ferry.
(b) 125th Street to Portal (Whitlock Avenue) Broadway-West Side Lines.
(c) Dyckman Street to South Ferry to Portal east of 149th Street and Third Avenue Station.

All Brooklyn Lines:

(a) From Borough Hall Station to Portal east of Utica Avenue Station.
(b) Nostrand Avenue from Eastern Parkway to Flatbush Avenue.

Further Ordered, That within fourteen days after service upon it of a certified copy of this order Interborough Rapid Transit Company shall notify the Commission, in writing, whether the terms hereof are accepted and will be obeyed.

Further Ordered, That this Order shall take effect immediately.

By the Commission.

James B. Walker, Secretary.

[fol. 916] SCHEDULE 2

Before the Public Service Commission for the First District, held at Its Office, No. 49 Lafayette Street, in the Borough of Manhattan, City and State of New York, on the 28th Day of May, 1920
Approved: Lewis Nixon, Commissioner.
Present: Hon. Lewis Nixon, Commissioner.

Case No. 2500

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY for a Hearing and Determination by the Commission, under Section 49 of the Public Service Commissions Law, as to a Just and Reasonable Rate of Fare on its Subway Lines.

Final Order Denying Application

Complaint having been made to this Commission by Interborough Rapid Transit Company that the maximum fare of five cents now chargeable by it as a common carrier is insufficient to yield reasonable compensation for the service rendered by it in the operation of the subway and is unjust and unreasonable and the company having made application by petition dated and verified May 28, 1920 for a hearing and determining under Section 49 of the Public Service Commissions Law as to a just and reasonable rate on the subway lines of said company; and said complaint having been read and filed;

[fol. 917] And the Commission after hearing James L. Quackenbush, Esq., counsel for the petitioner, and Russel B. Burnside Esq., Assistant Counsel for the Commission, being of the opinion that it is without jurisdiction in the premises to determine or fix a rate of fare different from the five cent rate fixed by Contract No. 3, it is

Ordered, That said complaint be dismissed and said petition of Interborough Rapid Transit Company be and the same hereby is denied for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3 referred to in said complaint.

By the Commission.

James B. Walker, Secretary.

[fol. 918] SCHEDULE 3

At a meeting of the Transit Commission held at its office, No. 270 Madison Avenue, in the Borough of Manhattan, City of New York, on the 28th day of March, 1922.

Case No. 2632

In the Matter of THE INTERBOROUGH RAPID TRANSIT COMPANY for a Determination of the Just and Reasonable Rate, Fare, and Charge on the Subway and Elevated Railroads Operated by it, and for the Authorization of an Immediate Reasonable Temporary Increase in the Existing Rates, Fares, and Charges Pending a Final Determination

The Interborough Rapid Transit Company having by petition, verified March 22, 1922, made application to the

Commission for authority to increase the rate of fare charged on the subway and elevated lines operated by it, and the Commission having been advised by Counsel that it is without jurisdiction to entertain said application owing to the provisions of Chapter 153 of the Laws of 1922, amending the Public Service Commission Law;

Ordered that the said application of the Interborough Rapid Transit Company, verified March 22, 1922, be and the same hereby is in all respects denied for lack of jurisdiction.

By the Commission.

[fol. 919] SCHEDULE 4

Section 24, Rapid Transit Act

§ 24. Connections with other railroads, stations, and ferries.—1. The public service commission may also from time to time, with the approval of the board of estimate and apportionment, upon application of any person, firm or corporation owning, leasing, constructing or actually operating or having the right by contract to thereafter operate a railroad wholly or in part within the limits of the city in which the commission has power to act, if in the judgment of said commission, the public interests so demand, fix and determine the route or routes by which any such person, firm or corporation may connect with other railroads, or the stations thereof, or with ferries or bridges, or may extend his or its line or lines which he or it operates or has the right to operate as aforesaid within said city, or upon the application of a corporation organized under the railroad law for any of the purposes specified in subdivision nine of section twenty-seven of this act, and agreeing to equip, maintain and operate or to procure to be equipped, maintained and operated, any road or roads of the city in connection with any existing railroad of a railroad corporation and any extension or extensions thereof wholly within such city, on the basis of a division of income, earnings or profits as hereinafter provided, the commission may with like approval, authorize such corporation to construct, public interests so demand, fix and determine the route or routes by which such corporation may construct, maintain and operate such extension or extensions, and may, with

like approval, authorize such corporation to construct, maintain and operate such extensions, and may with like approval authorize any such person, firm or corporation to lay an additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of his or its railroad or railroads within said city and to [fol. 920] acquire terminal or other facilities necessary for the accommodation of the traveling public on any street or place except the place known as Battery park on which said railroad shall be located; and may also with like approval authorize any such person, firm or corporation to lay his or its tracks and operate his or its railroad to any terminal or terminals within the said city, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains; and the commission shall with like approval fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefore to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, provided, however, that every such determination, authorization and license shall be made upon the condition that such person, firm or corporation shall from the time of the commencement of the operation of any such railroad or track or tracks under such determination, authorization or license, annually pay to the said city a sum or rental which may be a part or proportion of gross or net receipts, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of any such railroad, track or tracks, shall be prescribed by the commission in such determination, authorization and license, and that every such determination, authorization and license shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future, to the end of the period of renewal, if any, of the amount of such annual payment at intervals each of not more than twenty years; provided further, however, [fol. 921] that such determination, authorization or license

may provide that for the whole or any portion of the life of the grant in lieu of such annual rental the gross or net receipts derived from the operation of such railroad owned, operated or to be operated by the said person, firm or corporation within the limits of said city, and from the operation of such connecting or extending route or routes, additional track or tracks or facilities may be combined, and that the city may receive as such compensation at intervals named a specified part or proportion of the income, earnings or profits of the railroad, and the route or routes, additional track or tracks or facilities whose receipts are so combined or of those and any other railroads which may be operated in connection therewith in like manner, which part or proportion may be deferred to a previous distribution to said person, firm or corporation, which distribution may be cumulative, and in such case such determination, authorization or license may apportion out of the amount so to be received by the city and shall specify a portion thereof which shall be deemed to be the rental for the use of such route or routes, additional track or tracks or facilities, and shall also provide for determining the amount of the income, earnings or profits of the railroad within the limits of the city and of the route or routes, additional track or tracks or facilities whose receipts are so combined and may provide for readjustment of the proportion which the city shall receive or of the portion thereof which shall be deemed to be the rental for the use of said route or routes, additional track or tracks or facilities at specified intervals, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its proportion of such income, earnings or profits or as such rental upon any such readjustment thereof. Such determination, authorization or license shall contain a reservation to the city of the privilege, upon giving a specified notice, to [fol. 922] terminate the franchise, right or authority granted under this section as to all, and if deemed advisable as to any specified portion or portions of such route or routes, additional track or tracks or facilities, and to purchase and take the plant and property as defined in the grant at any time after the expiration of ten years from the date when operation of any part of said route or routes, additional track or tracks or facilities or of such specified

portion thereof shall actually begin, upon paying an amount for said plant and property as property, excluding any value for the franchise, right or authority, which amount shall not exceed the actual cost as defined in the grant of said plant and property plus fifteen per centum thereof and shall decrease under provisions of the grant as the franchise continues, so that at the end of the full term of the grant or at the end of a period specified therein, no amount shall be paid except for betterments, additions, improvements and additional equipment as hereinafter provided. The grant shall provide a method of ascertaining the amount to be paid for said plant and property on termination by the city of the said franchise, right or authority and for the betterments, additions, improvements and additional equipment at the end of the full term of the grant, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under such grant. Such determination, authorization or license may also make suitable provision to the end that if the city shall after so terminating such franchise, right or authority or at the end of the full term of the grant propose to give a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of said plant and property or any part thereof may be transferred directly to the grantee of any such new [fol. 923] franchise, right or authority when the said new grantee shall pay the amount so required; provided, however, that in the case of additional track or tracks added to any existing elevated rapid transit railroad, the determination, authorization or license may provide that said privilege of the city to terminate the franchise, right or authority therefor and to purchase and take the plant and property shall not be for railroad transit operation either by the city or by any other party, and shall be without prejudice to the rights of the said person, firm or corporation in the lines of said existing elevated railroad, and may make adequate provision for the protection of such rights. The commission may with like approval authorize the relocation of any existing tracks, structures, stations and appurtenances of such person, firm or corporation in any street or avenue

in which the same now exist, such relocated structure to be held under all the terms and privileges of the original franchise.

2. A certificate shall be prepared by the commission, attested by its seal and the signature of its presiding officer, setting forth in detail the action taken by the commission with respect to such connecting or extended route or routes and such tracks and facilities, and the terms, conditions and requirements aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification of the terms of the contract as hereinafter provided. Every such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the supreme court. Such certificate shall be delivered to said person, firm or corporation upon the receipt by said commission of a written acceptance of said terms, conditions [fol. 924] and requirements, duly executed by said person, firm or corporation, so as to entitle it to be recorded.

3. The said certificate shall be filed in the office of the secretary of state, and a duly certified copy thereof shall be filed in the office of the clerk of each county to which the said privileges granted hereunder pertain, and thereupon, and upon fulfillment, by such person, firm or corporation, so far as it relates to such connections, additional track or tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the commission may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations with respect to his or its railroads authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have

been duly filed, such person, firm or corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of his or its railroad then in actual operation or in process of construction, except that no franchise, right or authority shall be granted under this section to extend any railroad, make any connections, lay any additional track or tracks or acquire any terminal or other facilities for a longer period than the unexpired term of the original grant, franchise or contract of the railroad and any renewal thereof contained in such contract to which such *extension, connection, additional track or tracks, or terminal or other [fol. 925] facilities are added, and that any such franchise, right or authority granted hereunder shall also be subject to be terminated by the city in like manner and under the same terms and conditions and at the same time or times as may be provided in such original grant for the termination or taking by the city of that grant if provision therefor be made.

4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time with the consent of such person, firm or corporation, be modified by the commission. In the case of any grant under this section for the extension of any railroad or the making of any connections, or the laying of any additional track or tracks, or the acquisition of any terminal or other facilities under the provisions of this section, the commission may make provision as a condition of the said grant for the termination by the city of the original grant or franchise or contract, for the railroad to which such extension, connection, additional track or tracks or terminal or other facilities are to be added and for the taking over at the same time of the plant and property of the grantee or holder of said original franchise or contract suitable to and used for the purpose of such origi-

nal grant or contract in connection with the termination of the franchise, right or authority granted under this section, upon giving a specified notice and paying an amount for said plant and property, as property, excluding any value for the original franchise or contract, which amount shall not exceed actual cost of said plant and property plus [fol. 926] fifteen per cent thereof and shall decrease under the provisions of the grant made hereunder as the franchise or contract continues, so that at the end of the grant or contract no amount shall be paid except for equipment as defined in the grant. The grant shall provide a method of ascertaining the amount to be paid for such plant and property on termination by the city of the said original franchise or contract or for equipment at the end of the full term thereof, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under said grant. The grant in such case may also make suitable provision to the end that if the city shall after so terminating such original grant or franchise or at the end of the full term thereof propose to grant a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of the said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise.

5. But the construction and operation of such connections, extensions, additional track or tracks or facilities are hereby authorized only upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which they are proposed to be constructed, may, upon application, in the same manner, and on the same notice specified in section five of this act, appoint three commissioners who shall determine after a hearing of all the parties interested whether the same ought to be constructed or operated, and their determina-

[fol. 927] tion, confirmed by the court, may be taken in lieu of the consent of the property owners.

6. Every such certificate granting any franchise, right or authority, as aforesaid, except for additional track or tracks added to any existing elevated rapid transit railroad, shall provide that upon the expiration of a period fixed therein the franchise shall end and that upon such termination thereof all the rights of property of the grantee in the streets, avenues, parkways, highways and public places shall cease and terminate without compensation and shall further provide that upon the expiration of a period fixed therein the franchise shall end and that upon such expiration of such franchise, right or authority the plant and property together with the appurtenances thereto, of the grantee, constructed pursuant to such certificate, except betterments, additions, improvements and additional equipment as defined in the grant, shall become the property of the city without further or other compensation to the grantee; and that such betterments, additions, improvements and additional equipment shall be and become the property of the city on paying the grantee the amount ascertained as provided pursuant to said certificate. The provisions of this section shall apply to any railroad or railroads constructed, constructing or contracted for under the provisions of section twenty-six of this act and to any person, firm or corporation, constructing or operating such railroad or railroads. [Former 32a, as added by Laws 1906, ch. 472, § 4, and amended by L. 1909, ch. 498, § 7, and L. 1912, ch. 226, §§ 3-4.]

[fol. 928] SCHEDULE 5

Section 27, Rapid Transit Act

"§ 27. Contract for Equipment, Maintenance and Operation of Road—

"1. The public service commission shall, subject to the approval of the board of estimate and apportionment, or other analogous local authority of such city, have full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads and also

of the aforesaid galleries, ways, subways and tunnels for subsurface structures and all other appurtenances, constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said commission shall be best qualified to fulfill and carry out said contract, for the equipment, or any part thereof not provided for pursuant to the next preceding section of this act, of such road or roads, at his or its own cost and expense, and for the maintenance and operation of such road or roads for a term of years to be specified in said contract and not to exceed twenty years, or in lieu of such definite term of twenty years the contract may be for a longer period to be fixed by the contract and in such case it shall provide that the city upon giving a specified notice shall have the right to terminate the contract for the equipment, maintenance and operation of such road or roads as to all and if deemed advisable as to any specified portion or portions thereof at any time after the expiration of ten years from the date when operation of any part of such road or roads or of such specified portion thereof shall actually begin, but such right of termination shall be upon condition as follows:

"(1.) If the title to the equipment of said railroad or railroads shall not be vested in the city then that the equip-[fol. 929] ment of said railroad or railroads or portion thereof suitable to and used for purposes of such contract shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but which shall not be greater than the actual cost of same plus fifteen per centum thereof and such equipment shall upon such termination of such contract become and be the property of the city on paying to the contractor such amount, or in case the title to the equipment of said railroad or railroads shall be vested in the city then that the city shall pay to the contractor an amount for his investment in the equipment of said railroad or railroads, or portion thereof, which shall not exceed the actual cost to the contractor of the equipment of said railroad or railroads or portion thereof, plus fifteen per centum thereof, and shall decrease under

the provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid except that if additional equipment shall be required and supplied after the railroad, or portion thereof, shall have been put in operation, and if the contract shall provide that title to such additional equipment shall vest in the city when supplied, then the city shall pay an amount for the contractor's investment in such additional equipment which amount shall not exceed the actual cost to the contractor of such additional equipment plus fifteen per centum thereof, and shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in additional equipment only such amount as shall be provided in such contract, and

"(2.) Upon the further condition if said railroad shall be constructed wholly or in part at the cost of the contractor that the city shall also pay to the contractor an amount for his investment in the construction of said road or portion thereof which shall not exceed the actual cost to the contractor of constructing said road or portion, plus fifteen per {fol. 930} centum thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid, except that if betterments, additions or improvements shall be required by the commission or approved by the commission prior to the construction thereof and be constructed wholly or in part at the cost of the contractor, then that the city shall pay an amount for the contractor's investment in such betterments, additions or improvements which shall not exceed the actual cost to the contractor of constructing such betterments, additions or improvements plus fifteen per centum thereof and which amount shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in betterments, additions or improvements only such amount as shall be provided in the contract.

"The contract shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's said investment in the construction of said road upon termination by the city of any such contract and for the equipment of such railroad at the end of the full term

of the contract, and the contract may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract. The contract may provide that the title to the equipment as well as to said road, shall vest in the city from the beginning and that the amount to be paid by the city for the contractor's investment in such equipment shall decrease as the term of the contract continues, so that at the end of the full term no amount shall be payable therefor except for additional equipment as aforesaid.

"The contract shall provide that upon the expiration of a period fixed in the contract, the term of said contract shall [fol. 931] end without compensation to the contractor except as provided in the contract, for betterments, additions or improvements to any such railroad required to be made or approved by the commission prior to the construction thereof during the term of any such contract, and, if the title to the equipment be not vested in the City, for equipment suitable to and used for the purposes of said contract to the amount if any ascertained as provided in the contract, and that in such event said equipment shall become the property of the city upon payment to the contractor of the said amount or, if the title to the equipment be vested in the city, then an amount for the contractor's investment in additional equipment for any such railroads to be ascertained as provided in the contract. The contract may also provide that the city in exercising the right so to terminate any contract shall for such compensation as may be reasonable and which shall be determined pursuant to the contract permit the contractor whose contract is so terminated or the assignee or lessor of the contractor to use the tracks, structure and line equipment of a portion of such road or roads when necessary or convenient to reach terminals, yards or other facilities of the contractor or such assignee or lessor then located thereon. The contract may also provide for assuring that in case a new contract under this section for equipment and for maintenance and operation of such railroad or railroads is made after such termination pursuant to notice or after the expiration of the full term

of the contract that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required.

2. If such contract be made with a railroad corporation organized for the purpose of maintaining and operating a railroad, including the equipment or any part thereof, constructed pursuant to the provisions of this chapter, and [fol. 932] which has entered into a contract or contracts for the maintenance and operation of a railroad or railroads theretofore constructed in whole or in part at the expense of the city as in this act provided, and is engaged in the maintenance and operation of the same within such city, and if such contract shall make provision for the equipment, maintenance and operation of such road or roads of the city in connection with the said railroad or railroads theretofore constructed as aforesaid at the expense of the city, and for a single fare, the said corporation and the city may in such contract or by modification of an existing contract or contracts provide that the original term of any contract for operation of the said railroad or railroads theretofore constructed in whole or in part at the expense of the city, may be extended or reduced and any right to a renewal or renewals thereof may be abrogated or waived so that such term as extended or reduced shall become and be co-terminous with the term for equipment, maintenance and operation of such road or roads of the city to be fixed in and by such contract; and that if the city shall elect to terminate the contract for equipment, maintenance and operation of such road or roads as to any line or portion thereof, which with a connecting line or portion of the said railroad theretofore constructed and then operated by such corporation shall make a continuous line, then the city may when so terminating such contract as to any such line or portion thereof, take over the said connecting line or portion thereof theretofore constructed in whole or in part at the public expense and then operated by the said railroad corporation and terminate the contract of such corporation as to the same, provided that in lieu of such connecting line or portion thereof so taken over the said corporation shall for the then unexpired term of the contract for operation of the railroad theretofore constructed have the right to main-

tain and operate without right of recaption by the city an- [fol. 933] other line of road or portion thereof specified in such contract which with the said lines of the railroad theretofore constructed shall make a continuous line, and the contract shall in such case provide for adjustment between the city and the corporation of the difference in the value of the right to operate the lines or portions thereof so exchanged by agreement or arbitration or by the court and for payment of such difference between them. The city and the corporation may also in such contract provide that if the city shall under any provision of law terminate the contract for the maintenance and operation of the said road or roads of the city after the expiration of ten years from the date when operation of any part of such road or roads shall actually begin, the city may at any time after thirty-five years from said date terminate the said contract or contracts for the maintenance and operation of the railroad or railroads theretofore constructed at the public expense, and take over such railroads upon payment to said company of a sum not exceeding the then present worth of the unexpired portion of the term of said contracts to be ascertained as provided in such contract, which may provide that in default of agreement such sum may be determined by arbitration or by the court.

The contract between the city and such corporation may also provide that in consideration of the operation of the railroads specified as provided for in such contract and the said railroad or railroads theretofore constructed in whole or in part at public expense in connection with each other for a single fare, and of the payment by said company of moneys to be applied as hereinafter authorized to or toward the construction by the city of the road or roads to be maintained and operated under such contract, and in further consideration of any covenants or agreements by the company to modify the term or terms of its leases or to waive or modify any of the other provisions of its contract [fol. 934] or contracts, the gross receipts of the operation of such railroads theretofore constructed and of such road or roads of the city to be maintained and operated under such contract may be combined during the term of such contract, and that the city shall receive for the use of its said additional road or roads at intervals named a specified part or proportion of the income, earnings or profits of the

railroads whose receipts are so combined, and in such case the contract may apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be the rental for the use of each of the roads of the city maintained, equipped and operated under said contract. Any such contract shall provide for determining the amount of income, earnings or profits of the railroads whose gross earnings are so combined, and for such considerations may authorize the retention by the said railroad corporation for each year of the term of such contract, prior to the payment of any sums or of any part or portion of the income, earnings or profits to the city as rental for the use of the roads specified or provided for in such contract, of (a) a specified sum of money, which sum may represent the average annual income from operation of the said railroad or railroads theretofore constructed and operated by such corporation for any two or more years; (b) a sum not exceeding six per centum per annum for each year upon the investment of the said company, including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor plus one per centum per annum on account of the contractors' investment in betterments or improvements upon or additions to such road or roads and equipments. Such contract may also provide that such annual payments shall be cumulative, and that any deficiency with respect [fol. 935] thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rental or compensation for the use of such roads shall be made to the city. [Added by Laws 1912, ch. 226, § 7.]

"3. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an

existing railroad as part of a continuous route as aforesaid, then and in any such case the public service commission may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the commission may be enabled to make a single operating contract or lease of the entire road. The said commission may in its discretion, as one of the terms and conditions of any such contract, provide that as a consideration for the making of such contract the contractor in addition to any sums to be paid as in this act provided by way of rental or otherwise for the use of such road or roads shall contribute a part of the cost of construction of such road or roads which shall be contributed and disbursed by such method, in such manner and at such times as may be provided for in any such contract, and which contribution shall be deemed to be an investment by the contractor in the construction of such road or roads or to be part of the cost to the contractor of consructing such road or roads within the meaning of the first subdivision of this section providing for termination of such contract by the city. Any such contract may provide for the construction during the [fol. 936] term of such contract of any branches or extensions of such road or roads and the construction of additional lines and for the equipment and operation thereof by the contractor in connection with the said road or roads and may make separate provision for apportioning the receipts of such road or roads and of such branches, extensions or additional lines and as to the compensation to be paid to the city for the use of any such branches, extensions or additional lines. The city may enter into a contract for the equipment, maintenance and operation of any such road or roads before contracts for construction of such road or roads or any portion or portions thereof shall have been made, and in such case the contract may provide that the city may construct or complete such road or roads or additions thereto or betterments thereof from time to time at the expense of the city, or partly at the expense of the city and partly at the cost or through contribution of the contractor as aforesaid in such proportion as may be agreed upon between the city and the contractor. Such contract for the equipment, maintenance and operation of such road or roads or any portion or portions thereof may be made

and entered into as in this act provided before the consents shall have been obtained for any such road or roads or for any portion or portions thereof as provided in section five of this act, and before the detailed plans and specifications shall have been prepared as provided in section six of this act, provided, however, that in such case such contract for equipment, maintenance and operation of such road or roads or any portion or portions thereof shall be upon condition that such contract shall not become operative or go into effect as to such road or roads or such portion or portions thereof unless and until the city shall acquire the right to construct such road or roads or portion or portions thereof by obtaining such consents. The public service commission may in any contract reserve the right, upon conditions and for compensation to the contractor, as provided in the contract, to permit other persons, firms and corpora-
[fol. 937] tions and the municipality itself to use the tracks, structure and line equipment of the railroad, or any portions thereof.

"4. Every such contract shall further provide that the person, firm or corporation so contracting to equip, maintain and operate said road shall annually or at specified intervals pay into the treasury of said city, such rental for the use of said road, as shall be prescribed therein. The rental may be either a specified sum of money or a specified part or proportion of income, earnings or profits of such road, or both a sum of money and a part or proportion of income, earnings or profits, as the said commission shall deem best suited to the public interest and the board of estimate and apportionment or other analogous local authority of such city shall approve. Every such contract may further provide that the amount and character of such rental may be readjusted at the expiration of a prescribed period of not more than twenty years, and be readjusted from time to time in the future at intervals of not more than twenty years, and may prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof. If such contract be made with a person, firm or corporation owning or actually operating or agreeing to operate a railroad or railroads wholly or in part within the limits of the city and shall make provision for the equipment, maintenance and operation of

such road or roads of the city in connection with such railroad or railroads and for a single fare the contract may provide that the gross receipts from the operation of such railroad or railroads within the limits of the city and from the operation of such road or roads of the city may be combined during the term of such contract and that the city shall receive for the use of the said road or roads at inter-
[fol. 938] vals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined and the contract may, in such case, apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be rental for the use of each of the roads of the city maintained, equipped and operated under such contract. In any such case the contract shall provide for determining the amount of the income, earnings or profits of the railroads whose gross earnings are so combined, and may authorize the retention, prior to the payment of any sums to the city for or on account of the city's investment in the contruction of such road or roads or for the use of the same, of (a) a specified sum of money, which may represent the average annual income from operation of said railroad or railroads theretofore constructed during a period specified in such contract; (b) a sum not exceeding six percentum per annum for each year upon the investment of the contractor, including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract, and in the construction and equipment of extensions of any railroads and tracks not owned by the city thereafter constructed and to be operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor, plus one per centum per annum, on account of the contractor's investment in betterments or improvements upon, or additions to such road or roads of the city, and upon or to any railroads not owned by the city and operated under such contract, and upon or to the equipment thereof. Such contract may also provide that such payments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rentals or

[fol. 939] compensation for the use of such roads shall be made to the city. The contract may provide for a readjustment at specified intervals of the part or proportion of the said income, earnings or profits of the railroads, which the city shall receive, or of the portion of the amount received by the city which shall be deemed to be the rental of each such road owned by the city, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its part or proportion of such income, earnings or profits or as such rental upon any such readjustment thereof.

"5. Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, at such time or times as may be provided in the contract. The aforesaid rental shall be paid at such times during each year or at such intervals as said commission shall require. If a contract to equip, maintain and operate such road be made with the person, firm or corporation having or to have the contract to construct the same and such contract shall provide that said road shall be constructed wholly or in part at the cost of the said person, firm or corporation, the said road, however, to be the property of the city in the same manner and to the same extent as if constructed wholly with public money, then the contract may provide as an alternative in lieu of the rental above provided for that any and all income and increase derived by the contractor or on his behalf in any manner from the enterprise of constructing, equipping, maintaining and operating such road, shall after deducting operating expenses, taxes, payments to reserve and amortization funds as provided for in the contract, and not exceeding six per centum interest per annum payable quarterly upon the actual cost to the contractor of construction and equipment of such road, be divided share and share alike between the contractor and the City. The rental and [fol. 940] any sums payable under such contract, except any sum or sums of money that may be contributed toward the construction of any road or roads by the contractor having the contract for the equipment and operation of such road or roads, shall be applied first to the payment of the interest upon bonds issued by said city for the construction and equipment of said road as hereinafter provided

for, as the same shall accrue and fall due, and the remainder of said rental and moneys not required for the payment of said interest shall be kept separate and apart from any and all other moneys of such city and shall be securely invested and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued as aforesaid; said rental, moneys and accumulations of said fund over and above so much as may be required for payment of interest and principal of said bonds as aforesaid, shall be paid into the rapid transit fund hereinafter provided for.

"6. Any such contract may also provide for a renewal or renewals not to exceed twenty years in the aggregate of the lease of said road upon the expiration of an original term or not more than twenty years upon such terms and conditions, to be approved by the board of estimate and apportionment, or other analogous local authority of such city, as to said commission may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time, or should the same be terminated or expire as aforesaid. Such contract shall also state the date on which the operation of the road, or any section thereof, shall commence.

[fol. 941] "7. In case the title to the equipment of said road shall not be vested in the city, the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same man-

ner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The commission may, however, from time to time, relieve from such lien, any of the property to which the same may attach, upon receiving additional security, which may be deemed by said commission to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such commission shall seem just.

"8. The said contract shall further provide that in case of the failure or neglect on the part of said contracting person, firm or corporation, after such notice as the contract may prescribe, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by the public service commission, may either terminate the contract or take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, and the said contract shall contain such terms, conditions and provisions in relation thereto as the said commission shall deem necessary or desirable for ade- [fol. 942] quately safeguarding and protecting the rights and interests of said city; and the said contract shall contain appropriate terms, conditions and provisions for accomplishing such termination or taking possession.

"9. Any existing railroad corporation owning or actually operating a railroad wholly or in part within the limits of the city in and for which said commission has power to act, and approved by the commission, shall be competent and is hereby authorized to enter into any contract for the equipment, maintenance and operation of any railroad pursuant to the provisions of this chapter, or, after such a contract shall have been made, shall be competent and is hereby authorized, with the approval of the commission, to contract with the original contractor or his assignee or assignees for the maintenance and operation (including the equipment or any part thereof) of any railroad constructed or in process of construction or to be constructed pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A cor-

poration may be organized under the railroad law of this state, for the purpose of constructing, equipping, maintaining and operating a railroad pursuant to the provisions of this act or for the purpose of maintaining and operating a railroad (including the equipment or any part thereof), already constructed, in process of construction or to be constructed pursuant to the provisions of this act; and any corporation so organized, upon the approval in writing of the commission, shall, in addition to the powers conferred by the general act under which such corporation is organized, be empowered, and is hereby authorized to enter into any contract permitted by law for the maintenance and operation when constructed, including the equipment or any part thereof if desired, as the case may be, of any such railroad owned or to be owned by the city, constructed or to be constructed at the expense of the city or of such corporation or both as in this act provided. The certificate of such [fol. 943] approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the public service commission as provided for in section nine of the railroad law.

"10. Where in this section or in section twenty-six of this act the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as herein before provided. [Former § 34a, as added by L. 1906, ch. 472, § 6, and amended by L. 1909, ch. 498, § 10; L. 1910, ch. 504 and L. 1912, ch. 226, §§ 6-14.]

State of New York,
City and County of New York, ss:

John Bauer, being duly sworn, says:

I am an economist and financial analyst. For twenty years I have been a student, lecturer and writer on public

utility finance and rate making. In June, 1908, I received the degree of Ph. D. in economics and finance from Yale University. From October, 1908, to June, 1914, I was successively instructor and assistant professor in economics at Cornell University, lecturing on general economics, accounting, corporation finance and regulation of railroad and public utility rates.

From July, 1914, to October, 1916, I was statistician to the Public Service Commission of the State of New York for the First District, making special reports in connec- [fol. 945] tion with the accounting, finance and rates of public service corporations under the jurisdiction of the Commission. From October, 1916, to June, 1917, I was professor of economics at Princeton University in charge of courses in accounting, corporation finance and public utilities. From July, 1917, to November 15, 1919, I was Chief of the Division of Accounts of the Public Service Commission of the State of New York for the First District, directing the accounting investigations and anlyses in rate cases and other financial matters.

I am author of "Effective Regulation of Public Utilities" (Macmillan Co., 1925); have published numerous articles and reports in various technical journals on public utility rates, valuation and return; am editor of the "Department of Public Utilities" in the National Municipal Review; and have had an extensive consulting experience in public utility rate cases and financial matters.

I have been in close contact with the transit situation in the City of New York for the past twelve years. As Statistician and Chief of the Division of Accounts of the Public Service Commission of the State of New York for the First District, I became acquainted with the financial organization of the different street railway companies in the City of New York, including the Interborough Rapid Transit Company, its intercorporate relations, leases, securities outstanding, fixed charges and financial history.

I am familiar with the terms of the so-called Rapid Transit Contracts Nos. 1, 2 and 3 and the elevated certificates granted by the City of New York in 1913, as well as the various special grants and legislation enacted in respect to rapid transit for the City of New York. I have made [fol. 946] numerous analyses of the various accounting and

financial aspects of said contracts, certificates and leases. I am familiar with the results of operation—traffic, operating revenues, operating expenses, taxes and return on the property, both on the elevated and subway systems.

During the year 1920 the Board of Estimate and Apportionment of the City of New York made an investigation of the financial condition of the street railway companies operating in the City of New York. I attended all the hearings before said Board in connection with said investigation, gave testimony therein, studied and analyzed the various financial statements presented by the companies, and made reports to the Board on the financial history, security issues, investments, and operating results of the several companies, including the Interborough Rapid Transit Company and its intercorporate relations.

During 1922, with a group of engineers and other experts, I made a comprehensive investigation of all the transit properties in the City of New York for the Corporation Counsel of The City of New York at the request of the Board of Estimate and Apportionment in connection with the "Plan of Readjustment" then under consideration by the Transit Commission under the special provisions of the 1921 statutes. In connection with said investigation I with my assistants made a study of the elements of value entering into the several properties, and especially a thorough study of depreciation, including in said studies and report the properties of the subway and elevated systems operated by the Interborough Rapid Transit Company.

Since January 1, 1920, I have been engaged by the Corporation Counsel of The City of New York in all the litiga-
{fol. 947} tion and matters affecting the finances and interests of The City of New York under Rapid Transit Contracts Nos. 1, 2 and 3, before the courts and before the Transit Commission and its predecessors. I am conversant with the proceedings before the Transit Commission relative to the platform lengthening and the need of additional cars. I made a study of the proposed platform lengthening, especially as to the increased carrying capacity of the subways and the financial results of the contemplated improvements.

At the request of the Hon. George P. Nicholson, Corporation Counsel of The City of New York, I read all the papers

of the Interborough Rapid Transit Company, Plaintiff, against John F. Gilchrist, et al., equity Case No. E-44-225 (United States District Court, Southern District of New York), "application for interlocutory injunction and temporary restraining order, order to show cause, and affidavits in support of application" under date of February 25, 1928. I have studied the allegations and data presented in the affidavits in respect to the alleged confiscatory character of the five cent fare applicable to the subway and the elevated systems, and as to the financial needs of the Interborough Rapid Transit Company.

I am informed and believe that it is claimed by the defendants that the rate of fare is fixed by written agreements between the parties made pursuant to the powers conferred by the Rapid Transit Act and that the general regulatory powers of the Transit Commission over the rates of fare of street railways have no bearing on this controversy. I have however at the request of the Corporation Counsel examined the above recited papers regardless of that consideration and hereby state as follows:

1. The principal affidavit upon which the Interborough bases its complaint that the five-cent fare charged on its [fol. 948] subway and elevated lines is inadequate and unreasonable, is the one prepared by Henry T. Berry, Comptroller of the Company. He sets forth (pp. 40-64) data relative to outstanding securities of the Interborough and the Manhattan Railway Company; the rentals, interest payments and other fixed charges incurred by the Company; the results of operation; the investment and claimed valuations, and the return realized upon the property. In computing the rate of return, he uses figures of investment and valuations which, in turn, are based upon the affidavit of William S. Gorsuch (pp. 98-114).

The Berry affidavit sets forth, also, the alleged future capital requirements of the Company from the standpoint of its impaired credit due, it is alleged, to the claimed inadequacy of the five-cent fare. The affidavit in conclusion sets forth the increases in prices since 1913, when Contract No. 3 was entered into, with the object of showing that the rate of fare fixed in 1913 is now inadequate because of the higher present level of prices. This contention is further elaborated by the affidavit of Earl E. Starbard, Vice-President of the Company (pp. 65-97).

2. The rate of return realized by the Interborough is given in the Berry affidavit for the years 1926 and 1927 on the elevated division, the subway division, and for the two combined. On the basis of the valuations used and according to the methods employed in combining the figures, Berry attempts to show what purports to be an inadequate rate of return. Upon the so-called "present value" of the elevated properties, he presents 1.89 per cent. in 1926 and 1.52 per cent. in 1927. Upon the "minimum present value," he gives the rate on the elevated division as 2.19 per cent. in 1926 and 1.76 per cent. in 1927. There is thus a large [fol. 949] indicated deficiency upon both bases of "value" compared with the 8 per cent to which the Company claims to be entitled.

On the subway division the rate of return on the "present value" for 1926 is given at 2.88 per cent. and for 1927 at 2.82 per cent. Upon the "minimum present value" the return is stated at 3.05 per cent. for 1926 and 2.98 per cent. for 1927.

For the entire Interborough operation, elevated and subways combined, the return for 1926 on the "present value" basis is given as 2.65 per cent., and for 1927, 2.52 per cent. On the "minimum present value" basis the rate is stated as 2.86 per cent. in 1926 and 2.72 per cent. in 1927. Upon the so-called "investment" basis, the return on both systems combined in 1926 is shown as 4.56 per cent., and in 1927 4.32 per cent. Finally, on the so-called "original cost" basis, the return on both systems combined is presented at 4.97 per cent. in 1926, and 4.71 in 1927.

3. As to the revenues, operating expenses, taxes, rentals, interest, other fixed charges, and the return realized, the facts are accurately presented by Berry; they agree with the amounts as stated in the sworn reports made by the Company to the Transit Commission.

The apparently inadequate rate of return, however, is due entirely to the excessive base represented by the various valuations employed in the computations. Each base upon which the return is computed as a percentage, is grossly excessive. Morever, the valuations and the rate of return are so combined and presented as not to bring out the facts as to the profitableness of the return realized by the Company.

In none of the several set-ups is the return shown in relation to the Company's own property and investment in-
[fol. 950] cluded in the operation under Contract No. 3. This will be presented later in this affidavit, showing that the Company actually earned high and excessive return upon its own property and investment for the two years under consideration in the Berry affidavit.

The Company operates the subway division entirely under Contract No. 3 with the City of New York. The railroads were constructed successively under Contract No. 1 entered into February 21, 1900, Contract No. 2 dated July 21, 1902, and Contract No. 3 signed March 19, 1913. All these properties are owned by the City of New York and are leased to the Interborough under the terms set forth in Contract No. 3. The City has title to all the properties except the equipment provided by the Interborough under Contracts Nos. 1 and 2. The Company thus owns only the equipment provided under Contracts Nos. 1 and 2, and has only such fixed financial interests in the other properties as are set forth and provided for in Contract No. 3. The Company can get a return only as fixed by the contract upon its own properties and investment; it cannot get any return from the City's properties and investment.

The Berry affidavit entirely disregards the actualities as fixed by Contract No. 3, and fails to show the fact that operation under that contract has been extremely profitable to the Company. The low rate of return shown is due not only to the excessive valuations, but also to the inclusion of the City's property from which the Company can get no return.

4. In regard to the valuations set forth both in the Berry and the Gorsuch affidavits, the figures given for the "present value" of the subway properties amount to $686,210,288 in 1926 and $689,920,610 in 1927. The "minimum pres-
[fol. 951] ent value" is stated for 1926 at $648,111,288, and for 1927 at $651,776,610.

It is significant that for the subways, there is no base predicated upon "investment" or "actual cost," although Contract No. 3 provides for the division of return between the Company and the City principally upon the basis of relative investment. For property provided under Contract No. 3, the valuations affecting both parties are fixed in

terms of "investment," and the returns allowed are based upon investment; not upon any "present value" other than the costs determined in accordance with the contract.

Notwithstanding the fact that the base of return under the contract is predicated upon investment, no computation of return is presented by Berry in relation to "investment" (either upon the Company's own investment or upon the total investment City and Company), although such investment figures are more readily available than the "present value" figures computed for the affidavit. For the elevated and subways combined, however, the rate of return is stated both in terms of "investment" and "original cost," and these rates are materially higher than any of those computed upon the basis of "present value."

The reason why the return was not computed for the subways on the basis of investment in line with the terms of Contract No. 3, is doubtless the fact that the rate would appear plainly adequate and would destroy any claim for an increase in fare. The adequacy of the five-cent fare is conclusively shown, especially if the return realized by the Company is based upon its own investment in the properties operated under the contract.

5. Both the "present value" and the "minimum present value" set ups for 1926 and 1927 for the subway properties [fol. 952] include not only the Company's property and its investment rights in the City-owned property, but also the City's owned property in which it has no investment interest whatever.

This is a fatal objection to the use of the valuations to test the adequacy of the rate of return upon the Company's own property. There is the further objection that the figures are grossly excessive and do not constitute in any way the "fair value" of the properties used in subway operation.

The details of the "present values" for the subways are set forth in the Gorsuch affidavit (p. 107). The aggregate "gross present value" is stated at $686,839,288 for 1926 and $690,549,610 for 1927, both city and company property. From these gross figures there is deducted "an amount necessary to recondition," $629,000, to derive the "present value" of city and company-owned property; $686,210,288 for 1926 and $689,920,610 for 1927. These are said to

be based upon the "Company's present value figures of property provided by it," and the "Commission figures for City-provided property." The Transit Commission, however, never determined the "present value" of any part of the property provided by the Company or City; nor has the "present value" ever been determined by any authority relative to any of the railway properties.

So far as the Company's property is concerned, as to which alone the adequacy of the five-cent fare can be considered in judging the rate of return realized by the Company on its property, the figures are extremely excessive, even if "present value" were properly fixed in this matter. First, they are "gross" figures, without any deduction for depreciation, except the small "amount necessary to recondition." In the determination of "present value" for [fol. 953] rate making, however, there must be deducted depreciation of the property to represent present conditions as to wear, physical condition, obsolescence, inadequacy and suitability to perform efficiently its functions. The failure to make a deduction for depreciation alone vitiates the use of the figures for the measurement as "present value" of the rate of return, even if such a base could be used to measure the adequacy of the return to the Company under Contract No. 3.

In respect of the Companys' values for property provided under Contracts Nos. 1 and 2 (p. 107), the amount is given as $106,793,000 for 1926 and $106,788,000 for 1927. But the sole property that the Company owns under Contracts Nos. 1 and 2 is the equipment whose alleged original cost is stated in the Berry affidavit (p. 51). The "present value" claimed, as will be set forth in detail hereafter, includes large sums of retirements, obsolescence and other depreciation, together with intangibles which under no circumstances can be included in the "present value" of the property. Moreover, the unit prices for materials and labor are, I believe, much greater than would be used in the determination of the "present value" of the properties even for ordinary purposes of rate making.

The criticisms just made in respect to the Company's property provided under Contracts Nos. 1 and 2, apply also to the "present values" of $232,010,000 for 1927 (p. 107). This amount does not provide a sufficient deduction for de-

preciation, includes intangibles that would not be allowed, and represents higher unit values for labor and materials than would be included, I believe, in the determination of "fair value" even for ordinary rate making.

The objections just set forth to the "present value" figures apply also, to a somewhat smaller degree, to the [fol. 954] "minimum present values" (p. 54, p. 108). The amounts are based upon excessive unit prices for labor and materials, do not provide deduction for depreciation, and include much greater sums for intangibles and overheads than would be allowed in the ordinary "fair value" for rate making where the return obtained by the Company is not fixed by contract.

6. While the rate of return on the subways is not computed separately upon the investment basis, especially not upon the company's own investment, the Berry affidavit does set forth the Interborough's alleged investments made under Contracts 1, 2, and No. 3 (p. 51). Its total investment for 1927 under Contracts 1 and 2, is given as $60,496,038, and for Contract No. 3, $120,879,749; for all these contracts, $181,375,787. These amounts are excessive, particularly so far as Contracts Nos. 1 and 2 are concerned.

In respect to Contracts 1 and 2, the amount of $60,496,038 grossly overstates the amount of the present investment in the company's property owned and used under Contracts 1 and 2. It includes for "subway equipment," $36,348,705, also $224,494 for "replacement" of such equipment, or total equipment $36,573,199. This is the purported original cost of the subway equipment installed under contracts 1 and 2 and owned by the Company. But it can in no sense be treated as present investment in subway equipment for the following reasons:

1. It includes substantial sums, the amount of which has never been determined, representing property retired in connection with Contract No. 3; both the cost of the replacement as well as the expense of the removal of the old equipment were charged to Contract No. 3.

[fol. 955] 2. It includes large amounts, the exact sum of which has not been determined, for obsolete power plant

and sub-station equipment which is antiquated and useless for present day operation.

3. As to property now used, the sum includes depreciation and obsolescence which must be deducted for the determination of present investment. The depreciation applies to cars, power plant facilities, and other equipment. The average life of the property is twenty years or more, so that the amount of the depreciation is large but has not been determined.

The amount of present investment in the subway equipment provided under Contracts 1 and 2 is thus less than the $36,573,199 claimed as investment by the Company. Contract No. 3, Article XLVI, provides that at the date of the beginning of operation under the contract, the depreciation of the cars provided under Contracts 1 and 2 should be recognized as $2,908,150, and the depreciation of other equipment, $3,000,000; total, $5,908,150. This amount may be deemed as the depreciation either as of January 1, 1917, the expected date of beginning of operation under Contract No. 3, or as of January 1 1919, when such operation actually started. In either case, however, there is to be considered the further depreciation for the period to date since January 1, 1917, or January 1, 1919. In view of all the circumstances, therefore, while the exact amount of the present investment has not been determined, I believe that it does not exceed the sum of $30,000,000, and is considerably less.

The other items asserted to constitute "investment" in Company provided property under Contract 1 and 2, do not constitute company owned property at all, as alleged (except two minor sums). The chief item is $22,278,589 [fol. 956] for "cost of leases." This sum consists of $4,000,000 of capital stock issued outright in connection with the organization of the Company and the mere acquisition of Contract No. 1. It consists also of amounts paid in the acquisition of the elevated lease, the losses sustained in the construction of the so-called Belmont tunnel, and the further loss sustained on the construction work on Contract No. 2. While these sums may, in a sense, be said to have been paid for the contracts and leases of the property, they do not represent the cost of property provided by the Company and now used in operation. They represented at

at the outset, not actual property provided for operation, but merely a base for the control and relative distribution of future expected earnings. Nor does the item "Contractor's expense, $1,302,817," represent property owned and used in operation. All these amounts should never have been charged to capital account, or should have been amortized out of past earnings many years ago.

In respect to the Interborough's investment under Contract No. 3, the total is stated at $120,879,749 for 1927, and substantially agrees with the official cost determination made under the terms of the contract. A large part of the property, however, has now been in operation since January 1, 1919, and the rest has been placed in operation at various dates since January 1, 1927. Consequently there has been a considerable depreciation of the physical property, especially as to the equipment; or there has been an accrued amortization of the investment. The amount of depreciation or amortization has not been determined, and the exact present investment cannot be stated; but it is less than $120,000,000.

[fol. 957] On the basis of present investment, therefore, with due consideration to property retired, property completely obsolete, and property depreciated, I believe that the present investment of the Company in property now used in operation and provided under Contracts Nos. 1, 2 and 3, does not exceed the sum of $150,000,000, instead of the sum of $181,375,787 stated in the Berry affidavit (p. 51).

The rate of return realized by the Company from operation under Contract No. 3 should be based upon the present investment, a maximum sum of $150,000,000; not upon any "present value" figures, and not upon "values" which include both the company provided property and the City's property leased under definite financial terms.

7. While the rate of return for the elevated division is based only on the "value" figures, and not on the alleged "investment," the figures for the investment in the elevated properties are presented in the Berry affidavit (page 52). The total elevated investment is separated between the Manhattan property and the property provided under the so-called elevated certificates granted by the City in 1913, which covered third tracking, elevated extensions,

power plant improvements and certain other additions made by the Interborough.

Referring to the investment made by the Manhattan Railway Company itself, the total is placed for 1927 at $112,943,654. This sum is grossly excessive and does not constitute present investment in properties used in operation. The total includes, in the first place, large amounts which do not constitute the cost of property: $6,974,285 for "discount of New York Elevated Railroad Co.," etc.; $5,113,309 for "amount of par value of Metropolitan Elevated Railroad Co., capital stock and bonds issued for road built by contract over expenditures for construction as [fol. 958] found by Board of R. R. Commissioners in 1883"; and $14,014,080 for "intangible street railway capital." None of these items ever constituted proper capital charges for property used in operation, and cannot be included in a statement of present investment.

In respect to the Manhattan Railway Company's alleged investment in structures, equipment and other property, the amounts are excessive because they include in part property which has been retired and is not now in use, other property not retired but completely obsolete, and in addition includes large amounts of depreciation of property now used but antiquated and unsuited to present requirements of transportation in New York City.

In regards to cars, most of them are old and are of antiquated type. The power plant equipment is practically wholly obsolete and non-usuable for present day purposes. The original structures consisted of two track line, and even with the modernization brought about the third tracking, largely under the 1913 certificate, the railroad is unsuited to present day requirements of mass transportation in the City of New York. It makes possible only one-way express service, and the speed of service is impeded. All this constitutes obsolescence of the entire mode of elevated transportation.

In regard to the new elevated investment made by the Interborough under the 1913 certificates, the third tracking, the elevated extensions, power plant improvements, and other facilities, the total investment is stated at $44,116,549 for 1927 (page 52). While this amount represents the "original cost" to the Interborough, it does not

take into account the depreciation which has taken place since the time the expenditures were made. A large part of the property has been in operation since 1915, and dur- [fol. 959] ing the period of operation up to the present time, the factor of obsolescence has been particularly operative. The amount of such depreciation and obsolescence, however, has never been determined.

In view of the facts as to the present investment in the elevated properties, I believe that the amounts presented by Berry are grossly excessive. I believe, moreover, that the present value of the elevated lines, as presented in the Gorsuch affidavit (pp. 105-106) is wholly invalid for the purpose of determining the adequacy of the rate of return realized. The "present value" has never been determined; the proper unit prices have never been fixed, nor have the other elements of "fair value" ever been ascertained.

I believe that, in view of the present conditions of the property and their lack of suitability to present day requirements, that the "fair value" does not exceed the present investment and may be placed at an amount not to exceed $50,000,000. This represents, approximately, the capitalized earning power of the elevated system.

8. While the figures presented in the Berry affidavit for securities outstanding on the part of the Interborough Rapid Transit Company and the Manhattan Railway Company are correctly stated, they represent greatly inflated capitalization far beyond the amount of the present investment in the property. They are excessive in the same respect as the figures for investment are too high. The fixed charges placed upon the properties, including interests and rentals, are likewise excessive, and are due to the various elements of over capitalization and improper inclusion in capital account above recited.

[fol. 960] Upon a proper capitalization and reasonable fixed charges and with proper reserves provided out of part earnings, the Interborough would have no financial difficulties; its earnings at the five cent fare would pay all fixed charges, adequate dividends, and would provide sufficient surplus to sustain first-class credit for future financial requirements.

9. The returns to the Interborough will now be presented in terms of its own investment and interest in the subways as fixed by Contract No. 3.

Under the lease terms of Contract No. 3, all the revenues derived directly or indirectly from the operation of the railroads are pooled. From the total revenues for each year, upon quarterly accounting, the Interborough or lessee pays first the interest and sinking fund charges to The City of New York upon its old investment made under Contracts 1 and 2.

After this payment to the City, the charges against the revenues in the order of priority are: (1) Miscellaneous rentals paid by the lessee; (2) taxes paid upon property used in operation; (3) operating expenses, including maintenance and depreciation; (4) the so-called first preferential of $6,335,000, which constitutes the return on the Company's old investment under Contracts 1 and 2; (5) the return and amortization upon the Company's new investment made under Contract 3; (6) the City's return and sinking fund charges on its new investment made under Contract No. 3; (7) contingent reserve provisions; and (8) the balance paid, 50% to the City and 50% to the lessee.

Except for the City's old investment under Contracts Nos. 1 and 2, the Company's entire investment has a preferential position to the City's new investment made under [fol. 961] Contract No. 3. The Company obtains its full return, including the liquidation of unpaid and deferred preferentials, with interest, prior to any return to the City on its Contract No. 3 investment. The City took a junior position for the purpose of assuring the financial support to the Interborough and to enable the latter to furnish adequate, safe and convenient transportation at a five-cent fare. Among the various exact and detailed financial provisions of the contract, is the fixed five-cent fare. This is as much a part of the financial arrangements fixed by the contract and lease provisions, as are the preferential rights to return on the part of the Company.

10. The operation under Contract No. 3 has been highly profitable to the Interborough, as was the prior operation under Contracts Nos. 1 and 2. For the year ended June 30, 1926, the Interborough realized from the subway operation a net surplus of $6,569,573.03, after the payment of all

operating expenses, taxes, interest and other fixed charges, including the rentals of $2,655,186.26 to the City under Contracts Nos. 1 and 2. The surplus is the amount available for the payment of dividends upon the capital stock of the Company so far as subway operation by itself is concerned. The amount of total capital stock outstanding is $35,000,000 for which $19,000,000 was paid in cash to the Company. The subway earnings alone, therefore, under Contract No. 3, provide for dividend payments of over 18% on the par value of the stock and about 34% on the cost of the stock.

For 1927 the surplus amounted to $6,380,017.34. This was equal to 18% on par value and about 33% on the cost of the stock. The slight decline in the surplus in 1927 was due to a strike during the early part of that fiscal year that [fol. 962] cost approximately $2,000,000, of which $967,876.37 was actual outlay, and the balance in loss of business.

For the current fiscal year ended June 30, 1928, the figures for the first six months are available and show a net surplus amounting to $3,687,000, which exceeds the surplus for the corresponding six months of the fiscal year before by $1,609,000.

These earnings are, of course, enormous and leave no room for claim that the five-cent fare fixed by Contract No. 3 is inadequate to give a fair return upon the investment of the Company in the subway properties, or that the five-cent fare is without due regard of the rights of the Company under the contract.

11. While during the past two years the subway system has earned for the Company at the rate of 18% per annum upon the par value of its capital stock of $35,000,000, or over 33% upon the contributions of the stockholders, none of this capital stock represents any actual investment on the part of the Company in the subway properties. The interest and sinking fund charges provided for prior to the determination of the subway surplus represent a sum of bonded indebtedness and note issues which in the aggregate are substantially in excess of the actual investment of the Interborough in the subway properties. The bonds outstanding include $52,000,000 issued prior to the signing

of Contract No. 3 in 1913, and thus stand against the Company's old investment under Contracts Nos. 1 and 2.

But the Company's total net investment under Contracts Nos. 1 and 2 does not exceed, as heretofore presented, the sum of $30,000,000; consequently the interest and sinking fund charges represent bonds of at least $22,000,000 in excess of the Company's actual investment in the old proper-[fol. 963] ties prior to the signing of Contract No. 3. As to the Company's new investment under Contract No. 3, all the funds were provided through the issuance of bonds and notes whose interest and sinking fund requirements are included among the fixed charges borne by the subways. Consequently, the surplus thus derived and heretofore set forth, constitutes profit above all interest and amortization charges covering the Company's entire investment under the three contracts. It is an amount not only in excess of this return required upon the property, but also return upon substantial over-capitalization, also above the amortization of the investment.

12. Under Contracts Nos. 1, 2 and 3, the Company's present investment, as heretofore explained, does not exceed $150,000,000. For the year ended June 30, 1926, the Company's return realized from subway operation after the payment of all operating expenses, taxes and rentals to the City under Contracts Nos. 1 and 2 amounted to $17,107,138.59. Upon a total investment of $150,000,000 the rate of return realized by the Company was 11.4%. For the year ended June 30, 1927, the return on the Company's investment in the subways was $16,798,404.44; this amounted to 11.2%. This rate of return upon the Company's property cannot be claimed to be inadequate or confiscatory of the reasonable right of the Company; the returns are, in fact, excessive.

13. The rate of return computed in the preceding paragraph is based upon the Company's maximum present investment in the subway properties. But even if the Company's investment were computed in terms of its claimed investment of $181,375,787, the rate of return would still be excessive; it would amount to 9.4% in 1926 and to 9.2% in 1927, and would leave no valid claim of inadequacy.

[fol. 964] 14. Even if the Company's investment in subway property were expressed in terms of "present value," representing present-day prices and conditions of construction, with deduction for depreciation, the return realized would still be adequate at the five-cent fare.

In the case of the Interborough's investment under Contracts Nos. 1, 2 and 3 there can be no great difference between the reproduction cost less depreciation and the actual investment. This is due to the fact that the Company's old investment under Contracts Nos. 1 and 2 constitutes the much smaller part of the total and is greatly depreciated because of its average expired life of twenty years *years* or over. This is the only part of the investment which would be materially affected by the higher present price level.

The Company's new investment under Contract No. 3 was to a large extent provided under the higher range of prices during and since the War, and consequently would not be greatly affected by valuation at reproduction cost as compared with actual cost of the properties. Moreover, upon the reproduction cost basis there would be a substantial reduction in the interest and other carrying charges which were due to the delays because of the War and which would not be incurred now when there would be plenty of materials and labor available for construction without any exceptional delays.

15. It is said that under the five cent fare the City of New York has received no return upon its new investment made under Contract No. 3 and that, therefore, the five cent fare is inadequate and that its inadequacy has in fact been made up by the taxpayers. The failure of the City, however, to get a return up to date upon its new investment made under Contract No. 3 is not due to the inadequacy of [fol. 965] the five cent fare, but to the terms of the contract which give the Company preferential claims and excessive returns in relation to its contribution to the enterprise.

The first preferential of $6,335,000 a year paid to the Company on its old investment under Contracts Nos. 1 and 2, is excessive; the investment, as heretofore stated, does not exceed $30,000,000, so that the rate of return is over 21%. This excessive preferential paid to the Company is

principally responsible for the failure of the City to get any return upon its new investment under Contract No. 3 up to the present time. If the preferential were reasonable, commensurate with the relative financial contribution to construction and equipment, the City would now be obtaining a return upon its new investment. The fault lies not in any inadequacy of the five cent fare, but in the financial structure and provisions of the contract.

The excessive preferential of $6,335,000 a year, together with certain other features of the contract, were seriously objected to by representatives of the City of New York in the course of the negotiations prior to the signing of the contract. It was finally signed with the unjustified provisions on the ground of expediency; it was assumed that no better terms could be obtained. The City authorities felt compelled to sign the contract to obtain relief from the then existing congestion, notwithstanding the unsatisfactory provisions of the contract insisted upon by the Company.

16. Besides the subways operated under Contract No. 3, the Interborough also operates the elevated system which was leased from the Manhattan Railway Company in 1903 for the period of the franchise of 999 years from 1875. In addition to the properties directly leased in 1903, the Inter- [fol. 966] borough has constructed certain third tracks under a certificate granted by The City of New York to the Manhattan Railway Company in 1913, also certain extensions to the elevated lines, for which the City granted a certificate to the Interborough Company in 1913. The general financial obligations of the Interborough in respect to the elevated operations are fixed by the 1903 lease. The City of New York had nothing to do with that contract. This was agreed to exclusively by the Interborough and the Manhattan Railway Company. The only part that The City of New York has had in connection with the development of the present elevated system was the granting of the third tracking and the extension certificates in 1913. The elevated lease itself, under which all of the properties are operated, did not have the approval of the City. The latter is not a party to the elevated lease in any respect. It was executed many years before the City had any concern with the Interborough.

17. The financial difficulties of the Interborough during the past eight years, have been due to the elevated lease from the Manhattan Railroad Company, and not to the subway contract with the City. The terms of the elevated lease provide that the Interborough must pay as rental the interest upon the Manhattan Railway Company bonds outstanding and dividends after an initial period, at 7% upon the capital stock. The dividend rate, however, was adjusted in 1922 so that the Interborough is now paying 5% upon about 94% of the capital stock, only if and as earned by the Interborough, and 7% upon the minority interest.

The Manhattan Railway company bonds outstanding amount to about $45,000,000 and the capital stock to $60,000,000, which cost its stockholders considerably less than par value. In 1927, the interest payments on the bonds [fol. 967] amounted to $1,808,240 and the dividends on the stock to $3,086,756. In addition to these amounts, however, the Interborough must pay also interest and sinking fund charges on its own bonds and notes issued for the third tracking, the extension of the elevated lines, and other improvements. The total fixed charges resting on the elevated division, including the dividend rentals, amounted for the year ended June 30, 1926, to $8,062,274.85. The income above operating expenses and taxes available for these charges, was only $3,936,396.50. The net revenues from the elevated fell short of earning all charges, including the dividends to the Manhattan Railway stockholders, by $4,125,878.35. For the year ended June 30, 1927, the corresponding shortage amounted to $4,909,129.66.

18. These so-called deficits, however, have had nothing whatever to do with the operation of the subways under Contract No. 3 with the City. The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation. Under the City Contract No. 3, the operation has been highly profitable to the Company; but under the contract with the Manhattan Railway Company the elevated operations have been unprofitable. Part of the annual surplus earned under the City contract has been consumed by the guaranty and other payments under the elevated lease, with which the

City has no concern. For the past ten years or more, the payments under the elevated lease, with which the City of New York has nothing to do, have left the Interborough crippled financially, notwithstanding the large profits realized on the subways operated under the City Contract No. 3.

[fol. 968] 19. The annual deficit accruals to the Interborough under the elevated lease are in part due to the excessive rental payments fixed by the lease, in part to the unsound financial policies of the Interborough, and in part to the obsolescence of the property. The rental, consisting of the interest of the Manhattan Railway Company's bonds and 7% dividends on the $60,000,000 capital stock, was never justified on the basis of sound and economical railway operation.

The property accounts of the Manhattan Railway Company prior to the lease in 1903 had large amounts which should not have been included in capital account. The securities outstanding exceeded substantially the actual and reasonable investment in the properties. Prior to the lease, the elevated lines had never earned a net return justifying the amount of the rental. The lease was a part of the far-flung plan of the New York City Interborough-Metropolitan traction consolidation which proved to be unsound and soon collapsed in other respects than the elevated lease—which, too, would have collapsed long ago except for its support by earnings of the City's subways operated under Contract No. 3.

After the lease was entered into and operation was taken over by the Interborough, the latter did not pursue sound financial policies. It has never set aside any cash provisions for depreciation; nor has it provided for the amortization of excessive charges included in the elevated capital account. A large proportion of the equipment taken over upon the lease has since depreciated almost entirely, for which practically no provisions have been made out of earnings. Every dollar that could thus be taken out of operation from 1903 to the present time, has been applied to the payment of rentals and fixed charges, and up to 1919 to [fol. 969] dividend payments on the Interborough's capital stock.

The property has become depreciated also in other respects besides the equipment. The structures were built

mostly prior to 1880 under transportation conditions of the City prevailing at that time. Consequently, with the passage of time the elevated railroads became increasingly unsuited to the new requirements of transportation.

Notwithstanding the extreme crowding which has existed for several years on the trunk subway lines, the number of passengers has increased steadily upon the subways, while on the elevated it has been decreasing. Since 1920 the transportation revenue at a five cent fare has increased from $29,300,000 to $40,731,000 in 1927. For the first six months of the current fiscal year, the subway revenue was $21,433,000, compared with $18,647,000 for the same six months the year before; the growth is still continuing unimpeded.

On the elevated lines the total transportation revenues in 1920 amounted to $18,450,000 and for the year ended June 30, 1927, to $17,951,000. During the first six months of the current fiscal year the elevated transportation revenues were $8,874,000, compared with $9,098,000 for the same six months the year before. The decline has not stopped. The elevated properties are rapidly on the road of obsolescence, and it is all but inconceivable that at least within Manhattan they can survive more than ten or fifteen years of further operation until they are replaced by modern subways.

If the present condition of the elevated is taken into account, and if either the investment or the "fair value" of [fol. 970] the property is determined on the basis of present-day actual conditions, the earnings at the five-cent fare are adequate.

The difficulty is not the fare, but the obsolescence of the facilities. If the structures were modern, providing attractiveness of service and proper capacity for mass transportation similar to the subways, the earning power would be sufficient to pay a full return on the reproduction cost less depreciation. The Company could not as a practical proposition, fix the rate of fare on the elevated structure high enough to enable it to pay a return on its own claimed valuations, disregarding the obsolescence, when a five-cent fare is adequate on the modern subway property which cost more than three times per mile to construct.

20. The financial difficulties of the Interborough are thus due to a large extent to the elevated lease, which it had undertaken, without sufficient consideration of future changes in transportation requirements and whose rentals were never justified.

Besides, however, the unsatisfactory financial condition of the Interborough is due also to other reckless financial management in the past. In its subway financing, with respect to Contracts Nos. 1 and 2, the Interborough has included and continued under capital account large amounts that should never have been included or should have been amortized out of income many years ago. It has not made provisions out of earnings for depreciation of either subway or elevated properties.

Outside of the immediate scope of the subway operation the Interborough has acquired, prior to the signing of Contract No. 3, control of certain trolley lines in the Borough of Queens. On these lines it incurred huge deficits and its entire investment has practically proved a complete loss. Nevertheless, both the deficits and investments in the trolley properties have to a large extent been continued in the ac- [fol. 971] counts without having been amortized out of past earnings.

21. Besides the unwarranted financial practices above indicated, the Interborough pursued a reckless dividend policy after Contract No. 3 was entered into. Prior to the signing of the contract, up to 1912, the dividend rate for five years had been 9% per annum on $35,000,000 of capital stock outstanding. In 1912 the rate was increased to 16% but in 1913, the year of the signing of the contract, it was again reduced to 12%. The following year, in 1914, the rate was increased to 15% and in 1915 to 20%; this high rate was continued during 1916 and 1917. In 1918, the rate was 17.5% and in 1919 5%; no further dividend payments were made subsequently.

The high dividend rates, following the signing of the contract were utterly unjustified. At the time when the rate was raised to 20%, the World War had started, and its probable economic consequences might readily have been foreseen. Prices of labor and materials started up-

ward immediately after the beginning of the War. Instead of conserving its financial strength by reducing dividends to a conservative basis, the Company raised the rate to an extreme height and continued that level after the time when it had started its efforts to obtain an increase in fares charged on the subways under the City contract.

As a result of this reckless dividend policy the Company stripped itself of all its current assets and thus contributed greatly to the impairment of its credit, notwithstanding its financial obligations under Contract No. 3. During this period the Interborough faced the necessity of making large capital contributions under the contract and should to a considerable extent have made the payments out of [fol. 972] surplus earnings. Instead, however, it distributed all its current assets in dividends, impaired its credit and was compelled to seek capital at a time when general interest rates were extremely high. This reckless financial course has affected adversely the interests of the City as to investment, return, and quality of service.

22. In the affidavit by Henry T. Berry, reference is made to the proposed platform extensions on the subways, the new cars to be purchased, and other equipment to be installed. According to his estimates the total capital additions for the next five years to be provided by the Interborough under the improvements contemplated would amount to about $40,000,000, which would require not only the additional carrying charges of the investment but also additional operating expenses for labor and materials to cover the extended operations. The proposed improvements, however, are all matters for the future. They do not enter at the present time into the property now operated at a five cent fare. The reasonableness of the five cent fare must be judged on the basis of the present property now used in operation. The question is whether the return realized now on the company's present investment would be reasonable if there were no obligations under the contract to operate at a five cent fare. It is not a question of what will be the situation when $40,000,000 of additional investment will be incurred in the distant future. A large proportion, however, of the future investment is conjectural; no order or definite obligation to provide the facili-

ties has been placed upon the Company, except as to four station extensions.

The improvements, moreover, if carried out will be more than financially self-sustaining, so that the additional [fol. 973] traffic obtained will pay not only the additional operating costs but also the carrying charges and a substantial surplus besides. The program of platform lengthening, if carried out according to the plans considered by the Transit Commission, would increase by about 25% the carrying capacity of the trunk lines, and would produce much greater traffic than would otherwise be attainable.

23. The affidavit presented by Earl E. Starbard, discusses at some length the great changes in economic conditions since the contract was signed, affecting the operations of the subway under the contract. The argument is that the contract was entered into upon the condition of the continuance of the general economic situation as of 1913, and that, therefore, an adjustment in the fare should be made in accordance with the change in economic conditions.

There is no doubt that there has been an increase in price levels which affects the wages paid for labor and prices paid for materials. There was, however, no implied condition that the fare was in any way based upon static economic considerations. The fact is that the Interborough, under the circumstances then prevailing, was able to exact its preferentials and other advantages without regard to any particular economic status. Naturally it did not expect the price upheaval, and did expect huge profits from its contract.

While price increase has taken place, huge profits have nevertheless been realized by the Interborough. This is due to several economic changes which also were not expected and could not have been contemplated prior to the signing of the contract. Reference is made to the great increase in the rate of wages paid. While this may be true, [fol. 974] at the same time there have been introduced many mechanical devices and other arrangements by which the relative number of employees has been greatly reduced in proportion to the service; so there has not been a proportionate increase in the labor costs, in operation and

maintenance, as would be naturally inferred from the increase in the rate of wages paid.

Likewise, reference is made to the increase in the prices paid for coal, which constitutes a large item in the operation of subways. But no reference is made to the tremendous improvements made available since the signing of the contract in the production and utilization of electricity. The number of pounds of coal required for efficient generation of a kilowatt hour of electricity has decreased from six pounds to one and one-half pounds per kilowatt hour. Consequently, notwithstanding the increase in the price of coal, the actual cost of electricity for the propulsion of trains and the lighting of the subways has decreased. No one could have expected such great increases in economies prior to the signing of the contract.

In other important respects greater economies of operation have been realized than could have been readily predicted. The final development, however, that was unexpected is the tremendous increase in New York City and metropolitan population, and the much greater volume of traffic than could have been considered. The factor of mass transportation has become increasingly important. The number of passengers carried has advanced very much faster than had been expected, and has given to the subways a much greater earning capacity than had been assumed. All these economic changes must be considered in connection with the increase in prices which alone is set forth in the Company's affidavit.

[fol. 975] 24. A comparison is made in the Starbard affidavit between the five cent fare charged under Contract No. 3 and the rates of fare in other municipalities in the State of New York under the jurisdiction of the Public Service Commission and in other large cities of the country. Such comparisons, however, are wholly misleading and inapplicable to the present situation. There is no other city in the country where an increase in fare above five cents has been granted where the city has had invested hundreds of millions of dollars in transit property, where the properties are owned by the city and are leased upon a preferential basis to a company under a fixed five cent fare.

The New York City situation—the subways operated

under Contracts Nos. 1, 2 and 3—is unique. There is no parallel anywhere.

Moreover, so far as the character of the railroads and the conditions of operation are concerned, there is no valid comparison of the New York subways with the local transportation in any other city. Nowhere are the transit lines built with the object of furnishing great carrying capacity with mass transporation as in the case of the subways operated under Contract No. 3. Nowhere is there such a great volume or density of traffic. On no other local railroads are there as many trains operated over the routes, as many cars on the average per train, or as many people on the average per car, as in the operation of Contract No. 3 by the Interborough. All these factors enter into the cost per passenger.

While an ordinary street railway may not be able to carry passengers at a five cent fare, and some are not likely to earn their carrying charges even at a higher fare, the [fol. 976] enormous traffic carried on the Contract No. 3 subways reduces all the costs in accordance with the mass transportation. The operating expenses, taxes, interest and sinking fund charges are all reduced as the number of passengers increases. Notwithstanding the general increase in price level, with the unexpected economies of operation and the unexpected growth in the volume of traffic, the actual cost per passenger, including all carrying charges, has practically not increased at all since the signing of Contract No. 3 in 1913. The subway profits to the Company are now much greater than prior to 1913.

John Bauer.

Sworn to before me this 12th day of March, 1928. Walter E. Dunn, Notary Public, Kings Co. No. 16, Reg. No. 8014; New York Co. Clerk's No. 8; New York Co. Register's No. 8009; Bronx Co. Clerk's No. 1; Bronx Co. Register's No. 2801; Queens Co. Clerk's No. 97. Certificate filed in Richmond County. Commission expires March 30, 1928.

[fol. 977] STATE OF NEW YORK,
County of New York, ss:

M. MALDWIN FERTIG, being duly sworn, deposes and says:

I am Assistant Corporation Counsel of the City of New York and of counsel herein.

In the original bill of complaint filed by the plaintiff reference is made (p. 58) to the filing by the plaintiff, with the Public Service Commission for the First District on May 28, 1920, of a complaint claiming the five-cent fare to be unjust and unreasonable, and asking for a hearing pursuant to section 49 of the Public Service Commissions Law. The bill then recites the making of an order by the Public Service Commission ordering that the complaint be dis-
[fol. 978] missed and that the petition of the plaintiff be denied for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3. This is followed up by an allegation dealing with the application of the Public Service Commission for rehearing and reciting the denial by the Commission of said application for a rehearing.

At this point the subject matter of the endeavor of the plaintiff to obtain an increased fare pursuant to its application to the Public Service Commission in 1920 is dropped and is followed by the recital of another application on or about March 22, 1922.

In the matter of the 1920 application to the Commission plaintiff fails to bring to the Court's attention the fact that proceedings were had in the State Courts by writ of certiorari. The fact is, that proceedings were judicially commenced by the plaintiff on May 29, 1920, by the allowance of a writ of certiorari by Justice Leonard A. Giegerich, in the Supreme Court of the State of New York, directing that a return be made for judicial review. A preference in the matter was granted by the Appellate Division of the State of New York for the First Department for November, 1920. On November 8, 1920, a stipulation was filed to the effect that the hearing was not to be brought on before December 7, 1920. On December 12, 1922, an order discontinuing the appeal on consent was filed, and on December 14, 1922, the proceedings were remitted to the County Clerk of the County of New York, where they are now

on file (No. 15634—year 1920). The title of the action was—"Supreme Court, Appellate Division—First Department. The People of the State of New York ex rel. Interborough Rapid Transit Company, relator, against the Public Service Commission of the State of New York for the First District, and Lewis Nixon as Commissioner [fol. 979] thereof, respondents, and The City of New York and John H. Delaney, as Transit Construction Commissioner, intervenors-respondents." The said John H. Delaney and The City of New York were made parties defendants by consent orders.

The question raised in the said proceedings both before the Public Service Commission and the State Court with reference to the subway lines is the same as now raised by the plaintiff in its application to the Public Service Commission made February 1, 1928. In its application dated May 28, 1920, to Lewis Nixon, as Public Service Commissioner for the first District for the State of New York, made by Frank Hedley, President of the plaintiff, the following statements were made:

"The Interborough Rapid Transit Company complains that the maximum fare of five cents now chargeable by it as a common carrier is insufficient to yield reasonable compensation for the service rendered by it in the operation of the subway and is unjust and unreasonable and the Company respectfully petitions that you hold a hearing pursuant to statute and determine a just and reasonable rate for the service to be performed by the Company in the operation of its subway lines of railroad, and in support of this complaint and petition the following facts are alleged:

* * * * * * *

Because of the differences in the provisions affecting the rate of fare chargeable on the elevated lines that rate will have to be made the subject of a separate application."

In the application made to the Supreme Court for the issuance of the writ of certiorari the plaintiff alleged that the order denying the rehearing by the Public Service Commission was

"contrary to law, takes the property of your petitioner for public use without just compensation, deprives your peti- [fol. 980] tioner of its property without due process of law, and deprives your petitioner of the equal protection of the law in contravention of the Constitutions of the State of New York and the United States * * * that the said final order and order denying a rehearing made by said Public Service Commission finally determine the rights of your petitioner in the proceeding before said Public Service Commission upon said complaint and application and that said orders and the determination of said Public Service Commission in said proceeding cannot be adequately reviewed by appeal to a court or other body or officer and that your petitioner has no other remedy except by the writ of certiorari herein applied for."

An examination of the records on file clearly discloses that the basis of the position taken by the plaintiff before the Public Service Commission of 1920, and before the Courts, was identically its present position, namely, that notwithstanding the contract entered into between the plaintiff and The City of New York, the Public Service Commission retained superior regulatory rights and duties to regulate the rate of fare contained in said contract.

In the brief (consisting of 101 printed pages) prepared by counsel for the plaintiff in the Supreme Court of the State of New York, Appellate Division, First Department, the sole issue involved in that proceeding is clearly stated (p. 6) as follows:

Question Involved

The jurisdiction of the Public Service Commission to alter the rate of fare now being charged by the relator upon its subway lines is the sole question now before this Court.

The relator maintains that the Public Service Commission is authorized by statute to *regulate* the rate of fare chargeable by the relator and establish a just and reason- [fol. 981] able rate. The relator invokes, not a *contractual* power, but the exercise of the police power of the State which it maintains has been delegated by the statute to

the Public Service Commission to the extent of authorizing that body to *regulate* the rate of fare in the public interest. (Italics in original.)

Whether said brief, dated September 20, 1920, was actually filed in the Appellate Division, I am unable to say, but it was apparently served on the Corporation Counsel and is on file in his office.

I have made a personal inspection of the Clerk's register of the Appellate Division of the Supreme Court for the First Department and of file No. 15634, 1920 in the office of the Clerk of the County of New York in the matter above referred to, and of the Reports of Plaintiff to the Public Service Commission for the First District and the Transit Commission.

Plaintiff's financial position with reference to net subway income when it instituted its 1920 proceeding was much less profitable than its present position, according to its own figures as is shown by the following tabulation:

Net corporate income from the subway division based upon reports by the plaintiff to the Public Service Commissions and the Transit Commission by years from July 1, 1918, to June 30, 1927, is as follows:

Year ended June 30, 1919	$292,371 48
Year ended June 30, 1920	2,630,953 75
Year ended June 30, 1921	1,129,548 04
Year ended June 30, 1922	2,012,587 36
Year ended June 30, 1923	2,002,854 82
Year ended June 30, 1924	3,483,975 22
Year ended June 30, 1925	4,327,831 43
Year ended June 30, 1926	6,394,571 03
Year ended June 30, 1927	6,289,551 46

The writ of certiorari, the order for a writ of certiorari, both dated May 29, 1920, the petition for a writ of cer- [fol. 982] tiorari, dated May 28, 1920, the return of John H. Delaney, as Transit Construction Commissioner of the State of New York, dated July 22, 1920, the return of the City of New York, dated July 31, 1920, and the brief for relator above referred to, constitute a voluminous group of papers. Deponent respectfully begs leave to refer to them with the same force and effect as if actually incor-

porated herein, and begs leave to present them to the Court on the argument hereon.

This affidavit is submitted for the purpose, among others, of showing that an identical effort made to challenge the fare provisions of Contract No. 3 in the State Courts was abandoned by the plaintiff by its own stipulation and was discontinued over two and a half years after its inception. Nowhere in the complaint or in any of the affidavits on which the motion is made has any reference been made to the Court proceedings following the denial by the Public Service Commission in 1920.

M. Maldwin Fertig.

Sworn to before me this 12th day of March, 1928. Walter E. Dunn, Notary Public, Kings Co. No. 16, Reg. No. 8014; New York Co. Clerk's No. 8; New York Co. Register's No. 8909; Bronx Co. Clerk's No. 1; Bronx Co. Register's No. 2801; Queens Co. Clerk's No. 97. Certificate filed in Richmond County. Commission expires March 30, 1928.

[fol. 983] In United States District Court

[Titles omitted]

Reply Affidavits in Support of Plaintiff's Motion for an Interlocutory Injunction

[fol. 984] Affidavit of Comptroller of Plaintiff in Reply to Affidavits of Dr. John Bauer, Mr. Norman C. Hill, and Samuel Untermyer, Esq.

United States of America,
State of New York,
City and County of New York, ss:

Henry T. Berry, being duly sworn, deposes and says:

1. I reside in Chatham, N. J., and am the Comptroller, and chief accounting officer, of the Interborough Rapid [fol. 985] Transit Company, the plaintiff herein. I submit this affidavit in reply to the affidavits of Messrs. John

Bauer and Norman C. Hill, forming part of the papers submitted by the defendants Transit Commission and The City of New York in opposition to the plaintiff's motion before the Statutory Court for a temporary injunction.

2. I have been continuously employed in, or as the head of, said accounting department for the plaintiff for twenty-five years, and the facts herein alleged are based upon knowledge acquired by me as the result of such lengthy experience and in the regular course of my duties, all of the books of account of Interborough Rapid Transit Company being in my custody and control.

The allegations herein made with respect to the financial affairs of the Manhattan Railway Company are based upon knowledge acquired by deponent during the period from 1903 to 1913, when the books of account of said defendant, Manhattan Railway Company, were in the custody of and kept by the chief accounting officer of its lessee, the Interborough Rapid Transit Company, and since 1913, from annual and other periodic reports of said defendant, Manhattan Railway Company, made to the Transit Commission and other governmental authorities, copies of which are regularly furnished or submitted to the plaintiff, Interborough Rapid Transit Company, for its information.

[fol. 986] Replying to Dr. Bauer's Affidavit of March 12, 1928

The Plaintiff's Summaries of Revenues, Expenses, and Fixed Charges in its Operation of Rapid Transit Railroads are Undisputed

3. In Folios 346 and 347 of the Bauer affidavit the statement is made that the revenues, operating expenses, taxes, rentals, interest, other fixed charges and the returns realized are accurately presented and that they agree with the amounts as stated in the sworn reports made by the Company to the Transit Commission.

The reference is to the statement of the results of operation of the Interborough property for the years ended June 30, 1926 and 1927, appearing on pages 48 and 49 in my affidavit of February 25, 1928. The balance shown as available for a return on the value of the property employed

in the public service in these tables is without any deduction for reserves in those two years, the cost of maintenance being limited to the expenditures actually made and without any allowance for a depreciation reserve.

Nature of Issues Raised by Dr. Bauer

4. A large part of the Bauer affidavit is devoted to urging a claim that there have accrued many millions of dollars of so-called theoretical straight-line depreciation on the property operated by the Interborough Company. If such depreciation has accrued to the extent indicated in the Bauer affidavit, certainly some substantial allowance should be made as a deduction from the earnings for the [fol. 987] two years—1926 and 1927—to meet so much of that depreciation as accrued during those years. This is not, however, taken into consideration in any of the figures or conclusions in the Bauer affidavit.

Mr. Bauer in his affidavit makes many general statements and draws many conclusions with respect to the value of the property used by the Interborough Company in the public service, and he undertakes to criticise the valuation figures used by the plaintiff for the purpose of indicating the deficiency in the return actually obtained by the Company in its operation in the years 1926 and 1927, but he fails to present any supporting data for such conclusions—his idea being apparently, by mere wave of the hand, to destroy property values without giving any facts or figures upon which the court may reach an intelligent determination.

Furthermore, he states that the values used by the Interborough Company in computing a fair return are not the values of the Interborough property as it has claimed, but includes the values of the property provided by the City. The Company has never claimed that the amounts used represented only the value of property provided by it, but are used to compute a fair return on all the property provided and used by it for the public service.

The plaintiff claims to be entitled to earn a return upon all the property and to receive a half-part of the earnings over the Company and City preferentials.

At folio 349 of Dr. Bauer's affidavit, an attempt is made to convey the notion that a return should be denied upon

[fol. 988] all of the property used in the public service, and that the fare should be so limited that a return should be allowed only on the portion of the property the legal title to which is in the name of the companies. The plaintiff disputes this contention, because it does claim that it is entitled to earn a fair and reasonable return on all property used and useful by it in the public service, irrespective of the identity of ownership or the source of the capital; and that it is entitled to charge a rate of fare which will produce the required revenue and income for such a full return. The City of New York has never renounced its right to compensation upon the City provided property, even if the payment has been subordinated or postponed. The plaintiff has never foregone its right to a share in the excess of income after payment of the preferentials in order specified in Contract No. 3.

Without intending in any way to waive the plaintiff's claim, and merely as a matter of information, we have set up the following table showing the grossly confiscatory effect of the five cent rate if the plaintiff's net income therefrom were applied only (a) to the property provided by the plaintiff and the Manhattan Railway Company, exclusive of property provided by the City of New York, or (b) to the property the legal title to which is in the Companies, exclusive of property in which the plaintiff has at least an equitable interest and other property the legal title to which is in the name of the City of New York.

[fol. 989] (A)

Present Value of Property Provided by the Companies, Exclusive of Other Property Provided by the City of New York, and Rate of Return Earned Thereon under Five-cent Fare

	1926	1927
Company Owned Property:		
Company Property Contracts 1 and 2	$71,383,000	$71,378,000
Company Property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway Original Property	143,556,000	143,556,000
Material and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
Total Company Owned Property	$285,315,423	$285,678,474

	1926	1926
Company Provided Property:		
Company Property Provided under Construction Cont. 2	35,410,000	35,410,000
Company Property Provided under Contract 3	230,804,000	230,010,000
Excess Cost of Belmont Tunnel	5,895,174	5,895,174
Total Company Provided Property	$272,109,174	$271,315,174
Total Property Owned and Provided by Company	557,424,597	556,993,648
Amount necessary to recondition	2,580,000	2,580,000
Present Value of Company Property at Least	554,844,597	554,413,648
Gross Income	25,094,198	24,490,775
Deductions:		
Excess Maintenance	$981,345	$1,479,821
Interest and Sinking Fund on City Bonds	2,655,186	2,655,569
Miscellaneous	364,131	338,192
	$4,000,662	$4,473,582
Balance Available as a Return on Present Value of Company owned and provided Property	$21,093,536	$20,017,193
Per cent of Return Actually Earned on Such Value	3.80%	3.61%
Earnings Required for 8% Return at least	44,387,568	44,353,092
Deficiency in Earnings below 8% Return at least	23,294,032	24,335,899

Even denying a reasonable return upon the property provided by The City of New York, the plaintiff has not earned, during the years 1926 and 1927, a fair and reasonable return on the Company provided property alone. [fol. 990] The return earned thereon amounted to $21,093,536 and $20,017,193 for the years 1926 and 1927, respectively. In order to earn an eight per cent return upon such Company provided property, the plaintiff required to earn additional sums of $23,294,032 and $24,335,899, for the years 1926 and 1927, respectively.

(B)

Present Value of Property Owned by the Companies, Exclusive of Other Property Provided by Them or Owned by the City of New York, and Rate of Return earned thereon under Five-cent Fare.

	1926	1927
Company property Contracts 1 and 2	$71,383,000	$71,378,000
Company property Elevated Certificates	65,032,000	65,338,000
Manhattan Railway original property	143,556,000	143,556,000
Material and Supplies	2,467,577	2,318,517
Cash Working Capital	2,876,846	3,087,957
	$285,315,423	$285,678,474
Amount necessary to recondition	2,205,000	2,205,000
Present Value of Company property at least	$283,110,423	$283,473,474
Gross Income	$25,094,198	$24,490,775
Deductions:		
Excess Maintenance	$981,345	$1,479,821
Interest on 5% Bonds issued for Contract 3	3,998,073	4,010,057
Interest on 7% Notes issued for Contract 3	1,290,617	1,280,222
Sinking Fund on 5% Bonds issued for Contract 3	1,239,488	1,200,188
Interest on 10-Year 6% Notes issued for Contract 3	504,999	517,347
Interest on Equipment Trust issued for Contract 3	291,322	215,825
Interest and Sinking Fund on City Bonds	2,655,186	2,655,569
Miscellaneous	364,131	338,192
Interest and Sinking Fund on 5% Bonds for Brooklyn Extension and Belmont Tunnel	1,306,754	1,299,304
	$12,631,915	$12,996,525
Balance Available as a Return on Present Value of Company Property	$12,462,283	$11,494,250
Per cent of Return Actually Earned on Such Value	4.40	4.05
Earnings Required for 8% Return at least	$22,648,833	$22,677,877
Deficiency in Earnings below 8% Return at least	10,186,550	11,183,627

[fol. 991] Therefore, it will be seen that, even denying a reasonable return upon the other property provided by the plaintiff and upon the other property owned by The City, but used in the public service, the plaintiff has not earned, during the years 1926 and 1927, a fair and reasonable return on such property alone. The table further shows that the rate per cent. actually earned upon such

Company-owned property for the year 1926 was 4.05 per cent., and for 1927, 4.40 per cent. It also shows that, in order to receive an 8 per cent. return on such privately owned property, the plaintiff required to earn additional sums of $10,186,550, and $11,183,626, for the years 1926 and 1927, respectively.

No Basis for Dr. Bauer's Proposed Deduction of Accrued Theoretical Straight-line Depreciation

5. At Folio 357, etc., Dr. Bauer undertakes to find fault with the present value figures used for the purpose of measuring the rate of return received by the Company from the operation of the property devoted to the public service, and complains that there should be deducted from such values something more than the amount necessary to recondition the said property.

In this connection I wish to direct the court's attention to a statement made by Messrs. John H. Madden and Fred W. Lindars, Valuation Engineer and Chief Accountant of the Transit Commission, respectively, who said in their report, dated February 15, 1922:

"It is believed due consideration should be given to an estimate of the necessary expenditures of this character (cost to recondition) as a practical means of determining [fol. 992] the actual rather than the theoretical depreciation. Life is necessarily affected by the standard of the repairs. Renovation and rehabilitation from time to time will operate, to make over and renew if successively continued may prolong the life in service to an extent difficult to estimate."

Dr. Bauer's theory of accrued theoretical straight-line depreciation is generally discarded by practical operators of public utilities.

The most recent utterance on the subject of depreciation is found in the case of McArdle v. Indianapolis Water Company (272 U. S. 400).

In that case, the court reducing the deduction for depreciation as determined by the City's engineers, said:

"It was the result of a straight line calculation based on age and the estimated or assumed useful life of perishable elements. The Commission's report indicates that the property is well planned, well maintained and efficient. * * * The testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to have the preference to mere calculations based on averages and assumed probabilities."

This ruling has most recently been applied by the Special Statutory Court (Manton, C. J. and Cambell and Inch, D. (J. J.) in Brooklyn Borough Gas Company v. Prendergast (16 Fed. 2nd 615).

The contention now advanced by Dr. Bauer has been repeatedly made in behalf of the City of New York in numerous public utility rate cases in New York City, and has [fol. 993] been uniformly rejected by the Courts in those cases.

Dr. Bauer does not say that he has made any inspection of the property used by the Interborough Company in its operations, nor does he furnish any facts or figures to show that he has any substantial basis for the claim that the property of the Interborough System is substantially deteriorated.

If the work done by the engineers of the Transit Commission is of any value whatever, Dr. Bauer has seen fit to completely ignore that portion of the Commission's engineers' work in which they made an estimate of the "Expenditures necessary to place the property in first class operating condition," to be found on Sheet 1 of Exhibit 40 put in evidence by the Special Counsel to the Transit Commission during the 1927 Transit Investigation, in which it appears that as to Contracts Nos. 1 and 2 the Commission's engineers found the amount "necessary to place the property in first class operating condition" to be as follows:

Contracts Nos. 1 and 2	$254,000
Contract No. 3	375,000
Original Manhattan Property	654,000
Manhattan Power Plant Improvements	8,000
Additional Tracks	160,000
Extensions	1,129,000
Total for Interborough System	$2,580,000

Those were the figures used by Mr. Gorsuch as the limit of deductions from his reproduction cost figures in order to arrive at the present value of the plaintiff's property. [fol. 994] In the absence of substantial evidence that the Transit Commission's engineers have made a serious blunder in their inspection and examination of the plaintiff's property for the purpose of estimating the amount necessary to put that property in first class operating condition, it is difficult to see how Dr. Bauer can, by wave of his hand, destroy the work done by the Commission's engineers based upon such a field inspection.

References in Folios 369 and 370 of the Bauer affidavit to the provisions of Contract No. 3 calling for payments into a so-called "depreciation fund" in connection with cars provided under Contracts Nos. 1 and 2 and for other equipment overstate the amount now applicable to the cars for the reason that the first payment—$1,618,950—called for in the schedule in Contract No. 3 was in connection with the composite cars. The composite car bodies—478 in number—have all been removed from the Subway several years ago.

Furthermore, the payments provided in Contract No. 3 were not to meet admitted depreciation on the property provided by the Company under Contracts Nos. 1 and 2, but represent the amounts which the Company agreed to pay, in so far as it applies to the cars, into a "depreciation fund" in 1939 and thereafter as its contribution towards the provision of equipment to replace that in use at that date.

The $3,000,000 referred to was to be deducted from the value of the other equipment furnished under Contracts Nos. 1 and 2 upon its purchase by the City at the end of the lease under Contract No. 3. In both instances these amounts should be considered as a part of the consideration for Contract No. 3 in its entirety.

[fol. 995] Items of Investment in Rapid Transit Railroads Questioned by Dr. Bauer

6. At Folio 373, of the Bauer affidavit, reference is made to the cost of the Elevated lease. That amount was limited to $51,250 of the total cost of leases of $22,278,000. The affidavit also refers to the loss sustained in the construc-

tion work on Contract No. 2. The item so referred to was the cost of constructing the Subway under Contract No. 2 in excess of the amount paid by the City and did not represent a loss but represented the costs of property actually provided for public service. The same is true of the losses referred to in the construction of the so-called Belmont tunnel.

The Dual Subway Plan Contemplated the Earning of an Adequate Return Upon All the Property Devoted to the Public Service

7. Dr. Bauer, in his affidavit, folio 292, asserts that the City took a "junior position" under Contract No. 3 for the purpose of assuring the financial support to the Interborough Company and to enable the latter to furnish an adequate, safe and convenient transportation for the five-cent fare. The real reason for the City's taking the "junior position" referred to was so that it could be assured that private capital would be invested in the enterprise. At that time the City was unable to furnish all the capital required for the dual subway contracts and its position was necessarily made subordinate so that the use of private capital could be realized.

By such subordination, neither the City nor the Company made any renunciation of the right to earn an adequate [fol. 996] return upon all of the property devoted to the public service. The arrangement with the City was only as to the manner in which such return, when earned, should be distributed.

Dr. Bauer's Suggestion of Possible Dividends on the Plaintiff's Stock Ignores Legal Requirement as to Divisible Surplus from All Corporate Operations

8. Paragraphs 10, 11 and 12 in the Bauer affidavit deals with the earnings of the Interborough Company from the operations of the Subway Division for the years 1926 and 1927 and attempts to show by converting those earnings into a percentage of the par value of the capital stock or a percentage of the amount paid in on such capital stock—(this latter incidentally being stated at $19,000,000 when it should be $21,000,000)—that the Interborough receives

an adequate return. Under the terms of Contract No. 3, to which reference is made, the return to the Interborough Company for the two years named, from the operations of the Subway Division, is, however, to a very great extent the receipt of a return to which it was entitled during the past years but which had not been realized because of the inadequacy of the five-cent fare. Furthermore, this is only one part of the operations of the Interborough Company and the conclusions as to the Company's operations as a whole must take into consideration the operations of the Manhattan (Elevated) Division, which the affidavit subsequently admits have been conducted at a very substantial loss.

[fol. 997] Dr. Bauer's "Opinion" That Original Investment and Present Value Are Interchangeable

The test sought to be applied by Dr. Bauer of the possible dividends on the plaintiff's stock which might be available from Subway earnings is misleading. It ignores the elementary requirement that corporate dividends can be paid only out of corporate surplus, which must take into account the results of operation of the plaintiff's system as a whole.

9. The conclusions on page 102 of the Bauer affidavit that: In the case of the Interborough investment under Contracts 1, 2 and 3 there can be no great difference between the reproduction cost less depreciation and the actual investment—is not confirmed by the computations made by the engineers of the Transit Commission. On the contrary, their figures indicate that this statement is erroneous.

At folios 406 and 407, Dr. Bauer, who has not had any responsibility for construction work, ventures his opinion that substantial reductions would appear in present reproduction costs, because a reproduction of the property at this time when plenty of materials and labor are available would prevent the exceptional delays which were met during the actual construction period because of the war conditions.

But many of the delays referred to were not due to war conditions but were the result of the delays on the part of the Transit Commission in letting of the contracts and the furnishing of necessary plans and specifications. For ex-

[fol. 998] ample: The contract for the tunnel section under the East River was dated July 13, 1914, and under the terms contained therein was to be completed March 13, 1918, nearly one year and three months after the date named in Contract No. 3 for the beginning of the operation under that Contract. This particular section was one of those named in the contract as required for use before the operation under the contract could be begun in full.

Delays are part of the large contingent elements of cost which usually enter into construction work of a large magnitude.

Inadequacy of Five-cent Fare Due Solely to Changed Conditions

10. The charge made by Dr. Bauer in his paragraph "15" that the failure of the City to get a return up to date upon its Contract No. 3 investment is not due to the inadequacy of the five-cent fare but to the terms of the contract which give the Company an excess return in relation to its contribution to the enterprise, is refuted by the conclusions of the so-called McAneny Committee in 1912. As shown by the quotations from that committee's report contained in my affidavit of March 5, 1928, it was confidently expected that the returns to the company provided in Contract No. 3 would be met and a substantial profit to the City over and above the interest and sinking fund on the City's investment would be forthcoming within a few years after the beginning of the operations under that contract on a five-cent fare.

11. The statements contained in folios 416 and 417 in relation to the deficits from the operation of the Manhattan [fol. 999] (Elevated) Division for the years 1926 and 1927 are clear proof of the Interborough Company's position that the returns on the Manhattan Division on a five-cent fare are absolutely inadequate and confiscatory.

12. In paragraph 18 much is said about the deficits under the Manhattan lease, but no reference is made to the fact that the Interborough Company has to meet a charge for approximately $3,000,000 a year on its securities issued to provide additional tracks on the elevated lines and for the extensions thereof. This provision was made as part of the

Rapid Transit System contemplated when Contract No. 3 was executed and represents a very valuable addition to the property used in the public service.

13. In connection with the operations under the elevated lease, it should be noted that from 1903, the year in which that lease became effective, to and including the fiscal year 1917, the year following that in which the operations under the Elevated Extension Certificate began, the operations of the Manhattan Division show a profit to the Interborough Company of an average of $1,297,000 a year over and above all expenses, taxes, charges and rental.

14. Dr. Bauer (affidavit, folio 429), refers to the Manhattan property as obsolete and unable to provide proper capacity for mass transportation. Such a characterization is unfounded, and is refuted by the fact that the elevated lines carry approximately 1,000,000 passengers a day, which, under existing conditions, it would be practically impossible to transport in any other manner. Its capacity for mass transportation is shown by the fact that in 1927 it [fol. 1000] transported 2,589,768 passengers per mile of single track as compared with 3,266,476 passengers per mile of single track operated in the Subway, and also compared with the fact that the New York Rapid Transit Corporation transported 2,543,603 passengers per mile of single track during the same year.

The Plaintiff's Rate Base Does Not Include Investment in Street Surface Railroad Lines

15. Dr. Bauer (affidavit, bottom of page 108 and top of page 109) seeks to leave the inference that the cost of the Company's investment in street surface railroad lines in the Borough of Queens has been included in its capital accounts and in the amounts on which a return should be earned. Of course no part of this investment in Queens has been included in any of the capital accounts of the Interborough Company or in any of the costs to reproduce property which it devotes to the public service.

The Proper and Lawful Distribution of Profits in the Past Have No Relation to the Present Inadequacy of the Five-cent Fare

16. At folio 436 of Dr. Bauer's affidavit, the claim is made that the Interborough Company by a payment of excess dividends impaired its credit and was compelled to seek capital at a time when general interest rates were extremely high. As a matter of fact the financing under Contract No. 3 in 1913 was completed by the issuance of Company's 5% bonds sold at 93½ to the extent that it was then estimated would be sufficient to meet all the Company's commitments under that contract and the Elevated Extension Certificates. The tremendous increase in the cost over [fol. 1091] and above the estimates resulted in its being necessary for the Company to further finance its requirements in 1918 when it was extremely difficult to secure capital because of the war conditions and when necessarily interest rates were high.

Economies by Introduction of Mechanical Devices Have Not Overcome Increased Operating Costs

17. At folio 444 of Dr. Bauer's affidavit, reference is made to the introduction of mechanical devices and other arrangements which have reduced the relative number of employees so that the increase in rate of wages does not reflect the increase in the cost for labor used in operating the properties. While it is true that mechanical devices and other arrangements have been introduced which greatly reduce the cost of service rendered, the cost per car mile for the operating payrolls in 1913 was 6.08 cents and in 1927 was 12.42 cents, an increase of 6.34 cents, or 104%. Compared with this increase in payrolls the increase in gross operating revenue was from 24.34 cents per car mile in 1913 to 29.94 cents per car mile in 1927, an increase of 5.60 cents or 23%.

18. At folio 445 of Dr. Bauer's affidavit, reference is made to the tremendous improvements made since the signing of the contract in the production and utilization of electricity. This statement completely nullifies the statement contained in folio 368 of the affidavit that the cost of the property includes "large amounts, the exact sum of

which has not been determined, for obsolete power plant and substation equipment which is antiquated and useless [fol. 1002] for present-day operation." The further statement contained in the Bauer affidavit that the number of pounds of coal required for generation per k. w. hour has decreased from 6 to 1½ pounds per k. w. hour, is, I am informed by competent engineers, incorrect and erroneous, in so far as the Interborough power stations are concerned. There has been a considerable saving in the quantity of coal used to generate a kilowatt hour of electrical energy at the power stations of the Interborough Company, but there has been no such spectacular reduction, as is stated in the Bauer affidavit. In 1913, the actual average coal consumption per kilowatt hour output was 2.144 pounds. However, there was nevertheless an increase in the cost of coal per kilowatt hour as a result of the increase in the cost of coal per ton.

Inadequacy of Earnings from the System to Maintain the Plaintiff's Credit

19. Dr. Bauer concludes his affidavit by the general sweeping statement that the subway profits to the company are now much greater than prior to 1913, leaving the inference that the plaintiff is now earning a fair return on its property or investment. The fact is that practically all of the earnings of the subways which might otherwise be regarded or treated as profit have been utilized in large part to meet the plaintiff's obligations against the elevated lines in order that those lines might continue to function efficiently to the benefit of the public and much of the earnings have been used to provide additional capital requirements because the securities of the plaintiff have been selling at such a discount in the open market that it has been impos- [fol. 1003] sible because of the narrow margin by which the plaintiff's charges have been earned to induce the public to become interested any longer in the purchase of the plaintiff's capital securities.

Other Matters Answered in Principal Affidavits Submitted in Support of Plaintiff's Motion

20. In further answer to many of the statements contained in the Bauer affidavit, and the Untermyer affidavit dated March 12, 1928, I would refer to my affidavit of March 5, 1928, which is annexed hereto and made a part hereof, presented to this Court in the Ancillary Action in reply to an affidavit of Mr. Samuel Untermyer, the Special Counsel of the Transit Commission, dated February 25, 1928.

Answering Affidavit of Norman C. Hill of March 12, 1928

Verification of the Amounts Stated in the Plaintiff's Moving Affidavits for Present Value, Reproduction Cost, and Investment in Property

21. Referring to the second paragraph of Mr. Hill's affidavit, I desire to say that I have never made the claim that the figures of the Interborough, Manhattan property and miscellaneous Interborough items were prepared by the engineers of the Transit Commission, but, on the contrary at page 50, of deponent's affidavit, verified February 25, 1928, and forming a part of the application of the plaintiff for an interlocutory injunction and temporary restraining order, there is a very clear and specific statement as to the [fol. 1094] sources of the above named figures, including the miscellaneous items of cash working capital and materials and supplies. It is a fact, however, that in the figures used on page 52 of my said affidavit there does appear the original investment of the city of New York under Contracts 1, 2 and 3. The figures for the year 1926, were prepared by the engineers of the Transit Commission for all three contracts and those figures appear on exhibits 40 and 102, put in evidence by the Special Counsel to the Transit Commission during the 1927 Transit investigation by the Transit Commission.

22. As to the second paragraph of Mr. Hill's affidavit (fol. 249), Mr. Hill makes the statement that the figures shown on page 54 of my affidavit for the Manhattan Division were not prepared by the engineers of the Transit Commission, and states that he does not know the figures of the

Transit Commission's engineers on which this computation is supposed to be based. Except for materials and supplies and cash working capital, Mr. Hill will find on sheet 2 of Exhibit 102, put in evidence by Special Counsel to the Transit Commission in the 1927 investigation by the Transit Commission, the reproduction cost figures prepared by the Commission's engineers for the year 1926, which are the same figures used at page 106 in the affidavit of Mr. William S. Gorsuch (also forming a part of the plaintiff's application for an interlocutory injunction and temporary restraining order).

23. In the third paragraph (folio 250) of Mr. Hill's affidavit, the statement is made that he does not know the figures of the Transit Commission's engineers shown on [fol. 1005] page 54 of my affidavit, on which such computations are supposed to be based. Attention is called to the fact that in my affidavit, on page 54 (the second table), the statement is made that we have used the Commission's figures for city provided property. For Mr. Hill's information, I now state that the Commission's engineers' figures for city provided property forming a part of the total figures used in the said table will be found, for the year 1926, on sheet 1 of Exhibit 102, put in evidence by special counsel to the Transit Commission during the 1927 transit investigation by the Transit Commission, which are the same figures used by Mr. Gorsuch, shown at page 107 of his affidavit.

24. In the fourth paragraph of Mr. Hill's affidavit (folio 251) the statement is again made that the figures therein set forth are not the figures of the engineers of the Transit Commission. I wish to call attention to the fact that the table at the bottom of page 54 of my affidavit states that such computation is based on Transit Commission's engineers' figures of reproduction cost, and again I call attention to the fact that except for materials and supplies, cash working capital, excess cost of Belmont tunnel, the figures used for the year 1926, for Company property provided under Contracts 1, 2 and 3, and city property provided by the city under Contracts 1, 2 and 3 are the reproduction cost figures prepared by the engineers of the Transit

Commission and will be found on page 1 of Exhibit 102, and page 2 of Exhibit 40, both of which were put in evidence by Special Counsel to the Transit Commission during the 1927 Transit investigation.

25. In the fifth, sixth and seventh paragraphs of Mr. Hill's affidavit (folios 252, 253 and 254) Mr. Hill again [fol. 1096] states that the figures shown on page 55 of my affidavit are not the figures of the Transit Commission's engineers.

On page 55 of my affidavit, three tables are shown viz: The first table represents a computation based on the Company's own present value figures of property provided by the Companies, plus present value figures for property provided by the city, which latter figures were prepared by the engineers of the Transit Commission and will be found on page 1 of Exhibit 102, put in evidence by Special Counsel to the Transit Commission during the 1927 Transit investigation.

The details of the figures shown in the said table at the top of page 55 of my affidavit will be found on page 110 of the affidavit of Mr. William S. Gorsuch.

The second table shown on page 55 of my affidavit, the details of which will be found on page 111 of the affidavit of Mr. William S. Gorsuch, represents a computation based largely on the Transit Commission's engineers' reproduction cost figures, for all of the property of the Interborough System, all of which figures will be found, for the year 1926, on pages 1 and 2 of Exhibit 102, and page 2 of Exhibit 40, put in evidence by Special Counsel to the Transit Commission, during the 1927 transit investigation. To the said Transit Commission's engineers' reproduction cost figures, as shown in Table 1, page 111, of Mr. Gorsuch's affidavit, there were added materials and supplies, cash working capital and overheads omitted by the Transit Commission's engineers, and the excess cost of the Belmont Tunnel.

[fol. 1097] As to the last table shown on page 55 of my affidavit, the details of which are shown on pages 51 and 52 of my affidavit, I again call attention to the fact that the Transit Commission's engineers' original cost figures for City provided property, under Contracts Nos. 1, 2 and 3, as shown in said table, were taken from page 1 of Exhibit

102, put in evidence by Special Counsel to the Transit Commission, during the 1927 transit investigation.

In the eighth paragraph of Mr. Hill's affidavit (fol. 255) Mr. Hill again states that the figures appearing in the table shown on page 56 of my affidavit, are not the figures of the Transit Commission's engineers. The details of the said figures shown on page 56 of my affidavit are found on page 114 of the affidavit of Mr. William S. Gorsuch, and except for materials and supplies, cash working capital, excess cost of Belmont Tunnel, they are the same figures prepared by the Transit Commission's engineers, and will be found (for the year 1926), on page 1 of Exhibit 102, and page 2 of Exhibit 40, put in evidence by special counsel to the Transit Commission, during the 1927 transit investigation.

26. In all the cases cited above where the city provided property representing the valuation on original and reproduction cost bases is involved, the figures for Contracts 1 and 2 for the year 1926 were also used for the year 1927. In the case of Contract 3 the figures for 1927 were derived by taking the figure of the Commission's engineers for the year 1926 and adding thereto estimated expenditures made by the City on its own account for the year ended June 30, 1927.

[fol. 1008] In all the cases cited above where the Commission's engineers' figures for 1926, representing the valuation on both the original and reproduction cost bases of the Company provided properties were used, the 1927 figures were obtained by adding the net additions to fixed capital for the year ended June 30, 1927 to the 1926 figures.

The plaintiff has never claimed that the Transit Commission itself has made any official determination with respect to the valuation of the plaintiff's property, or the property used by it in the public service. We have merely called the Court's attention to estimates of present value based on reproduction costs of both Company engineers and the Commission's engineers of all the property used by the plaintiff in the public service, and these tables do show correctly that, based upon such present value of such property, whether the Company figures or the Commission's engineers' figures are used, the plaintiff is not receiving a fair return upon the value of such property.

Answering Schedule I Annexed to the Affidavit of Samuel Untermyer of March 12, 1928

The Impracticable Proposals Made by Mr. Untermyer

27. The various proposals made by the Special Counsel of the Transit Commission, beginning with his letter of January 7, 1928, and continuing through subsequent letters and conferences are in many respects very indefinite and involved.

My understanding of the proposals as they stand at the present time is as follows:

[fol. 1009] 1. The proposed settlement of disputed items in contract No. 3 accounting:

This settlement is to be made as of June 30, 1927, and it is to cancel the Company's claim that deferred preferentials existed as of that date; it also is to cancel the City's claim that there was some amount due the City as its share of the Subway earnings on that date.

It is to be made without further payments by the Company, but is to leave open disputed questions as to depreciation on property under Contracts Nos. 1 and 2 and the Elevated Certificates.

2. The proposals as to depreciation:

The settlement of disputed items would appear to dispose of depreciation on property provided under Contract No. 3 to June 30, 1927, without any payment on the part of the Company and provide that thereafter $1,000,000. a year will be paid into the Contract No. 3 depreciation fund. Such fund to be drawn upon only for the purpose of replacing property furnished under Contract No. 3, the City reserving the right, in the event of recapture, to deduct from the recaptured price whatever depreciation may be then found to exist. It naturally follows that the sum then in the depreciation fund would be offset against this deduction at that time.

So far as depreciation is concerned with respect to property furnished under Contracts Nos. 1 and 2, the Elevated Certificates and Manhattan Railway property no conclusion

is offered, that feature being left for future determination [fol. 1010] from the date of operation under the Elevated Extension Certificate and Contract No. 3. Whatever amount may be determined in the future as the depreciation to be paid in respect to these properties for the period from the beginning of operations under the Certificate and the Contract to June 30, 1927, must, apparently, be provided out of the Company's own resources, altho there is no indication as to where the Company could procure the amount required.

There is, however, a recommendation that a moderate sum arbitrarily fixed ($500,000 a year) be currently paid into a depreciation fund for these properties with a qualification that the amount will be subordinated to the Company's fixed charges, including interest on Manhattan Bonds and the dividend on Manhattan 7% Stock, but deducted from the Company's net preferential before computing any earnings applicable to dividends on Manhattan Modified Guarantee Stock. This method of deducting this depreciation payment is admittedly proposed so that there will be no balance available for the payment of dividends on Manhattan Modified Guarantee Stock.

If this sum be divided so that $200,000 a year would be applicable to properties furnished under Contracts Nos. 1 and 2, and $300,000 a year to the Elevated properties the effect of the proposal would be to deduct from the Company's preferential $200,000 a year, which, of course, is contrary to the existing conditions of Contract No. 3. The result of deducting the Elevated portion—300,000 a year—[fol. 1011] from the earnings of the Elevated would reduce the amount applicable to Manhattan Railway 5% dividends by that sum, but if that deduction were not accepted by the Manhattan Shareholders the net result would be that the entire amount would come out of the Company's resources rather than out of its earnings from operation.

3. The proposals for the provision for new capital requirements:

That 432 and 382, or a total of 814 cars be provided by the issuance of Interborough 10-Year Equipment Trusts with interest at 5%; that the Company pay one-half of the construction cost of local platform lengthening; and that

the Company provide the necessary power to handle the 814 additional cars.

The claim is made that the Company could provide this additional power without any substantial capital expenditure if it ceased to furnish power to the Surface Lines and possibly reduce its supply of power to the N. Y. R. T. Lines.

The Company is to accept the responsibility for all this work without any guarantee that the City will furnish any money towards meeting the cost, except what will be available from July 1, 1927, by applying the City share of the Subway earnings.

28. Based upon these conclusions as to the proposals which have been made we set forth, hereinbelow, our conclusions as to the probable results:

[fol. 1012] The settlement of the disputed items, as outlined, would leave the remainder in excess of the amount required to meet the extraordinary obligations to which the Company is now committed to June 30, 1930, at approximately $700,000.

It is evident, therefore, that except for the possible realization from the "Miscellaneous Assets of the Company," of about $4,000,000, the Company has no assets which can be applied to meeting the capital expenditures referred to hereinabove, in fact, the above balance and the "Miscellaneous Assets" are the only provision which the Company has in sight to meet the cost of signals after June 30, 1930, estimated at $11,305,000.

Admitting the possibility of the issuance of Interborough Ten-Year Car Trusts to provide for the 814 cars, and upon the assumption that the lengthening of station platforms will be finished prior to June 30, 1930, the new capital requirements under these proposals to June 30, 1930, are estimated as follows:

1—Upon the assumption that the Company furnish all the power machinery necessary without cutting off service now furnished to other Lines—	
Cost of 432 cars (305 motors and 127 trailers)	$8,856,000

Equipment Trust issued immediately would require an intial payment of 25% and two annual instalments before June 30, 1930, amounting to		$3,600,000
[fol. 1013] Cost of necessary power equipment		5,900,000
Cost of 382 cars to provide 10-car local trains	$8,000,000	
An Equipment Trust issued, say January 1, 1930, would require prior to June 30, 1930, only an initial payment of 25%		2,000,000
Cost of other equipment, including power machinery on account of platform extension work		4,300,000
Cost of the Company's one-half of the construction of the platform extension work		7,265,000
Total Estimated Requirements to June 30, 1930		$23,065,000

The only amounts available to meet this requirement will be the City's share of the Subway earnings, which under the proposal can be diverted for that purpose.

The estimates which have been the basis for our previous statements indicate that if the Company's return be limited to $3,700,000 a year, such earnings for the three years, without deduction for depreciation, will be as follows—

Year ending June 30, 1928	$3,850,000
" " June 30, 1929	4,850,000
" " June 30, 1930	4,350,000
Total Available	13,050,000
[fol. 1014] Estimated requirements in excess of amount available on this basis	$10,015,000

The estimates upon which this conclusion is based do not allow for any deduction for depreciation.

If the $1,000,000 a year, suggested for depreciation on Contract No. 3 property and $200,000 a year of the $500,000 suggested for depreciation on Contracts Nos. 1 and 2 and the Elevated properties be included, the requirements in excess of the amount available for the three years would be increased by $1,200,000 a year, or 3,600,000

making the total estimated requirements in excess of amount available $13,615,000

Neither do the estimates include any allowance for an increase in wages. If increased wages are paid the amount available will be reduced by such increase to the Subway employees. A 10% increase would amount to approximately $1,700,000 a year over the present payroll

Subsequent to June 30, 1930, the annual instalments on the two 10-Year Equipment Trust contemplated would amount to $1,260,000. In view of the competition by the new City subways and the probability of [fol. 1015] increased wages there is no assurance that this amount can be provided annually from the City's share of the Subway earnings after 1930.

2—Upon the assumption that the Company discontinue the sale of power to the Surface Lines, or purchase sufficient power from the New York Edison Company so that no additional power generating machinery will be required—

Initial payment of 25% and two annual instalments on an Equipment Trust for 432 cars, as shown in the preceding table 3,600,000

Cost of necessary substation and cable equipment	1,550,000
Initial payment of 25% on the Equipment Trust for 382 cars, as shown in the preceding table	2,000,000
Cost of other equipment, including substation machinery and cables, in connection with platform extension work	1,750,000
Cost to the Company of one-half of the construction of platform extension work	7,265,000
Total Estimated Requirements to June 30, 1930	$16,165,000
Estimated Total available as shown in the preceding table	13,050,000
[fol. 1016] Estimated Requirement in excess of Amount available on this basis	$3,115,000
This conclusion makes no allowance for any deductions for depreciation. If the amounts suggested be deducted the requirements in excess of the amount available for the three years will be increased by	3,600,000
making the total estimated requirements in excess of amount available	$6,715,000

Neither does this estimate include any allowance for increased wages. The effect of such an increase is indicated at the end of the preceding table.

29. A comparison between our estimates of the City's share of the Subway earnings for the three years—1928-1930—with the estimates of the Transit Commission, which are the basis of the Special Counsel's proposal, is as follows:

	1928	1929	1930	Total for the 3 Years
Balance available for City's charges—				
Transit Commission's estimates	$3,900,000	$5,100,000	$6,400,000	
Add:				
Amount deducted for depreciation	450,000	475,000	500,000	
City's share of the Subway earnings comparable with I. R. T. estimates	$4,350,000	$5,575,000	$6,900,000	$16,825,000
I. R. T. estimates	$3,850,000	$4,850,000	$4,350,000	13,050,000
Commission's estimates over I. R. T. estimates				$3,775,000

[fol. 1017] This difference is principally due to the increased estimates of passenger traffic—the Commission's estimates being in excess of the Company's estimates in—

1928	8,000,000	passengers
1929	27,000,000	"
1930	53,000,000	"
Total	88,000,000	"

In view of the great excess of the capital requirements over the amount available as estimated by us, shown in the foregoing tables, these differences in the estimates are not very material.

In neither estimates has any allowance been made for the loss of revenue if the sale of power to the Surface Lines be discontinued so as to decrease the necessary capital expenditures.

Mr. Kidder, our Superintendent of Motive Power, has estimated that in connection with the 432 cars this loss would be $475,000 a year, and for the 382 cars $550,000 a year additional.

30. If we correctly understand the proposals made in regard to depreciation that $1,000,000 a year be deducted from the Subway earnings after the Company has received its preferential, and that $500,000 be deducted each year for depreciation on Contracts Nos. 1 and 2, and the Elevated properties either from the earnings of the Manhattan Divi-

sion, or from the Company's Subway preferential the effect upon the earnings of the Company, as previously estimated, will be as follows:

[fol. 1018]

	Fiscal years		
	1928	1929	1930
Estimated deficit Manhattan Division before deducting Dividend Rental	$2,671,000	$2,878,500	$3,121,400
Limited Return on the Subway Division	3,700,000	3,700,000	3,700,000
Balance available for Manhattan Dividend Rental	$1,029,000	$821,500	$578,600
7% on Non-assenting Manhattan stock	305,000	305,000	305,000
	$724,000	$516,500	$273,600
Deduct for Depreciation	500,000	500,000	500,000
Balance after deduction for Depreciation	$224,000	$16,500	*$226,400*

These balances are, under the plan proposed, all that is available for Manhattan Dividend Rental, or for an increase in wages on the Manhattan Division. A ten per cent increase in wages on the Elevated would amount to approximately $1,110,000 a year. This indicates very clearly that there would be no balance available for Manhattan Dividends or for increased wages on the Manhattan Division. Without taking either of these matters into consideration the remainder is barely sufficient to meet the fixed charges on the Interborough securities issued for extensions and improvements on the Elevater Lines, and for the Manhattan Railway Rental, exclusive of dividends on the Modified Guarantee Stock.

31. The Special Counsel for the Commission contends that the Company has sufficient funds to meet the initial payments on the two Car Trusts required under his proposal.

As we have previously demonstrated nearly all the assets, which the Company has available are required to meet existing commitments up to June 30, 1930.

It would be possible to temporarily divert from such assets the amount needed to immediately meet the initial pay-
[fol. 1019] ment on an Equipment Trust for 432 cars, amounting to about $2,300,000, but such a diversion could not be made without a distinct understanding that the

amount would be reimbursed from the City's share of the Subway earnings.

It is evident that if none of the other work contemplated in these proposals is done the City's share of the Subway earnings would be ample to provide the initial payment on an Equipment Trust for 382 cars, say January 1, 1930, amounting to about $2,000,000.

The proposals, however, contemplate that the Company will agree to provide the cars, the necessary power and to pay its share of one-half of the construction cost of the platform extension work. Consequently, whether the initial payment for the Equipment Trusts can be made or not is entirely immaterial.

32. All the projects must be considered as a whole and we have, therefore, only attempted to show the cost of all the work contemplated and the amounts available to meet such costs to June 30, 1930.

Whatever the conclusions may be as to the results to June 30, 1930, there is an obligation after that date to install signals estimated to cost $11,305,000; no provision is made in these proposals to provide the funds to meet that expenditure.

There has not been included in the estimates of the Subway operations for the three years, made by the Company or in those of the Commission, any additional revenue from [fol. 1020] the use of the 432 cars, which it was expected would be in operation at or about the beginning of the fiscal year 1929.

Neither have those estimates included similar revenue from the 382 cars as it was expected they would not be put into use until the local station platforms had been lengthened, which would be about the end of the fiscal year 1930. Consequently, the first year of the operation of these cars (1931) would be that in which the competition from the Municipal Lines must be met with every probability that the additional cars will not be needed, particularly so on the West Side Lines. The estimated decrease in the Interborough revenues following this competition would offset any additional revenue which might be estimated from the use of these cars several times over.

The omission, from the estimates, of the additional revenue which would be derived from the use of the 432 cars is

based on the expectation that whatever additional revenue would be received would not exceed the additional operating expenses and charges.

In the recent service hearing before the Transit Commission it was shown that the Commission's proposal for the operation of these 432 cars would add annually to the Subway mileage and expense as follows:

12,000,000 additional car miles @ 15¢ per car mile	$1,800,000
Estimated cost of these cars, the necessary power and the annual charges thereon provided the Company furnish no additional power generating machinery is as follows—	
[fol. 1021] Cost of cars and substation and cable equipment $10,400,000	
Annual charges @ 6%	624,000
Total operating expenses and charges in connection with the 432 cars	$2,424,000

To provide this sum would require $48,500,000 passengers per annum at 5¢ each. This is equivalent to 112,000 passengers per annum to be carried on each of the additional cars.

At the present time each of the 2,280 Subway passenger cars in carrying an average of approximately 390,000 passengers a year. If the 432 additional cars were operated the same number of hours and uring the same periods the average number of passengers carried by each car would of course be about the same provided these cars produced a proportional increase over the present traffic. However, we now operate through the congested points during the peak of the rush all the Subway cars for which there is track capacity, and during the non-rush hours have a surplus of cars. Consequently, these additional cars would only be used for a short time on each side of the rush period, morning and evening, and would be idle during the greater part of the day. For these reasons the 112,000 passengers per annum for each of these cars appears to be a very liberal allowance.

In view of the financial condition of the plaintiff and the prospective earnings of the properties operated by it,

as set forth in the foregoing analysis, it can be readily [fol. 1022] seen that the carrying out of the Untermyer proposals is absolutely impossible.

Henry T. Berry.

Sworn to before me this 14th day of March, 1928. Emil Pensel, Notary Public. Bronx County No. 17, Bronx Register No. 2966. N. Y. County No. 335, N. Y. Register No. 9258. Kings County No. 38, Kings Register No. 9168. Queens Co. No. 2562, Queens Register No. 5006. Term expires March 30, 1929.

[fol. 1023] AFFIDAVIT OF PRESIDENT AND GENERAL MANAGER OF PLAINTIFF IN REPLY TO AFFIDAVIT OF DR. JOHN BAUER

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

FRANK HEDLEY, being duly sworn deposes and says:

I am President & General Manager of the Interborough Rapid Transit Company, and have acted in that capacity since October 21st, 1919. Prior thereto and in January 1903, I was appointed General Superintendent of the Inter- [fol. 1024] borough Rapid Transit Company, and in the following year was made General Manager, and on July 1st, 1908 was elected Vice President and General Manager, and continued in that capacity until my election to the Presidency to fill the vacancy caused by the death of the late Theodore P. Shonts. For several years prior to my appointment as General Superintendent I was actively engaged in the maintenance and upkeep of railroad equipment and property,—first

as a mechanic, and later, in various supervisory capacities in the employ of such companies as the Erie Railroad Company at Jersey City.
New York Central Railroad Company at New York.
Manhattan Railway Company at New York.
Kings County Railway Company at Brooklyn.
Lake Street Elevated Railroad at Chicago.

During all of this time I have been in active charge of all of the property employed by the Interborough Rapid Transit Company in the public service. It has been a substantial portion of my duties in addition to having general charge of operation in the earlier years of my association with the Company, to see to it that the property used by the Company in the public service was adequately maintained and capable of meeting the requirements of the traveling public. I have continued to give personal attention to the condition of the property in order to insure continued maximum operating efficiency. I am now and have been during all of the years of my connection with the property thoroughly conversant with its condition, and I have kept in close personal contact with the property and [fol. 1025] all branches of it by periodical inspection visits at reasonable intervals to the various power and substations, shops, structures and the property generally; I have by personal consultation with my heads of departments kept fully informed as to the general condition of all property used and useful in the public service; in addition I have been advised as to the condition of the property from outside agencies, such, for example, as:

(a) An inspection of the property by Messrs. Stone & Webster, in 1919; again in 1922, and, still later, during the latter part of 1925;

(b) By an investigation made by the Westinghouse Electric & Manufacturing Co., in the summer of 1923, covering the inspection and maintenance of car equipment;

(c) By an investigation made by the Westinghouse Traction Brake Company during the Fall of 1923, covering the inspection of all brake equipment;

(d) By an investigation made by the General Electric Company in the Fall of 1923, covering the inspection of all apparatus furnished by that Company and in use on the rolling stock on the entire system;

(e) I have also had the benefit of an independent investigation made by the joint board of engineers, known as the Swain Report, which investigation covered the condition

of the cars and structures and road equipment in use on all of the Elevated Lines of the Interborough System.

This Joint Board of Engineers was appointed as a result of a resolution of the Board of Estimate and Apportion-
[fol. 1026] ment, adopted on July 13, 1923, creating a committee on transportation facilities.

The Board consisted of Dr. George F. Swain, Chief Consultant of such Committee and designated by the Chairman thereof; Robert Ridgway, Chief Engineer of the Transit Commission, designated by that body; George H. Pegram, Chief Engineer of, and designated by the Interborough Rapid Transit Company. All of said reports have confirmed what I have always endeavored to accomplish, viz: that the entire property, both Subway and Elevated Divisions, had been adequately maintained, capable of performing the functions required of it in the most efficient manner.

Plaintiff's Property in Condition as Good as New and in the Highest State of Efficiency and Safety

I have read the affidavit of one John Bauer, dated the 12th day of March, 1928, and submitted by the Corporation Counsel in opposition to the plaintiff's motion before the Statutory Court for a temporary injunction, in which Mr. Bauer undertakes to make it appear that the property of the plaintiff is in a badly run-down and worn out, generally dilapidated condition. In view of my personal familiarity with all property of the plaintiff, based upon my personal inspection and contact with the property, as hereinabove outlined, and supported by the reports of the various engi-
[fol. 1027] neering firms hereinabove enumerated, I now state that there is not the slightest justification for Mr. Bauer's unsupported conclusions with respect to the condition of the property operated by the Interborough Rapid Transit Company, which conclusions are not supported by any evidence of personal familiarity with the property itself. On the contrary, I desire to point out that all property of the Interborough Company, cars, motive power equipment, structures, tunnels, bridges, viaducts, shops, yards, are in as good condition today as they were at the commencement of operation under the respective con-

tracts; in fact, they are in a condition as good as new, in so far as operating efficiency is concerned, and this applies not only to the property provided under Contract No. 3 and the Elevated Extension and Improvement Certificates, but it also applies to all property operated by the Interborough Company and provided under Contracts Nos. 1 and 2, and the property provided by the Manhattan Railway Company. And in further support of this statement, I direct specific attention to the field inspection made by the engineers of the Transit Commission, whose estimate of expenditures necessary to put all property operated by the Interborough Rapid Transit Company in a "first class operating condition," may be found on Sheet No. 1 of Exhibit 40, put in evidence by the Special Counsel to the Transit Commission during the 1927 transit investigation conducted by the Transit Commission. This estimate should set at rest all claim on the part of Mr. Bauer that the property is in a run-down or deteriorated condition,—$2,580,000 to put in first class operating condition a property estimated at cost, at present-day prices, between $800,000,000 and $900,000,000. To say the least the parties who are making affidavits [fol. 1028] in behalf of the defendant, the City of New York and the Transit Commission, should first reconcile their various statements in order that they may not directly contradict each other. Mr. Bauer might well have examined the inspection report of the Transit Commission's field engineers, who made the above estimate of cost to recondition, and he might also have read the statement contained in the Valuation Report of February 15th, 1922, made by Messrs. John H. Madden and Fred W. Lindars, Valuation Engineer and Chief Accountant, respectively, of the Valuation Bureau of the Transit Commission, which reads as follows:

"It is believed that due consideration should be given to the estimate of the necessary expenditures of this character (estimate of cost to recondition) as a practical means of determining the actual, rather than the theoretical depreciation. Life is necessarily affected by the standard of the repairs. Renovation and rehabilitation from time to time will operate to make over and renew, and if successively continued may prolong the life in service to an extent difficult to estimate."

While I do not concede that there is in fact deferred maintenance even to the extent of $2,580,000, nevertheless, for the purpose of the plaintiff's case in this fare litigation, I am willing to assume that such is the case, knowing as I do that practically all of this estimate of cost to recondition as made by the engineers of the Transit Commission, is made up in large part of painting and very minor repairs which have no relation whatever to the matter of efficient or safe operation. If any further evidence is needed of the character of the maintenance and efficiency of the property employed by the plaintiff in the public service it may [fol. 1029] be found in its unparalleled safety record notwithstanding the fact that the transportation system operated by the plaintiff carries between 3,500,000 and 4,000,000 passengers per day.

I direct specific attention to the fact that nowhere does Mr. Bauer in his affidavit give any supporting data or facts in support of his contention that because some of the property has been in operation for twenty years that it is now practically worthless. Dr. Bauer is not an engineer, and never had the responsibility for constructing, maintaining or operating a public utility property.

Frank Hedley.

Sworn to before me this 14th day of March, 1928. Emil Pensel, Notary Public. Bronx County No. 17, Bronx Register No. 2966. N. Y. County No. 335, N. Y. Register No. 9258. Kings County No. 38, Kings Register No. 9168. Queens Co. No. 2562, Queens Register No. 5006. Term expires March 30, 1929.

[fol. 1030] Reply Affidavit in Support of Plaintiff's Motion for an Interlocutory Injunction

United States of America,
State and County of New York,
Southern District of New York, ss:

Ralph Norton, being duly sworn, says:

I am of counsel for the plaintiff in the above-entitled action, and am familiar with the proceedings had therein. I have read the various affidavits, submitted March 12,

1928, by the defendants Transit Commission and The City [fol. 1031] of New York in opposition to the motion for a temporary injunction herein. This affidavit is in partial reply to certain of the allegations made therein by the affiants Nicholson, Lewis and Untermyer. Other statements in those affidavits are contradicted by the affidavits submitted in support of the plaintiff's motion, or are contraverted in the Brief to be submitted in behalf of the plaintiff.

Answering the Affidavit of Mr. Nicholson

The Fare Provision in Contract No. 3 of March 19, 1913, Superseded the Fare Provisions in Contracts Nos. 1 and 2

At folio 58 the Corporation Counsel expresses, as a legal conclusion, the proposition that the "fare provision of Contract No. 3 did not supersede the provisions of the previous contracts, (Nos. 1 and 2) but continued and enlarged the obligations of the original fare provisions to the extent that the lease of 1913 covered additional railroads."

The fact is that in Article I of Contract No. 3, it was provided that the new subway lines should be operated, in conjunction with the old, "for a single fare in accordance with this contract."

Contract No. 1 and Contract No. 2 each contained, in the paragraph relating to fares, the following provision:

"The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one car upon each train, and may collect from each passenger in such car a reasonable charge for such addi- [fol. 1032] tional conveniences furnished him, provided that the amount to be charged therefor and the character of such additional conveniences shall from time to time be subject to the approval of the Board."

While, as deponent is informed and verily believes, no charge of the character indicated was ever made, nevertheless, the provision quoted was as much and as essentially a part of the rights assured to the Contractor under these two documents as was its right to possess and operate the railroads during the term and renewals specified

in such documents. The term of the leases was specifically modified and changed by the provision of Contract No. 3, and just as forcibly was the fare provision of Contract No. 1 and Contract No. 2, including the permission to charge extra compensation for special services, changed and modified by the agreement just referred to, to operate the railroads built under Contracts 1 and 2 in conjunction with those built under Contract No. 3, for a single fare of five cents, in accordance with Contract No. 3.

Contract No. 3 did not Form a Part of the Constitutional Consent of the City of New York. Any Such Consent was Subject to the Regulatory Plan of the Public Service Commission Law

The Corporation counsel asserts (fols. 59-60) that the resolution adopted by the board of estimate and apportionment on March 18, 1913, approving Contract No. 3, is the constitutional consent of such board as the local authority for the City of New York.

[fol. 1033] That is incorrect. Section 4 of the Rapid Transit Act provides that, as the rapid transit commission may from time to time determine that it is in the interest of the public that a rapid transit railroad or railroads shall be established, it shall establish the route or routes thereof and the general plan of construction, and that "Such general plan shall show the general mode of operation and contain such details as to the manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected."

Subdivision 1 of Section 5 of the act provides that after such determination a copy of the said plans and conclusions as adopted shall be transmitted by the commission to the board of estimate and apportionment, and it shall thereupon become the duty of that body to proceed with the consideration thereof and within sixty (60 days to take a final vote "upon a resolution to approve such plans and conclusions and to consent to the construction of a railroad or railroads in accordance therewith."

Subdivision 2 of Section 5 provides that upon the adoption of such a resolution and the approval of the mayor

"the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city."

Subdivision 5 of Section 5 provides that "The board of estimate and apportionment of the city of New York shall, with respect to that city, be hereafter for all purposes of this act and be deemed to be the local authority in control [fol. 1034] of the streets, * * * which are within or belong to the said city; and the consent of such board of estimate and apportionment and the mayor without the consent of the common council, board of aldermen, or other board or officer of the city, shall be the only consent of local authorities required hereunder."

Since the establishment of the routes and general plan of the first rapid transit railroad, the procedure in procuring the constitutional consent of the local authority has in general been, upon the establishment of a route or routes of a rapid transit railroad or railroads by the rapid transit board or its successors, to transmit copies thereof, in the early period, to the board of alderman as common council, which then was the local authority in control of the streets, and subsequently to the board of estimate and apportionment, when that body was designated as the local authority in control of the street, for its approval, whereupon such body, following the procedure as outlined in Section 5 of the Rapid Transit Act, would hold hearings, and if the routes and general plan met with its approval, adopt a resolution approving the same and the construction of a railway or railways in accordance therewith.

The first such approval was given by the board of aldermen as common council on March 23, 1897, and the practice has continued uniformly up to the present time. The last approval as relating to lines described in Contract No. 3 having been in respect of the modification of the Queensboro Subway Rapid Transit Line in 42nd Street, Manhattan, which modification was adopted by the Transit Construction Commissioners, as successor of the rapid transit [fol. 1035] board on May 18, 1920, and approved by the board of estimate and apportionment on June 4, 1920, and by the Mayor on June 14, 1920.

The approval of Contract No. 3 as evidenced by the resolution adopted by the Board of Estimate and Apportionment on March 18, 1923, was not the approval of the local authority giving the constitutional consent to the construction and operation of the railroad or railroads, but was a mere statutory consent to the contract as provided by subdivision 2 of Section 37 of the Rapid Transit Act, which the legislature in the exercise of its judgment might or might not require, independent of any constitutional direction. That the consent required by subdivision 2 of section 37 of the Rapid Transit Act as evidenced by the said resolution of March 18, 1913, is not the constitutional consent is apparent from the history of the act. Neither the Rapid Transit Act as originally enacted nor the Act as amended by Chapter 572 of the Laws of 1894 requires any such consent. It was not required until the amendment by Chapter 562 of the Laws of 1905 when the legislature removed its limitation upon the total amount of bonds which the city might issue and amended the act so as to permit such limit to be fixed by the Board of Estimate and Apportionment.

Error of the Corporation Counsel as to the Ownership of Subway Equipment Under Contracts Nos. 1 and 2.

At folio 97 Mr. Nicholson states that all the property (Subway) valued in Paragraph L of the Complaint is owned by the City. That again is incorrect. All of the equipment [fol. 1036] provided for the original subways built under Contract No. 1 and Contract No. 2 was paid for and is owned by plaintiff, subject only to the right of the City to repurchase the same at the end of the term.

Capital Expenditures for Platform Extensions and Additional Cars

At folio 83 et seq. the Corporation Counsel endeavors to lay some stress on the fact that all of the capital requirements specified in plaintiff's tabulation (Complaint, p. 67) have not actually been ordered by the public authorities. He fails to state that the entire table to which he objects is an estimate of what the obligations would be "if the Transit Commission issues an order to the plaintiff to

furnish 432 additional subway cars and makes effective the order already issued to lengthen all of the subway local platforms." It is a statement expressing in terms of dollars the effect on plaintiff of action taken and threatened by the public authorities.

The Corporation Counsel makes startling observations in folio 79-85 of his affidavit in an attempt to show that the plaintiff's contention that the Transit Commission was about to order the expenditure by the plaintiff of many millions of dollars for platform extensions and new cars, is unfounded.

In reference to the 432 new cars, the Corporation Counsel says (fol. 84) that the plaintiff vigorously opposed the application and "introduced a vast amount of testimony (referred to and made part hereof) and that no decision has ever been made by the Commission, nor has it been intimated that any would be made."

[fol. 1037] There is no affidavit submitted by any member of the Transit Commission or by its Secretary showing that no decision has been reached by the Commissioners concerning the providing of a number of additional cars.

I know that the Corporation Counsel was not present at the hearings before the Transit Commission; and I am charitable enough to assume that he has not read the record which he has made a part of his affidavit.

These hearings began March 21, 1927, as hearings seemingly directed to determine whether the plaintiff furnished sufficient platformmen on its stations, and closed upon May 13, 1927. They were reopened upon November 9, 1927, as of the same nature, together with discussion of the proper number of cars to be held in reserve, until December 5, 1927, when the question of the necessity of more than 400 cars to be supplied by the plaintiff was testified to by Mr. Lancaster, an engineer for the Commission. As the purchase of these new cars involved the expenditure of many millions of dollars, which the Company was utterly unable to finance, and as the necessity therefor went into all the complex questions of service and finance and contractual relations of the plaintiff, the Counsel for the plaintiff asked for an adjournment of two weeks. It was denied, and the hearing was continued upon December 8, 1927. At the conclusion of

the hearing upon December 8, 1927, counsel for plaintiff again asked for an adjournment for two weeks "because of the intricacies of the proceeding and the great amount of money involved not only for cars but for power." The presiding commissioner said, among other things, as shown upon page 182 of the record:

[fol. 1038] "We are not going to take long adjournments in view of the fact that this affects the millions of people riding,"

and allowed an adjournment to December 14, 1927. Then the matter was rushed, with hearings upon December 14, 15, 19, 21, 22, 29 and 30, and concluded upon January 5, 1928.

Upon December 19, 1927, Mr. Untermyer appeared upon the scene, displaced the assistant counsel for the Commission, took the centre of the stage and conducted the inquiry for the Commission from that point on. There was no let-up, no adjournment over the holidays; but on the contrary, there was indecent and impatient haste to close the testimony, announce the decision and proceed to the execution.

At the very beginning, upon his appearance upon December 19, 1927, Mr. Untermyer showed his unconcern as to whether the plaintiff should go into bankruptcy or not, by stating as follows, as shown upon page 299 of the record:

"I understood that Mr. Norton took the position that the controlling question here was as to whether or not this Company was in a position to furnish cars. According to my conception of this proceeding that is something that has very little to do with the question * * *.

I just would like to have it understood at this stage, that it will be contended on behalf of the Commission that it is not a defense whatever. * * *"

It will be noted that Mr. Untermyer not only spoke for himself, but assumed to speak for the Commission. There was no intimation from the presiding commissioner but that [fol. 1039] the Special Counsel and spokesman for the Commission did not fairly state and reflect the attitude of that body.

During the hearings upon January 2, 1928, according to the New York Times, in an interview Mr. Untermyer said, referring to the Interborough:

"With its constantly growing profits, its plea of poverty will be shown to be not only disingenuous but downright untrue. It will be demonstrated that the figures have been alarmingly juggled to make it appear that it will be unable to pay for the additional cars required. Its threat of bankruptcy if the Commission enforces the performance of its public functions has no terrors. The service cannot be worse. It could only be improved in receivership where certificates could be issued for improvements."

Upon pages 1255-1256 of the record in the car case, Mr. Untermyer, unrebuked by the sitting commissioner, threatened to seize the entire property of the plaintiff in the following words:

"Why should even the interest and sinking fund payments on the Company's bonds, that are being regularly and readily made, be paid in preference to this prior obligation for equipment *under which the City may pay for the equipment for the account of the Company and take and hold the entire property for repayment even as against the bondholders? That is precisely what the City will be advised to do if this equipment is ordered to be furnished and these different interests do not find a way between the Company and themselves of furnishing it, unless the Court summarily forces the Company to obey the order, which is expected.*" (Italics mine.)

[fol. 1040] Upon January 8, 1928 Mr. Untermyer, as reported in the Brooklyn Times in an interview, said:

"What is the commission to do if the company defies its orders for extension of the platforms and the usual game of procrastination is resorted to, except to supply the cars as the contract entitled it to do, and recoup itself out of the company's receipts? The company will have ample funds for the purpose.

Its pleas to the contrary have been conclusively proven to be false. This time it is going to be forced to obey the

order. There won't be any more dodging and delay." * * *

So here we have the conclusive evidence of the attitude of the Chief Spokesman and Grand Inquisitor of the Transit Commission. Did he speak by the book? Was it idle chatter? Those threats were made, unrebuked, in the presence of the Transit Commission itself. Your deponent respectfully submits that, in such circumstances, plaintiff was entirely justified in regarding such statements of an intention to bankrupt this plaintiff and seize its property, as declarations of the policy of the Transit Commission, against which only judicial process would afford certain protection. And in further substantiation of this view, your deponent calls the attention of this Honorable Court to the letter written by Mr. Untermyer to the Board of Directors of the Interborough Company, dated January 7, 1928, appearing as Schedule "I" in defendant Transit Commission's affidavits and Exhibits (fols. 208-219).

Here is the refutation to the observations of the Corporation Counsel that there was no "Sword of Damocles" hang-[fol. 1041] ing over the head of this plaintiff in the shape of 432 cars and additional platforms. Mr. Untermyer admits in the communication, supra, that there are controversies between the City and the Company as to the obligation of the Company to pay one-half of the cost of extensions to station platforms and whether the Company shall furnish 432 additional cars. He has considered a possible compromise of these controversies, but writes "and made to the Transit Commission the following suggestion which it has approved" * * *. As part of the suggestion the plaintiff is to accept and carry out the order for all additional platforms, assuming one-half of the cost thereof, and the plaintiff is now to order the 432 additional cars. He then goes on with his scheme of financing, not pertinent to your deponent's affidavit, but which scheme is fully answered in the affidavit of Henry T. Berry, verified March 14, 1928, herewith submitted. Thus, it will be seen there was a very real controversy between the Commission and the plaintiff; that the Commission was insisting on 432 new cars to be purchased by the plaintiff and station platforms

to be lengthened, one-half of the cost of which was to be paid by the plaintiff, all of which was resisted by the plaintiff.

Threatened Seizure of and Violence Upon the Plaintiff's Property

Answering the allegations of the Corporation Counsel (fols. 109, 110) to the effect that no threat to seize the lines or properties of the Company "has ever been made by any official of the City or by any member or official of the Transit Commission," I refer to the allegations hereinabove made (fol. 168) as to the statements of Mr. Samuel Untermyer, Special Counsel to the Transit Commission [fol. 1042] made on the official record before that body in case No. 2851, and also to certain statements attributed to the same gentleman as reported in the public press.

The New York Tribune of February 12, 1928, said:

"Mayor Walker plans to seize the Interborough subways on the ground that the Company has defaulted under the terms of the contract between the Company and the City.

This was determined upon at the conference at the Mayor's office on Friday which was attended by Samuel Untermyer, John H. Delaney, Chairman of the Board of Transportation and William G. Fullen, counsel for the Board.

* * * * * * *

The proposed seizure of the subways of the Interborough, according to a high placed City official, is regarded as a more practical move than the application for an injunction restraining the Interborough from attempting to increase the rate to 7*c*."

According to the New York Times of February 15, 1928, this threat of seizure was denied by Mr. Untermyer and Mr. Nicholson, although the Times says:

"From a responsible and official source, however, the newspapers were informed that seizure had been considered."

Further answering said allegation of the Corporation Counsel, I allege upon information and belief that on February 17, 1928, the Mayor of the City stated to numerous representatives of the public press that, if the Interborough Company, plaintiff herein, succeeded in obtaining the right to charge a seven-cent fare through the intervention of the [fol. 1043] Federal courts he would give orders to the police to "tear up the tracks" if necessary to prevent the Company's use of the streets under such conditions. The sources of my information and the grounds for my belief in this connection are the accounts of such statements (in varying words but with identical effect) appearing in practically every newspaper published in the Borough of Manhattan on the morning of February 18, 1928.

Answering the Affidavit of Mr. Lewis

I am familiar with all and have participated in two of the proceedings referred to in the affidavit of Clarence M. Lewis (fols. 223-241).

Plans for Car-platform Extensions Contemplated no Competitive Rapid Transit Railroads to be Constructed by the City, and the Cost was to be Defrayed by the City

The proceeding looking to the lengthening of local platforms and the operation of ten-car local trains on the railroads described in Contract No. 3 was begun on September 6, 1923, and the statement of the then Chairman of the Transit Commission, Mr. McAneny, quoted by said deponent was made prior to the initiation by the City of New York of the vast scheme of additional and competitive subway construction, now rapidly advancing to completion.

During the progress of the hearings, which continued for more than four years, it became evident that the re-construction of the said railroads for the operation of ten [fol. 1044] car local trains was warranted, if at all, only as a temporary expedient and could not be justified as a "just and reasonable" permanent addition within the purview of Contract No. 3. The Commission therefore proposed that the entire cost of the structural changes should be governed, not by the contractual requirements that half

of said expense be borne by the plaintiff, but that it should be wholly undertaken by the City. Chairman McAneny said, at page 135 of the record, in reference to the said cost:

"It it be proven upon this inquiry that it (the plaintiff) cannot do it, another remedy lies at hand and in my judgment and in the judgment of the Commission it ought to be imposed upon the City government."

Further referring to the costs of platform reconstruction Mr. McAneny, estimating the amount of such costs at $25,000,000 said at page 254 of the record:

"Taking the present rates at which the Company could borrow its money, or the City respectively borrow its money, it would make a difference of about $750,000 a year in the operating account, all of which will inure to the benefit of the City through the various indirections of the situation. Those are question we have under consideration. To what degree such a plan could be given effect legally with contracts is a matter of consideration also."

The contractual question became so eliminated from the proceedings that the affiant Lewis, although quoting in his said affidavit alleged admissions of Mr. Quackenbush that, under the stressful temporary conditions, some relief could be afforded by reconstructing the existing subways wholly fails even to mention the repeated and uniform insistence [fol. 1045] by Mr. Quackenbush, that the proposed platform extensions were wholly unauthorized by the said Contract and if required under a pretense of contractual right would be illegal and confiscatory.

The plaintiff's contention was that the expenditures would be altogether disproportionate to the relief sought, would involve a vast and permanent loss in operation, and would destroy the proper operating balance between express and local service for which the subway was designed and upon the basis of which the plaintiff contributed jointly to its costs, and would cast a permanent and confiscatory burden upon the plaintiff wholly illegal and unjustified by the Contract, while only temporarily alleviating a condition due to the fault of the City.

There is no inconsistency between the statements of Mr. Quackenbush quoted by Mr. Lewis in his affidavit and the company's opposition to the lengthening of local platforms. The trouble is that Mr. Lewis has lifted these remarks from their context and thus conceals from this Court the full meaning of the quotation. For instance:

These words of Mr. Quackenbush follow what Mr. Lewis quotes from page 172 of the minutes:

"I do not want to be understood, however, in conceding that that means that there is any obligation resting on the Interborough Rapid Transit Company to treat this as an additional betterment which is just and reasonable within the terms of Contract No. 3. On the contrary, I shall contend that this is work which should have been planned, laid out and constructed by the City of New York when the original lines were constructed, when it could have been [fol. 1046] done at a reasonable cost; that it is no part of the subway that was within the contemplation of the parties when Contract No. 3 was executed," etc., etc. (S. M., pp. 172-173).

So as to the quotation from page 103 when Mr. Quackenbush was discussing at length the financial condition of the company. After the remark quoted, Mr. Quackenbush said the differences were as to detail and said "the revenues which we receive from passengers are not adequate to meet the obligations of the company. I should suggest your answer: that it is in the interest of the public * * * that that fare be placed at a sum which will put these bonds where they can be sold, as they were sold ten years ago, regarded as one of the prime investments of the world —and then we can do all these things and everybody can be happy * * *."

The quotation from page 116 follows a letter to the Transit Commission dated March 6, 1925, in which reference is made to a memorial to the Governor and Legislature asking that a statutory rate of fare be enacted which will produce sufficient revenue to restore the credit of the company to enable it to carry out the recommendations in the report of Mr. Justice McAvoy" (S. M., p. 112). The Commission had written to the Governor stating the recommendations of Mr. Justice McAvoy should be carried out

"without exception." So Mr. Quackenbush explained the financial difficulties of doing thus so far as the Interborough was concerned in his letter and urged the Commission "to express to the Governor and Legislature its approval of the statutory enactment of a rate of fare which will make [fol. 1047] it possible to carry out the recommendations of Mr. Justice McAvoy, not only in so far as they relate to the affairs of this company, but as the quickest method of securing relief from rapid transit congestion" (S. M., p. 114). He asked a postponement of the hearings. "It is a matter of ways and means," he said, going into considerable detail as to the financial inability of the company to sell its bonds.

Finally the quotation from page 304 is particularly unfair for the method of extracting part of a sentence from the context. The complete sentence on page 304 is:

"There is no doubt and I concede that *because the City of New York has delayed the construction of an additional trunk line subway*, the congestion upon the existing subways of the Interborough is so great that the lengthening of the platforms and the running of additional cars which would be done, because of that, will be in the interest of public service." (Italics mine.)

And Mr. Lewis forgot to print in his affidavit this sentence of Mr. Quackenbush's that precedes his quotation:

"I want to make it perfectly clear that I do not concede in any way that there is any obligation under the contract resting upon the Interborough Rapid Transit Company to contribute anything for the cost of construction or equipment of the lengthening of station platforms, or of the various things that are incidental thereto or flow therefrom" (S. M., pp. 303-4).

Mr. Quackenbush continuing on the same page insisted "I do not want to concede it in any language which can [fol. 1048] ever be tortured into a recognition of any obligation on this Company to do it."

The plaintiff insisted, as stated by its President, Mr. Hedley, that ten car local operation would unbalance the service (S. M. 546-578, 581). It would not attract sufficient

new business to justify it from an economical standpoint, and conditions at stations would be worse, even, than at present (S. M. 565), and the new business attracted would not pay the cost of the improvement (S. M. 541-546).

In December, 1927, the plaintiff offered to show the practical operating results under the proposed change in the scope and character of the existing subways resulting from ten-car local operation, and endeavored to obtain consideration by the Commission of the results of an exhaustive study of the practical results of the proposed changes, by Stone & Webster, an engineering firm of the very highest character and reputation.

Under date of December 15, 1927, Mr. Hedley addressed to the Transit Commission a letter protesting against the refusal of the Commission to permit this evidence to be given, pointing out that the evidence prepared by the said Stone & Webster conclusively demonstrated that a relatively insignificant number of additional passengers would be carried as a result of lengthening the local station platforms; that it would not cure the fundamental causes of overcrowding and discomfort, such as the necessity to ride in express trains to destinations not reached by local trains, the irregularities of express headways, the congestion in loading and unloading express trains, the superiority of express service with respect to speed, the prefer-[fol. 1049] ence of a great number of riders to speed for comfort and the lack of any practical method of restricting the growth of traffic. It was further pointed out to the Commission that the probable costs of lengthening station platforms and providing the necessary incidental equipment would be approximately $31,000,000, and that, in relative proportion to the number of passengers to be carried, the original subway investment would have to be approximately $1,550,000,000.

In view of this exhaustive investigation into the practical aspects of the question, Mr. Hedley stated that whatever had been his views "heretofore regarding the benefits to be derived from the lengthening of local station platforms of the Interborough system * * * my own further consideration of the subject, including the advice given by Stone & Webster prompts me to say that the possible benefit is out of all proportion to the costs and that the Commission

should give this Company an opportunity to put in its new evidence. I respectfully ask that the hearings set for Friday, December 16, at 10:30 A. M. be allowed to proceed." Notwithstanding this statement and offer of proof the Commission refused to receive any further evidence than in reference to the closing of the Worth Street and 18th Street Stations.

The Transit Commission, notwithstanding the statement made in its behalf by its former chairman, that the expense of reconstruction should be borne by the City, and if thus borne would save the City annually the sum of $750,000, is now arbitrarily seeking to impose upon the plaintiff an enormous, unjust and confiscatory cost, without any justification other than that a temporary exigency, for which the City is alone responsible and which while only slightly [fol. 1050] alleviating existing abnormal conditions, would be uneconomical, undesirable and wholly unwarranted as permanent improvements.

In this connection, I refer to the opinion of Transit Commissioner O'Ryan in the platform lengthening case, No. 4007, delivered April 21, 1926, a copy of which will be submitted on the argument.

Order for Installation of Signals on Local Subway Tracks

The Commission's order with respect to the installation of signals on local tracks and the acceptance by the Company of that order, to which Mr. Lewis refers (fols. 238-240), was the result of a conference between one of the individual defendant members of the Transit Commission and Mr. Quackenbush representing the Company, at which the financial condition of the plaintiff was fully and frankly discussed, and its inability to provide the entire cost of the new signal project was conclusively shown. Mr. Quackenbush stated that as the Company's existing equipment trust obligations matured and were paid off it would thereby be in a position to assume, in each year, new capital obligations of substantially the same size and amount as the annual instalments on the car trust certificates which were thus disposed of.

Attention was directed to the fact that in the year 1932 the Interborough Company would be faced with the necessity of paying, or otherwise providing for two large issues

of notes, one for the principal amount in excess of $33,000,000 and the other for the principal amount of $10,500,000. [fol. 1051] It was represented that if at that time arrangements could be made by the Interborough Company for the refunding, extension or other disposition of such notes, it was probable that provision could be made at the same time for a substantial amount of new capital which could be applied to the signal requirements.

On the basis of these statements and representations, the order in question, embracing a schedule for the installation of such signals at a moderate rate up to and including the close of the fiscal year ending June 30, 1931, and with the major portion of the proposed expenditure in 1932 and years thereafter, was adopted and thereafter accepted by the Company.

The Plaintiff's Financial Inability to Furnish Capital for New Cars Threatened to Be Ordered by the Commission

In the proceedings before the Transit Commission with respect to new cars, the Company proved in December, 1927, that by the utilization of excess earnings and the proceeds of certain free investments which it now has, it expected to be able to meet all known obligations of the plaintiff of a capital nature falling due or to be provided up to June 30, 1930, including in such obligations the proportion of the Commission's program for signal installation up to that date. The detail of these known obligations is shown in paragraph LI of the complaint herein. The proof also showed ability to pay the cost of the signals to be installed in the fiscal year 1931.

The testimony referred to likewise proved complete inability to undertake or provide for any existing capital ob- [fol. 1052] ligations beyond June 30, 1931, or any which might be imposed upon plaintiff or required of it prior to that date. The detail as to the proportion of the capital requirements which it would have to meet by reason of the order with respect to the installation of signals after June 30, 1930, is likewise shown in paragraph LI of the complaint herein. The respective amounts so unprovided for being $4,345,000 for the Subway and $6,960,000 for the Elevated.

The statement of Mr. Lewis (fol. 241) as to the attitude of the Transit Commission in case No. 2851 (the service

proceeding transformed into one contemplating the provision of new rolling stock) can only be explained on the ground of his unfamiliarity with the record, as he was present at only a few of the early hearings and was never in the hearing room during the sessions when Mr. Untermyer, as Special Counsel, represented the Commission.

In further reply to these allegations of Mr. Lewis with respect to this proceeding and the pendency of a possible order, I refer to the statements which I have made as to the same subject matter hereinabove (fols. 159, 168) in answering certain allegations in the affidavit of Mr. Nicholson.

Defendant City's Own Figures as to Increased Cost of Labor and Materials for Subway Purposes, Over 1913

The great increase which has taken place since 1913 in the cost of labor, materials, construction costs and other [fol. 1053] factors affecting value as well as operating expenses in connection with rapid transit properties, has been convincingly shown by the defendant The City of New York itself.

On December 27, 1925, in announcing the receipt of bids for certain sections of the City's proposed competing Eighth Avenue subway, the Board of Transportation of the City of New York issued a public statement, under the title "Subway costs increase," which said:

"One of the principal reasons for the increase in the cost of subway construction is the fact that it costs about 129 per cent more to build a subway today than it did at the time the existing rapid transit lines were contracted for before the World War. Advances in the cost of labor and materials are responsible for the increased costs.

"The average quantities of materials specified in each subway contract are earth excavation 108,000 cubic yards; rock excavation 112,000 cubic yards; concrete 30,000 cubic yards; steel 4,200 tons; tunnel ducts 152,000 duct feet; road asphalt 12,000 square yards; cast iron pipe 50 tons; steel rods 220 tons; three-ply waterproofing 20,000 square yards; brick in asphalt mastic 1,000 cubic yards; vitrified sewer pipe 250 linear feet; steel gratings for ventilators 4,500 square feet.

"Computed on the basis of total quantities of materials enumerated in the specifications for the eighteen sections

of the Washington Heights route contracted for during the present year, a comparison of average prices prevailing to-day for the principal items and the average prices for materials required in the construction of the subways ten years ago, shows the following:

[fol. 1054] "Materials	Quantities	Unit cost, 1925	Unit cost, 1915-1916	Per cent Increase
Earth Excavation	1,944,000 cu. yds.	$9 73	$4 04	140
Rock Excavation	2,016,000 cu. yds.	11 57	5 61	106
Concrete	540,000 cu. yds.	21 20	8 93	137
Steel	75,600 tons	121 67	71 44	70
Tunnel Ducts	2,736,000 feet	0 29	0 12	141
Road Asphalt	216,000 sq. yds.	5 06	2 63	93
Cast Pipe	900 tons	148 68	46 00	223
Steel Rods	3,960 tons	112,64	61 25	84
Waterproofing	360,000 sq. yds.	3 03	1 06	186
Brick & Mastic	18,000 cu. yds.	49 28	26 10	89
Clay Pipe	4,500 feet	6 85	2 98	129
Steel Gratings	81,000 sq. ft.	4 23	1 71	147

"These items represent in cost 85 per cent of the total materials used in construction of the eighteen sections of the Washington Heights route."

The statement of the defendant City's Board of Transportation pointed out that these sharply increased unit costs of rapid transit construction have taken place despite substantial improvements and economies in construction methods, saying:

"On the other hand, the advent of the electric crane and the electric shovel, for use in the sub-surface has brought about a more convenient and economical method of sub-surface excavations, when compared with coal burning cranes and shovels which made such sub-surface work very costly. Moreover, when the existing subway lines were built, the motor truck of heavy capacity had not been developed to handle tonnage carried today. Therefore, vertical shafts for excavating by means of buckets attached to derricks are now being replaced by ramps, at steep grades which can be negotiated by the present day type of motor truck both for taking away excavated material and bringing steel, cement, sand, terra cotta, brick, etc., to the work."

Although the twelve items tabulated by the distinguished [fol. 1055] Chief Engineer of the City's Board of Transportation represent ordinarily 85 per cent of the total contract, and they were tabulated as showing an increase of

129 per cent in 1925 over 1913, the figures do not tell the full story. The comparison is the basis of a unit cost of work or material basis; complete comparison would require application of the 1913 and present prices to the relative quantities of work on the subways built before 1917 and those now nearing completion, as the latter are being built on a larger bore and hence call for different quantities of the different units.

Before Judge McAvoy in 1925, Chief Engineer Ridgway testified that City subway work was then costing about 225 per cent of the pre-war cost.

A comparison of the total cost of construction and equipment per track mile under Contract No. 3 and the City's competing system may show a present cost as much as 300 per cent of Contract No. 3 costs.

The Plaintiff Fully Invoked the Exercise of the Commission's Powers and Duties

The plaintiff's petition to the Transit Commission under date of February 1, 1928, and its subsequent communication to the Commission on February 8th, clearly invoked any and all powers and duties which the Commission had in respect of adequacy of rates on transportation lines, including those under Section 49 of the Public Service Commission Law. While the petitioner, at the outset, applied "under Section 29 of the Public Service Commission Law, for an order granting permission" to put specified tariff [fol. 1056] schedules in effect upon not more than five days' notice after publication at stations and filing with the Commission, the petition of February 1, 1928, concluded:

"Wherefore, the Interborough Rapid Transit Company respectfully applies to your honorable Commission, pursuant to the powers which have been vested in you by law, to approve the said"

tariff schedules, etc.

In its subsequent communication to the Transit Commission, on February 8th, the present plaintiff squarely asked the exercise of the Commission's powers and the fulfillment of its statutory duties, in behalf of a rate of fare sufficient to permit safe and adequate service and the obtaining of new capital for improvements and extensions:

"The New York Courts have held that a reasonable rate, higher than that stipulated by franchise or contract, may be made effective and lawful by the procedure which this Company has followed under the advice of counsel. The way must be deemed fairly open to an adequate fare which will protect our patrons and our property; and, in the language of the United States Supreme Court (270 U. S. 587, 591-592), the Transit Commission is the 'tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation.'

"If this duty and responsibility to to be disregarded by you and action taken without consideration by you of the confiscatory character of the five-cent fare and its ruinous effects upon rapid transit service, the Interborough Company will have no recourse but to bring the indisputable facts before a tribunal which may not disclaim the power [fol. 1057] and jurisdiction, which today is yours. If, however, as this Company hopes, you will definitely take jurisdiction of our rates and proceed upon any proper complaint to determine the facts which will show whether or not our filed 7-cent rate is excessive, counsel for this Company will be glad to attend before you and arrange for the presentation of our contentions and proofs in the orderly course as above suggested. If you are unwilling to do this and to face the facts as to the utter inadequacy of our present elevated and subway fares, then it will be your refusal which transfers future consideration of these fares to another tribunal. Yours also will be the clear responsibility for any public consequences of the traffic conditions made worse by your failure to grant prompt relief."

The defendant Transit Commission never granted this request, never exercised "the powers which have vested in you by law," and never did anything to further an adequate rate or preserve the plaintiff's property from confiscation.

As to the statements repeated in Mr. Nicholson's affidavit that the plaintiff itself had established the five-cent fare by the filing of a tariff schedule, in 1925, prescribing such rate of fare, I desire to say that all tariff schedules filed by the plaintiff pursuant to the various orders of the Public Service Commission, after the first tariff filed twenty years

ago were reissues of the same rate, to comply with the Commission's order and regulations.

[fol. 1058] The Defendants Themselves Have Correctly Interpreted the Regulatory Status of the "Contractual" Provisions under the New York Laws and Decisions

Mr. Untermyer, in his oral argument before the District Court, stated (Transcript, pages 9-10) that

"this proceeding is certainly to restrain the enforcement of a statute of a State by a State Court, because we are seeking in a State Court to uphold and enforce a contract made pursuant to the Rapid Transit Act, pursuant to orders of a Commission."

Corporation Counsel Nicholson, in his affidavit before the District Court (fol. 80), admits and asserts

"that said Contract No. 3 and elevated extension certificate, under the decisions of the Courts of this State, have the force and effect of statutes."

Counsel for the Transit Commission (Mr. Lewis) repeatedly refers, in his opposing affidavit on this motion, to the plaintiff's seven-cent fare schedules as "unlawful," because contrary to the rate limitation fixed by the Commission as a part of the subway lease, etc.

As recently as March 6th, in oral argument before Bondy, D. J., "senior counsel" for the defendants argued (mim. transcript, pages 271-272):

"We contend that this injunction in the ancillary suit does restrain these State officials from enforcing these statutes, which they are endeavoring to do."

[fol. 1059] The Defendants Admit that Plaintiff's Filed Schedules Embody Duly Established and Lawful Rate Unless They are Permitted to Maintain Suit on Contract

Before Bondy, D. J., on the motion of the plaintiff for an injunction pendente lite in the ancillary action, the defendant public authorities frankly confessed their realization that, in view of what they have more or less deliberately done and left undone, the plaintiff's duly filed schedules have become the rate lawfully and properly chargeable, unless they are permitted to assert and enforce their State Court restraining orders based upon the so-called "contractual"

provisions. The defendants' principal brief before Bondy, D. J., said (page 19):

"As we will hereafter show, the 7-cent fare would, except for the restraining orders issued by the State Court, *ipso facto* have taken effect on March 3, 1928, *for the reason that the plaintiff filed its new schedule of rates on February 1st, and no order suspending the rate was made by the Transit Commission during the limited periods provided by Section 29.* Such a construction of the statute is, in fact, affirmatively asserted by the plaintiff (reply affidavit of William Ransom, fols. 92, 93).

"The only obstacle, therefore, to a 7-cent fare effective on the 3d of March is the pendency of the three suits in the Supreme Court of New York State. *An injunction by this Court against the prosecution of those suits would automatically put into effect on that date the 7-cent rate of fare.*'" (Italics mine.)

[fol. 1950] The same accurate statement of the law and the facts is made by the defendants at page 115 and elsewhere in their principal brief.

The defendants are unquestionably right in their construction of the statute and of the legal effect of what they have done (and not done) as to the plaintiff's duly filed schedules. The defendants were clearly wrong, however, in their claim that they must be permitted to proceed with their subsequent State Court suits, else the duly established seven-cent rate will go automatically into effect.

Ever since the explicit assurance obtained by Bondy, D. J., from plaintiff's counsel on February 21st, embodied in a specific order on March 2nd, there has been no possibility that the seven-cent fare would be actually charged and collected by the plaintiff, in advance of the determination of the Special Statutory Court, upon the plaintiff's motion for a preliminary injunction in the original action.

The defendants Have Themselves Fully Shown the Plaintiff's Compliance on the Plaintiff's Part with the Conditions Precedent to the Taking Effect of the Seven-cent Rate

In the affidavit submitted to Bondy, D. J., by Clarence S. Lewis, Esq., Chief counsel for the defendant Transit

Commission, verified by him on February 21st, in opposition to the motion of the plaintiff for an injunction pendente lite in the ancillary action, Mr. Lewis stated the facts as follows (printed affidavit, fols. 26-27):

"On February 1, 1928, plaintiff, acting under Section 29 of the Public Service Commission Law, filed certain sheets [fol. 1061] purporting to amend its tariff schedules then on file and in effect and to become effective March 3, 1928, which showed that on and after March 3, 1928, plaintiff purposed to charge a fare of seven (7) instead of five (5) cents. It has also filed at its stations copies of these new sheets showing an intent to charge a seven (7) cent fare on and after March 3, 1928."

In folio 55 of the same affidavit, Mr. Lewis stated his opinion and advice to the defendant Transit Commission as follows:

"My opinion was, and is, that since the schedules when once filed are public records (Ancillary Complaint, Art. XIV, fol. 59, page 20) they could not be physically removed from the files, but that the proper course was to leave them there and by a formal rejection give notice to plaintiff of the Commission's claim that they were illegal and void and so permit the question of law as to the meaning, purpose and intent of the statute to be speedily determined in the Courts of the State."

In paragraphs 6 and 7, both inclusive, of the petition of the defendant Transit Commission, verified on February 14, 1928, by John F. Gilchrist, its chairman, and on that day filed in the New York County Supreme Court, in the action entitled Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant, it was stated:

"6. That during the period of operation by it under said contracts, defendant has filed and kept on file with the Pub- [fol. 1062] lic Service Commission for the First District or with the Transit Commission, and now has on file with the Transit Commission, printed schedules showing, as the charge for transportation of passengers upon the rapid Transit railroads operated by it as aforesaid, the rate of five (5) cents for a single fare.

"7. That on February 1, 1928, defendant filed with the Transit Commission certain revised sheets purporting to amend certain existing sheets of the said schedules already on file with the Transit Commission, which revised sheets contain the word 'Effective March 3, 1928,' and show as the charge for transportation of passengers upon the said railroads comprising the 'Subway Division' and the 'Manhattan Division,' respectively, the rate of seven (7) cents for a single fare."

In paragraphs 12 and 13 of the affidavit of John F. Gilchrist, chairman of the defendant Transit Commission, verified on February 14, 1928, in the action in the New York County Supreme Court, entitled The City of New York, acting by the Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant, Chairman Gilchrist stated:

"12. That on February 1, 1928, defendant filed with the Transit Commission certain revised sheets to said schedules which said revised sheets set forth the purpose and intention of the defendant, on and after March 3, 1928, to put into effect, charge and collect a fare of seven (7) cents on all the said subway and elevated railroads operated by it, instead of the five (5) cent fare now being charged and collected as fixed and provided in said Contract No. 3 and [fol. 1063] said Certificate.

"13. That defendant, as more fully set forth in the affidavit of Edward D. Hutchinson, hereto annexed, has filed with its agents at various stations of its subway and elevated railroads, copies of said revised sheets heretofore filed with the Transit Commission on February 1, 1928, and has posted and displayed at said stations printed notices to the effect that schedules showing the rates, fares and charges are on file with the said agents and are open to inspection by any person."

The said affidavit of Edward D. Hutchinson, Chief of the Tariff Bureau of the defendant Transit Commission, also verified February 14, 1928, and referred to in the affidavit of Chairman Gilchrist above quoted, said:

"Edward D. Hutchinson, being duly sworn, deposes and says that he is Chief of the Tariff Bureau of the Transit

Commission and has charge of the tariff schedules filed with said Commission by railroad corporations and common carriers; that the Interborough Rapid Transit Company filed with the predecessor of the Transit Commission and now has and for a long time past has had on file with the Transit Commission certain tariff schedules showing the rates, fares and charges in effect upon the subway and elevated railroads operated, controlled and managed by it; that said schedules show and have shown a rate of fare of five (5) cents as the rate to be charged upon the railroads so operated by said Company.

"Deponent further says that on February 1, 1928, said Interborough Rapid Transit Company filed with the Transit Commission certain revised sheets marked to become effective March 3, 1928, which said sheets purported [fol. 1064] to amend certain sheets of said existing tariff schedules now on file with the Transit Commission; and that among said revised sheets were sheets showing a rate of fare of seven (7) cents proposed to be charged by said Interborough Rapid Transit Company on and after March 3, 1928, on the said railroads operated and controlled by it.

"Deponent further says that on February 6 and February 7, 1928, he visited twelve ticket offices on the stations of the subway railroads operated by the Interborough Rapid Transit Company and known as the 'Subway Division,' and twelve ticket offices on the stations of the elevated railroads operated by the Interborough Rapid Transit Company and known as the 'Manhattan (or elevated) Division'; and that the ticket offices so visited, the station, division and line on which they were located, and the dates on which deponent visited them were as follows:

"Monday Evening, Feb. 6th, 1928, Subway Division

"Ticket booths on the south side of Madison Avenue on the 42nd Street Shuttle Line.

"Two booths at northwest end of the Times Square Station.

"Ticket booths at the entrance from the Long Island Concourse of the Pennsylvania Station.

"Ticket booth at the Chambers Street Station.

"Ticket booth at the Cortlandt Street Station, south end of southbound side.

"Tuesday, February 7, 1928, Subway Division

"Cortlandt Street Station, south end of northbound side. [fol. 1065] "Times Square Station, ticket booth at south end of station at 40th Street.

"Times Square Station, ticket booth near foot of stairway leading from west side of Broadway.

"Times Square Station, ticket booth at entrance from B. M. T. concourse.

"Grand Central Station, in 42nd Street Shuttle, west side of Madison Avenue.

"14th Street Station, Lexington Avenue Subway, northbound side, south end of station.

"Southbound side, south end of station.

"Tuesday, February 7, 1928, Elevated Division

"Third Avenue Elevated Line:

42nd Street Station, southbound side.
34th Street Station, southbound side.
28th Street Station, southbound side.
23rd Street Station, southbound side.
18th Street Station, southbound side.
14th Street Station, southbound side.
14th Street Station, northbound side.

"Sixth Avenue Elevated Line:

14th Street Station, southbound side.
14th Street Station, northbound side.
18th Street Station, northbound side.
23rd Street Station, northbound side.
34th Street Station, northbound side.
42nd Street Station, northbound side.

[fol. 1066] "Deponent further says that at each and all of the stations so visited by him there was posted a notice, a true copy of which is hereto annexed, marked Schedule A and made a part hereof; and that at eac hand all of said stations deponent examined the tariff schedule there on file and found that all of said tariff schedules contained copies of the new revised tariff sheets filed with the Transit Commission by the Interborough Rapid Transit Company on February 1, 1928, and marked to become effective March

3, 1928, and that among said sheets so examined there were at all stations visited sheets showing a seven (7) cent fare for the railroads of the 'Subway Division' and the 'Manhattan (or Elevated) Division,' respectively."

Schedule "A," annexed to Mr. Hutchinson's affidavit, was as follows:

"Schedule 'A'

Notice

"Schedules showing the rates, fares, and charges and the rules or regulations for the transportation of passengers and property upon the routes of the Interborough Rapid Transit Company, including those leased, operated or controlled by the company are on file with the Agent at this station or office, and are open to inspection by any person, and the Agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force.

Interborough Rapid Transit Company, by Frank Hedley, President and General Manager."

[fol. 1067] In paragraphs 16 to 19, both inclusive, of the complaint, verified by John F. Gilchrist, Chairman of the defendant Transit Commission, on February 14, 1928, in the action in the New York County Supreme Court, entitled The City of New York, acting by The Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant, it was stated:

"16. During the entire period since March 19, 1913, defendant has in compliance with the provisions of said Contract kept on file with the plaintiff and its predecessors schedules as required by law, which set forth and showed for the subway and elevated routes leased, operated and controlled by defendant the full fare of five (5) cents fixed and provided in said Contract No. 3 and said Certificate respectively.

"17. On February 1, 1928, defendant filed with plaintiff certain revised tariff sheets of said schedules.

"18. Said revised sheets set forth the purpose and intention of defendant on and after March 3, 1928, to put

into effect, charge and collect a fare of seven (7) cents on the subway and elevated lines operated by defendant instead of the five (5) cent fare now being charged and collected as fixed and provided in said Contract No. 3 and in said Certificate in violation and disregard of the agreements between the City and the Company as defined by said Contract and Certificate.

"19. Upon information and belief the defendant has filed with its agents at the stations on its subway and ele- [fol. 1068] vated railroads copies of said revised sheets heretofore filed with plaintiff on February 1, 1928, and since said date has posted and displayed at such stations printed notices to the effect that the schedules showing the rates, fares and charges are on file with said agents and are open to inspection by any person."

The Defendant Transit Commission's Action on February 14, 1928

On February 14, 1928, the Transit Commission made an order rejecting the plaintiff's tariff sheets and dismissing its application of February 1, 1924.

The determination order or resolution purported to have been adopted by the defendant Transit Commission at its special meeting about noon on February 14, 1928, was as follows:

Whereas the Interborough Rapid Transit Company on February 1, 1928 filed with this Commission certain revised sheets marked to become effective on March 3, 1928, and purporting to amend its tariff schedules, now on file with the Commission and showing a rate of fare of five (5) cents, so as to show a seven (7) cent fare proposed to become effective on and after March 3, 1928, as the rate of fare to be charged by it on the subway and elevated railroads operated by it; and

"Whereas it appears that the rate of five (5) cents now charged and collected by said Company upon the said railroads operated by it is fixed by certain contracts heretofore entered into between said Company and The City of New York, which contract and rate is still in full force and effect; and

[fol. 1069] "Whereas the Commission has rejected said revised sheets as unlawful and of no effect; and

"Whereas the Company threatens and is about to charge and collect on and after March 3, 1928 a rate in excess of that fixed in said contracts and allowed by law and in excess of that shown in the schedules lawfully filed and in effect; and

"Whereas the Commission is of the opinion that, by reason of its said threat to discontinue its practice of charging a five (5) cent fare and to charge a seven (7) cent fare on and after March 3, 1928, said Company is about to fail to do something required by law and is about to do something contrary to and in violation of law, it is

"Resolved that this Commission do, and hereby does, direct Counsel to this Commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of this Commission against the Interborough Rapid Transit Company for the purpose of having such threatened violation of law stopped and prevented either by mandamus or injunction."

Ralph Norton.

Sworn to before me this 14th day of March, 1928. Emil Pensel, Notary Public. Bronx County No. 17, Bronx Register No. 2966. N. Y. County No. 335, N. Y. Register No. 9258. Kings County No. 38, Kings Register No. 9168. Queens Co. No. 2562, Queens Register No. 5006. Term expires March 30, 1929.

[fol. 1070] Affidavit of Plaintiff's Counsel in Reply to Affidavits of Clarence Lewis, Esq., and Samuel Untermyer, Esq.

United States of America,
State and County of New York,
Southern District of New York, ss:

Arthur G. Peacock, being duly sworn, deposes and says:

I am an attorney at law and of counsel for Interborough Rapid Transit Company, being regularly employed in the

law department of that company, at 165 Broadway, New York City.

[fol. 1071] Arbitrary action in Connection with Conduct of Proceeding Before Transit Commission as to Service on Subway Division.

I represented the Company before the Transit Commission in Case 2851, referred to in Mr. Lewis' affidavit (fol. 241) and in Mr. Nicholson's affidavit (fol. 84), and was present at every formal session, and at many conferences with members of the Commission, its engineers, officers and employees with respect thereto.

The hearing order was adopted in this case on February 24, 1927, and hearings began on March 21st, 1927. The only topics discussed at the first hearings were service and platform men. It was the theory of the Commission's witnesses that more and better platform men would facilitate the movement of trains through controlling stations. These hearings were all held and the case closed before the Investigation of 1927 was begun. The Company agreed to and did place on stations more platform men and began a frequent check-up on these men in cooperation with the Commission. In the summer of 1927 more platform men were put on certain stations after conference with the staff of the Commission. And it was agreed by all that additional men would be placed on stations in the fall.

Without warning the Commission sent a letter on October 21, 1927, reopening the case for further hearing on November 9, 1927. At this hearing certain checks were introduced by the Commission and still the complaint was about platform men and the way they were trained (S. M., p. 115). Before the next hearing November 15 conferences were held between Company and Commission and a form of order [fol. 1072] agreed upon—it involved placing additional men at controlling stations. The plan was to then close the case. Commissioner Lockwood refused to close the case in spite of Mr. Lewis' wish to do so (S. M., pp. 120-121), and adjourned the case for two weeks.

At this hearing the following colloquy took place about service on the Pelham Bay Park Line which the stenographer was instructed not to report on the record:

"Why don't they run more trains there?", asked Commissioner Lockwood.

"They have not got enough cars," replied Colonel Lancaster, the Commission's Chief Engineer.

"Well, why not order them to get more cars," said Commissioner Lockwood. "I do not take any stock in conferences, they never do anything as a result of conferences. Let's order them to get more cars if they need them. I'll adjourn this hearing for two weeks in order to see if there is not some improvement in the service and I'll take up the question of cars in this case."

No minutes were taken of the hearing of November 29, but the talk was all of cars, the Commissioner saying he had read a report somewhere that the Interborough could use 400 new cars. Mr. Walter I. Edgerton, Chief of the Service Bureau of the Transit Commission, told him there was such a report in existence but that the Service Bureau was now recommending only 107 cars.

Counsel for the Commission wished an adjournment of two weeks, but Commissioner Lockwood insisted on going on on December 5 and on that day adjourned to December 8, saying, among other things:

"We are not going to have any long adjournments. We want to conclude this hearing just as quickly as possible" [fol. 1073] (S. M., pp. 144, 183, 184).

Thereafter on December 19—Special Counsel Mr. Samuel Untermyer appeared and conducted the rest of the hearings in the case, so far as examination and cross-examination of witnesses for the Commission was concerned. His conduct was arbitrary, dictatorial and oppressive. He attemped in every possible way to prevent the Company from offering evidence as to the necessity of the cars; he proceeded on the theory that the cars were absolutely necessary and his conduct gave the impression to all that the conclusion of the hearings the cars would be promptly ordered by the Commission. No other result could be imagined by any attendant at the hearings or from a most casual reading of the record or from reading his scandalous summation. The proposed order has hung like a sword of Damocles over the Interborough since the hearings closed and de-

ponent believes that only the restraining order of this Honorable Court has prevented the issuance of this proposed order, which would drive this Company into bankruptcy.

Mr. Untermyer's Misstatement as to the Meeting of the Transit Commission on February 14, 1928

I deny the allegations made by Mr. Untermyer (fol. 115) to the effect that the Transit Commission met at 10 o'clock on the morning of February 14, 1928, and then rendered its decision, accompanied by Commissioner Godley's opinion, purporting to reject plaintiff's revised tariff schedules as unlawful. It is significant that no transcript of the Commission's minutes showing that such a meeting was [fol. 1074] held, or set, is annexed to Mr. Untermyer's affidavit.

On February 16, 1928, on behalf of Interborough Rapid Transit Company, I requested Mr. James B. Walker, Secretary of the Transit Commission, to furnish me with (1) a certified copy of the Order of the Transit Commission adopted February 14, 1928, in Case No. 2897, entitled "In the Matter of the Application of the Interborough Rapid Transit Company under Section 29 of the Public Service Commission Law," purporting to reject the revised tariff sheets of said Interborough Rapid Transit Company and dismissing the Company's said application, and (2) a certified copy of the minutes of the entire proceedings of the Transit Commission at the time of the adoption of said order, including the direction to its counsel to commence an action or proceeding in the Supreme Court of the State of New York against Interborough Rapid Transit Company. I also requested that the Secretary certify as to the particular time or hour at which the Transit Commission acted. Mr. Walker furnished me with copies of the order and minutes as requested, duly certified in the usual manner as duplicates of the original; but stated that he was unable to include in the certification any reference to the hour at which the action of the Transit Commission was taken. After making this statement, Mr. Walker informed me that the meeting of the Commission at which the order referred to was adopted took place between 11.30 A. M. and 12 o'clock noon, on Tuesday, February 14, 1928.

I also desire to submit the affidavits, on file with the United States District Court for the Southern District of New York in the Ancillary Action herein (In Equity No. 44-229), by Henry V. Becher, Deputy United States [fol. 1075] Marshal, and Emil Pensel, each verified March 17, 1928, showing that Chairman Gilchrist did not arrive at the office of the Transit Commission until nearly 11 o'clock of February 14th.

On the basis of this information, I believe and therefore allege that the Transit Commission took no formal action to reject the revised tariff sheets of Interborough Rapid Transit Company, to deny the Company's application under Section 29 of the Public Service Commission Law in Case No. 2897, or to direct its counsel to begin legal proceedings in the New York Supreme Court before 11.30 A. M., on Tuesday, February 14, 1928.

Arthur G. Peacock.

Sworn to before me this 14 day of March, 1928. Emil Pensel, Notary Public. Bronx County No. 17, Bronx Register No. 2966. N. Y. County No. 335, N. Y. Register No. 9758. King's County No. 38, Kings Register No. 9168. Queens Co. No. 2562, Queens Register No. 5006. Term expires March 30, 1929.

[fol. 1076] In United States District Court

[Titles omitted]

Reply Affidavits of Defendant Transit Commission in Opposition to Motion for an Interlocutory Injunction

[fol. 1077] State of New York,
County of New York,
Southern District of New York, ss:

Isidor Steinbad, being duly sworn, says:

I

I am connected with the Accounting Department of the Transit Commission as Chief of its Division of Statistics

and Accounts and have been employed by the Commission and its predecessors for upwards of ten (10) years last past.

II

On December 21, 1927, I was present at a hearing in Transit Commission Service and Equipment case 2851, re-
[fol. 1078] lating to an application for additional cars for Plaintiff. This hearing is referred to in my affidavit verified March 12, 1928, and already filed.

III

Subway Overcrowding a Danger to Public Health; Transmission of Disease Facilitated; Resistance Lowered; Indecency Fostered.

At this hearing Dr. Edward Levy, consulting physician to the Transit Commission, upon examination by Samuel Untermyer, Esq., as Special Counsel for the Commission, testified as follows:

"Q. I will ask you this hypothetical question: Mr. Edgerton testified in this proceeding in respect to Exhibit 42, sheet No. 8, that during all five 20-minute periods from 7:40 A. M. to 9:20 A. M. on the Lexington-Fourth Avenue southbound express the average loads in excess of 250 per cent were carried, the highest rate being 396 per cent. In respect to sheet No. 10 on the Lexington-Fourth Avenue Subway northbound express during the five 20-minute periods from 5 o'clock to 6:40 P. M. there were loads in excess of 250 per cent, the highest rate being 423 per cent. He also testified at page 154 of the record that some of the cars during these average periods carried loads in excess of 423 per cent; inasmuch as all loads are not evenly distributed among the cars of the train, that there will be cars during the period in excess of the percentage over the period, and that also in excess for the maximum loading. He also testified that, at page 154, that with the 250 per cent loading the average square foot available for standing passengers is 3.14 square feet, and with the 400 per cent loading is 1.57 square feet per passenger. • • •
[fol. 1079] "On page 155 he testified in answer to a question:

"Q. Can you explain how passengers can be placed in a space of 1½ square feet?

"He said: 'Well, they are. That is all. It simply means that they are crowded just about as tight as you can get them.'

"At page 174 Mr. Edgerton testified that on the Queens-Corona Line overloads are carried on every period from 6:20 to 9:40 with a maximum of 430 per cent, and overloads are carried at night during the periods with 434 per cent; that on the Astoria Line during ten periods in the morning the overloads are carried with a maximum of 436 per cent, and during eight periods in the evening with a maximum of 428 per cent.

"At this morning's hearing Mr. Edgerton testified, by actual observation on six different cars of the Queensboro Line, counted at Jackson Avenue Station during the morning rush hours, on December 20, 1927, there were loads of 222 passengers or over 500 per cent loads. He also testified that on the Interborough Subway car carrying a 500 per cent load, or 222 passengers, there is an average space per passenger of 1.18 square feet. Were you present when Mr. Quackenbush made the statement the other day that the service was adequate?

"A. Was I present? No.

"Q. Now, based upon your personal observation and upon the testimony just recited to you, what is your opinion as to the probable effect upon the health of persons riding in cars under such conditions?

"A. I believe it is not conducive to good health for the following reasons:

"Q. Not conducive?

"A. Yes.

"Q. Is it likely to impair health?

"A. It is.

"Q. You consider that it is distinctly unhealthy?

"A. Uncomfortable and harmful.

"Q. Never mind about the comfort, for the moment, but speaking about the effect on the physical condition of the passengers?

"A. Positively harmful.

[fol. 1080] "Q. Will you explain why and in what respect?

"A. The ordinary individual depends for his good health upon the temperature, even temperature of his body. This temperature is controlled both by his lungs and by evaporation from his body. In close contact that we have with a 300 per cent overcrowding, one upon another, evaporation cannot take place.

"Q. Well, the evaporation through the skin performs the major part of the work?

"A. It performs 75 per cent of the work of the heat control. This not being able to take place causes congestion of the body with perspiration, causing temporary anemia in other parts of the body which affect generally the brain and the mucous membranes of the nose, causing dizziness and affecting the mucous membrane so that affection is apt to take place.

"Again when people are so closely crowded the individual who must cough or sneeze cannot protect his mouth in any way, and the individual who is the recipient of the nasal spray or the cough spray cannot protect his or her mouth or nasal passages. Therefore inhalations of globules of infected material take place. As a rule bronchitis, influenza and pneumonia and possibly tuberculosis are contracted by inhalations of the infected material with the bacteria of that particular disease.

"Then again in cases of crowding personal trauma or injury must take place. Your arm is apt to be twisted, your ankle is apt to be sprained, and abrasions take place and there is a great deal of interference with normal respirations in a crowd any place.

"Fourth, I should say that there is a moral condition to be considered; a close contact between the different sexes or the two sexes, especially the young lady, is a condition that is likely to promote immoral actions.

"Q. That does not bear on the physical aspect?

"A. That is the physical health, in my opinion. That depends on a man's health after a while.

"Q. But confining ourselves for the moment more particularly to the effect on the physical health of the indi- [fol. 1081] vidual, the direct effect on the physical health, will you explain how the inability to protect the mouth under those conditions affects the general health? Does it lead to inhalations of infected globules?

"A. It does when the person next to you or the person in contact with you is coughing. And when you are inhaling this, these globules are so small or minute that they are barely visible and they are brought in in inhalations and taken into the lungs and the bacteria become implanted in the lungs.

"Q. Does this congestion from crowding have the effect of creating an anemic condition of the body?

"A. An anemic condition?

"Q. Yes. Does it lead to anemia?

"A. I do not think so. I do not see how. It is only secondary to some other disease.

"Q. Well, does not the congestion and sweating of the body create an anemia in other parts of the body?

"A. It creates a local anemia as I suggested which may be in the nasal pharynx, lungs or throat or something like that, and makes a person more susceptible to colds and infection.

"Q. And it reduces his resistance?

"A. It does.

"Q. And all life is a struggle against disease?

"A. It is.

"Q. And when you get the resistance power reduced, you are very much more liable to get diseases of the body?

"A. It reduces resistance. That reduced resistance is only for the time being while they are exposed to this.

"When you have 222 passengers in a single car, the air is very much vitiated from the breaths of all those people in that space isn't it?

"A. Not if the windows are kept open and ventilation takes place.

"Q. But does not the ventilation, the kind of ventilation you get in the subway, affect the question at all?

"A. The only objection to the ventilation we have in the subway is the current or draughts. Any violent air blown on any particular part of the body for a short time causes trouble.

[fol. 1082] "Q. Apart from that, the grinding from the rails and from the wheels in a confined space of that kind, that has a certain effect hasn't it?

"A. Well, most of our diseases are due to germs, and

those being inorganic matters, I do not believe it has any particular effect, Mr. Untermyer.

"Q. But you think this excessive crowding has a very serious effect?

"A. I do.

"Q. For the reasons you have given?

"A. I do."

IV

Dr. Harris's Testimony on the Evils of Overcrowding

On December 30, 1927, I was present at hearing in Transit Commission Service and Equipment Case 2851, relating to an application for additional cars for Plaintiff. This hearing is referred to in my affidavit verified March 12, 1928, and already filed.

At this hearing Dr. Louis Harris, Commissioner of Health of the City of New York, upon examination by Samuel Untermyer, Esq., testified as follows:

"Q. In the line of your duty as Commissioner of Health, is it part of your work to investigate into the health of citizens and residents of the City of New York?

"A. It is.

"Q. How much of a staff have you in the Board.

"A. Well, exclusive of the hospital corps we have about 3,000 employees in the Department of Health.

"Q. How many are there in the hospital?

"A. Roughly about a thousand.

"Q. So that you have a force of about four thousand people?

"A. About four thousand people.

"Q. Has it been part of your duty to make an investigation of health conditions in the subways of the City?

"A. It has.

"Q. Have you made quite extensive studies on that subject?

"A. The studies and personal experiences extended over [fol. 1083] a period of many years. I do not intend to be facetious or disrespectful, but I was constrained until two years ago to use the subways as the only means of transportation, practically, that I had, so that I had direct first

hand knowledge of the conditions that obtained on various divisions of the subway.

"But in connection with our interest in the subway conditions coming to a particular focus in 1918, when we had that great influenza epidemic, or the pandemic which claimed a tremendous number of victims, all public health administrators were intent upon finding ways of diminishing, if they could not adequately cope with, the epidemic. It is considered axiomatic among public health administrators that crowding, congestion, particularly in street cars during certain seasons of the year, especially when respiratory infections are most prevalent, are conducive ordinarily to the spread of respiratory diseases. That ordinary state of affairs is aggravated and magnified many times during an epidemic, and so we set ourselves to the problem of studying the subway situation.

V

Girls Exposed to Indecency

"Q. No. It is all relevant.

"A. (continuing) I have tired to resurrect the staggering of traffic, not as a solution of the subway overcrowding, but as a means of amelioration, but only on two grounds: The primary ground, and the ground that is proper to my department, the public health ground. That is the major ground. I wish, if you will permit me, to dwell on that at greater length in a moment. The other ground was the question of decency and morals.

"I had had a number of complaints—in fact I have had conferences with representatives of the Police Department who have told me, and I have received independent complaints from various citizens, of indecencies that were per- [fol. 1084] petrated upon various girls and women under the cover of crowding. The crowding has been so terrible that many things could be done that would not be possible or tolerable under ordinary conditions.

VI

Danger of Infection from Colds, Influenza, and Pneumonia

"But my primary motive is public health, and we feel that the respiratory infections, especially in the winter sea-

son, are greatly increased by crowding. That is not a personal belief, but one that is axiomatic, as I indicated before, for all those who have a knowledge of it.

"You will find that Martin J. Rossineau, Professor of Preventive Medicine at Harvard, stresses especially among the administrative measures for preventing colds and influenza and pneumonia—

"Q. Preventing the spread of them?

"A. Preventing the spread of them. He speaks especially of measures to prevent street car crowding.

"Q. That is worse in the subway where the air is confined?

"A. It is very much worse and from personal experience, I have gone through situations that have made me feel that things have become intolerable. One does not have to be fragile. One does not have to be enfeebled to realize that subway travel is an ordeal that calls for unusual powers of resistance. A short person suffers particularly. I speak rather feelingly on that subject. It is impossible to breathe with a solid mass of humanity packed before you.

"Droplet infection is unavoidable.

"We may preach all we will, and people may even be disposed to follow our preachments of covering up coughing and sneezing, but it is utterly impossible with conditions as they exist in the rush hours. Those conditions are not confined, however, to the rush hours, from my personal knowledge and experience.

[fol. 1085] "Q. You find as much congestion, do you, at certain hours of the night, after the theatres and at other times?

"A. Exactly, and on Sundays, if one travels on Sunday mornings or Sunday afternoons when this traffic is, practically speaking, eliminated, one finds conditions of crowding that are just as bad very frequently. I have found that repeatedly to exist on Sunday, and in the evenings.

"So that droplet infections is one of the most competent means of spreading respiratory diseases. We have a rather comprehensive term when we use the phrase 'respiratory diseases.' I have in mind the common cold, which is recognized now as one of the most serious causes of disability among working people. It may not be serious in its

ultimate effects, but it disables. It causes an economic loss to the community. We include in the respiratory diseases, cases of tonsilitis of various types. We include influenza. We include, of course, pneumonia, and then there is, of course, the ever present danger of the carriers.

"Q. Tuberculosis?

"A. That is another. I was thinking in terms of the acute respiratory infections. Tuberculosis should be included.

"There is the ever present danger of carriers. It is recognized, for example, that in the winter season from 2 to 3 per cent. of our general population are carriers of virulent diphtheria germs. We differentiate diphtheria germs which are capable of producing serious disease from those that are apparently innocuous in the stage in which we find them in the body. Now our virulent germs we find 2 to 3 per cent. of the population carries during the winter season. Some authorities have estimated the proportion to be higher. Those are healthy carriers. That is healthy individuals who may transmit the disease to others, especially children, should they be using the subway as they do.

"Q. They are people whose health is such frequently that they can withstand the ravages of disease without becoming virulent?

[fol. 1086] "A. For the time being. They may possess temporary immunity or permanent immunity.

VII

Robust Persons Endangered Also

"Q. But people of robust physique? They might infect others?

"A. The people of robust physique who are fatigued at the end of the day's work and I have tried to stress that particularly—that a great many people have been under the stress and strain of a hard day's work, muscular or physical or mental exertion, are not as well prepared to withstand. Their powers of resistance are diminshed by the day's experience, or the cumulative experience of weeks and months. So we have the health carrier not only of diphtheria to consider, but of many micronisms that spread

respiratory infections. Pneumonia, for example. The public does not generally realize how many healthy carriers there are of pneumonia germs; people who have the power to resist the disease but who can transmit it in their coughing and their sneezing. So that crowding and congestion, with coughing and sneezing that are inevitable under those conditions, create ideal situations.

"Q. You mean ideal situations for the spread of disease?

"A. For the spread of disease.

VIII

Dangers in Case of Accident

"Q. With 44 seats, 56 straps, making 100 standing and sitting, it is testified that there were as many as 224 to the car. Now can you visualize the extent of overcrowding that that represents?

"A. That represents a very dangerous overcrowding from two viewpoints, First from the standpoint of disease, and I have tried to indicate how droplet infection, coughing and sneezing, and near proximity, close proximity, [fol. 1087] would favor the spreading of disease on a serious scale; and then there is in such a situation latent potentiality for catastrophe. Should there be anything in the nature of a serious accident with the people wedged in so terribly, feeling themselves helpless, you have the making of a panic or a grave danger. I would have to study that situation, as I was delegated by the Mayor to study the question of emergencies and headways, so I speak on that not without a certain degree of feeling a direct interest as a health official.

"Q. Are you aware that as a result of the overcrowding, men and women being pushed in that way, that their hands and arms have been driven through the glass windows?

"A. I have received complaints to that effect from time to time. May I interpolate that the most unfortunate phase of many city studies in health and accident matters is this, that there is no clearing house, no one clearing house in which the minor as well as the major accidents, in which the indirect results of a situation such as we have been discussing are focused or brought to a common clearing house. We get some complaints in the Department of Health. We

get about a fair sampling. I take it that the Transit Commission gets no end of complaints of the same sort. So that there is only a sampling of those who are voluble, who are willing to speak, who are willing to testify. But we lost a great deal of the effective material and of the effect, major and minor, upon health and welfare through the failure of many people to bring testimony when they arrive at their homes of the dangers, and of the sicknesses, that they suffer or the accidents they suffer.

"Q. Have you also had brought to your attention many complaints of indecency and immorality?

"A. I had several conferences on that subject with the head of the policewomen—I forget the name of the squad. There are a group of policewomen who are working especially assigned to these problems, and I think her name was [fol. 1088] Miss Sullivan. I had several conferences with her and that dates back about a year and a half ago and she called to my attention quite a number of complaints that they had to deal with of indecency and of perverse practices, immoral practices, under the cover of the indecent crowding that existed in the subway.

"Q. And you know that condition to exist?

"A. I have had complaints of that character brought to me directly.

"Q. And these indecencies are brought upon what class of the car riders?

"A. Upon women and girls.

"Q. Is there any relief from that so long as that condition of congestion exists?

"A. The congestion encourages and invites that situation to continue.

"Q. Is there any means of these women and girls making complaints of that condition when they are jammed in the cars in that way so that they can get in and out or get anywhere to make complaints?

"A. Apparently they cannot.

"Q. They are quite helpless?

"A. They are quite helpless."

IX

Figures in Special Counsel's Report Already in Evidence, Verified

I am familiar with the financial reports filed by the plaintiff with the Commission.

Exhibits A, M, Q, R, S and T, attached to the "Report and Recommendations of Special Counsel to the Transit Commission on Proposed Plan of Readjustment directed by Legislature," were complied under my direction by employees of the Division of Statistics and Accounts of the Transit Commission.

[fol. 1089] Exhibit A—Rapid Transit and Street Surface Railways Operating in City of New York

Sheet 1—Statement showing:

(1) Route and Track Miles Owned and in Operation June 30, 1926.

(2) Revenue and Transfer Passengers Carried during the Fiscal Years ended June 30, 1925, 1926 and 1927.

Sheet 2—Statement showing:

(1) Book Value of Physical Property at June 30, 1926.

(2) Valuations on Original Cost Basis of Operating Property at June 30, 1926.

(3) Valuation on Reproduction Cost Basis less Depreciation of Operating Property at June 30, 1926.

(4) Funded and Other Long Term Debt, June 30, 1927.

(5) Ratio of Net Operating Income for the Year Ended June 30, 1926, to Values of Physical Property on Various Bases.

Sheet 3-4—Statement Showing:

Comparative Results of Operation for the Fiscal Years Ended June 30, 1925, 1926 and 1927.

Sheet 5—Statement Showing:

(1) Operating Ratios for the Fiscal Years ended June 30, 1925, 1926 and 1927.

(2) Revenues and Expenses per Mile of Track for the Fiscal Years ended June 30, 1925, 1926 and 1927.

(3) Net Corporate Income per Revenue Passenger for the Fiscal Years ended June 30, 1925, 1926 and 1927.

[fol. 1090] (4) Average Speed (Miles per hour) for the Fiscal Year ended June 30, 1927.

Exhibit Q—Interborough Rapid Transit Company

Statement Showing Charges to Operating Expenses for (1) Injuries to Persons and Property and (2) General Law Expenses for the Fiscal Years Ended June 30, 1926 and 1927.

Exhibit R—New York Rapid Transit Corporation

Statement Showing Charges to Operating Expenses for (1) Injuries to Persons and Property and (2) General Law Expenses for the Fiscal Years Ended June 30, 1926 and 1927.

Exhibit T—Interborough Rapid Transit Company

Summary Statement Showing as of June 30, 1927:

(1) Assets available to pay liabilities.

(2) Liabilities not provided for by specific cash deposited.

(3) Excess of assets over liabilities.

The foregoing exhibits were compiled from or based on the sworn Annual, Quarterly and Monthly reports filed by the various companies with the Transit Commission, or from the books and records of the companies in a few instances where the information contained in the reports was not in sufficient detail for the purposes of the Exhibits, with the exception of the figures in columns 2, 3 and 4 of Sheet 2 of Exhibit A, which were furnished by Mr. Norman C. Hill, Chief of the Division of Valuations and Maintenance of the Transit Commission.

[fol. 1091] Exhibit M—Brooklyn Rapid Transit Company

Statement Showing Volume of Sales and High and Low Prices by Months, January, 1922, to October, 1923.

Brooklyn-Manhattan Transit Corporation

Statement Showing Volume of Sales and High and Low Prices by Months, November, 1923, to April 15, 1927.

This exhibit was compiled from tabulations prepared by Touche, Niven & Company, Certified Public Accountants, formerly employed by the Transit Commission. I am informed and believe that the original source of the data in this exhibit was the Commercial and Financial Chronicle.

Exhibit S, consisting of 6 sheets showing the dealings in securities of the Interborough-Metropolitan Company and the Interborough Consolidated Corporation, was compiled from tabulations and graphs prepared by the Accounting Department of the Transit Commission in Transit Investigation No. 1 in 1922. I am informed and believe that the original source of the data in this exhibit was the Commercial and Financial Chronicle.

These exhibits were carefully checked against the sources referred to, and to the best of my knowledge and belief are accurate presentations of the facts contained therein.

Isidor Spiritad.

Sworn to and subscribed before me this 27 day of March 1928. Louis Marder, Notary Public, New York County.

[fol. 1092] United States of America,
State of New York,
Southern District of New York, ss:

Harry S. Fischer, being duly sworn, deposes and says:

I am connected with the office of the Secretary of the Transit Commission as Statistician, and have been in the employ of the said Commission and its predecessors for upwards of nine (9) years last past.

I

Five-cent Fare an Issue at Extended Hearing on Transit Conditions Last Spring

A hearing was held before the Transit Commission on many days from and including May 23, 1927, to and includ- [fols. 1093 & 1094] ing July 27, 1927, in the matter of the investigation into the general condition of all railroads, street railroads, stage or omnibus lines and routes and persons and corporations within its jurisdiction, at which hearing 1,873 pages of official stenographer's minutes were taken and 105 exhibits were received in evidence.

One of the questions before the Commission during said hearing was as to the adequacy of the fare on the lines of the plaintiff Interborough Rapid Transit Company, as appears from page 238 of the official stenographer's minutes of such hearing, when James L. Quackenbush, General Counsel for plaintiff company, upon examination by Samuel Untermyer, Special Counsel for the Transit Commission, testified as follows:

"Q. So that really a five-cent fare is ample, isn't it, under present conditions?

"A. No.

"Q. I mean, taking the subway along, if we haven't anything to do with the Manhattan?

"A. Mr. Untermyer, it is not ample because under Contract No. 3 with the City of New York, the City of New York ought to receive a return on its interest, on its securities and enough in addition to make a total return of 8.76, and then above that the Interborough and the City should share equally in a profit out of this venture.

"Q. Now, Mr. Quackenbush——

"A. It cannot be done on a five-cent fare."

II

Extended Hearing as to New Cars; Testimony of Plaintiff's Expert

A hearing was held before the Transit Commission on many days from and including August 9, 1923, to and including January 5, 1928, on the subject of the regulations,

practices, equipment, appliances and services of the plaintiff Interborough Rapid Transit Company.

As appears from pages 599 and 600 of the official stenographer's minutes of such hearing, George Keegan, Assistant to the President and General Manager of said plaintiff company, testified that no more cars can be advantageously used on its lines, testifying on December 21, 1927, on cross examination by Special Counsel for the Commission, as follows:

"Q. Then as I understand your testimony, no more cars are needed now at all and no more could be advantageously used than you now have on the road, is that right?

"A. I did not testify to that.

"Q. Do you so testify?

"A. I did not say that no more cars could be advantageously used, because I just testified——

"Q. I do not want any becauses. Can more cars be advantageously used?

"A. More cars, no; more mileage, yes.

"Q. I am asking you for cars now. Is it your contention that no more cars, more than those now on the line, can be advantageously used there?

"9. Yes.

[fol. 1095] "Q. No more can be used, is that right, to advantage?

"A. Within reason, yes.

"Q. To advantage?

"A. All depends on what you mean by 'advantage.' * * *

and again, at page 602:

"Q. I say if you had any more cars you would not know what to do with them, would you?

"A. Not effectively, no"

and again, at page 605:

"Q. Well, as I understood you, you want the Commission to understand from your testimony that you not only have adequate cars for the service on the Interborough but you have a surplus?

"A. Oh, yes; we have an eight per cent. surplus.

"Q. And under those circumstances, of course, you do not need and could not use advantageously any more cars?

"A. That is true.

"Q. Unqualifiedly true?

"A. Oh, yes. To meet the conditions of the traffic, yes. I think——"

Harry S. Fisher.

Sworn to before me this 27th day of March, 1928.
Louis Marder, Notary Public, New York County.

[fol. 1096] United States of America,
State of New York,
County of New York, ss:

Paul S. L. Bolgee, being duly sworn, says:

I

Qualifications of Affiant

I am a Civil Engineer and an Accountant, and am licensed by the University of the State of New York to practice Professional Engineering.

I am Auditor of Rapid Transit Costs, and Chief of the Division of Rapid Transit Costs of the Transit Commission, and have been in the employ of the Transit Commission or its predecessors for about 15 years, since 1913, in various engineering and accounting positions. I was for several years in responsible charge of the construction of [fol. 1097] parts of the railroads provided under Contract No. 3 and now being operated by the Interborough Rapid Transit Company. For the past eight years I have been engaged on various parts of the work of the Transit Commission or its predecessors having to do with the determinations of the costs of construction and equipment and studies and estimates of the operations under Contracts Nos. 3 and 4 and the Related Certificates, the valuations of the rapid transit systems, estimates of the prospective results of future operations of the existing and proposed rapid transit systems, and the accounting of the rapid transit systems.

II

Plaintiff's Assertions as to City Competition Most Misleading

In the affidavit of Earl E. Starbard, of February 25, 1928, in support of an application for an interlocutory injunction and temporary restraining order, the statement is made in folios 241 to 243, that the City's new Eighth Avenue Subway will take from the existing lines of the plaintiff at least 110,000,000 passengers per year, thereby further reducing its net earnings from the five cent fare; and also that the imminence of municipal competition, with the certainty of further diminution and destruction of the plaintiff's already inadequate revenues and net earnings, appears from the facts as shown by the Transit Record for December, 1927, and January, 1928, published by the Board of Transportation of the City of New York, as to the progress of work on construction contracts, respectively, as of November 30, 1927, and December 31, 1927.

On page 83 of the Starbard affidavit is a tabulation entitled "City's Table Showing Substantial Completion of One [fol. 1098] of Its Competing Rapid Transit Railroads."

Averments to the same effect are contained in pages 53 and 54 of the Complaint herein.

These assertions and this title are, in my opinion, most misleading.

III

More Than a Hole Necessary to Run a Subway

There are many other things than the bare structure which must be provided before even a shuttle operation of this line can be commenced, even as far south as 14th Street. Tracks must be laid. The stations must be substantially completed and station facilities provided. Power generating stations and substations must be provided, or agreements for purchase of power negotiated and entered into whereby outside parties would furnish the power. If the power is purchased, considerable time would probably be required by the seller to provide additional generating, substation and other units to take care of the increased

load. And, among other things, cars, interlocking and other signal apparatus, transmission and distribution cables and accessories, third rails and other line equipment must be provided. And even after all these things are provided the railroad could not be placed in independent operation until employees had been hired and trained in their several duties.

IV

No Competition until 1930, at Earliest

Upon information and belief, no contracts for any of the above equipment, construction or material have been let [fol. 1099] by the City, except certain contracts for the purchase of track material. The source of my information is Mr. Harry D. Windsor, an assistant to the Chief Engineer of the Board of Transportation of the City of New York.

I have made a careful study of the matter and I expect and believe that, if operated independently of existing rapid transit lines, the City's new Eighth Avenue Subway will not be in operation from the north end south to 14th Street earlier than in 1930 and probably not until July 1, 1930, or later, and that it will not be in operation south of about 14th Street earlier than in 1931, and probably not until July 1, 1931, or later.

V

Plaintiff's Passengers Will Not be Fewer Than in 1927

In connection with the investigation conducted by the Transit Commission during 1927 preparatory to the promulgation of a Readjustment Plan, I made studies and estimates of the prospective future traffic on the Subway and Elevated Divisions of the Interborough Rapid Transit Company during each fiscal year to and including the fiscal year ending June 30, 1941.

These estimates were based on a study of the rate of increase of population in the City of New York in the past, the rates of increase in traffic on rapid transit lines in New York City, the rides per capita on rapid transit lines, the

distribution of past traffic between the several rapid transit systems, the existing traffic on the several systems and the past rates of increase thereof, the effects of competition of new lines, and other pertinent considerations. The population data considered included the estimates of the Board [fol. 1100] of Health for the years 1920 and 1925, the New York State Census for 1920 and 1925, and the United States Census for 1910 and 1920. The traffic on the rapid transit lines was obtained from reports of the rapid transit companies to the Transit Commission and compilations thereof prepared in the office of the Transit Commission. The rides per capita, sometimes called the "Riding Habit," which for a given year is the ratio of the total rides on rapid transit lines to the population of the City, was computed from the records of population and rapid transit traffic.

The actual number of passengers carried, based on fare collections are reported by the Interborough Rapid Transit Company to the Transit Commission on the Subway and Elevated Divisions of the Interborough Rapid Transit Company and the totals for both divisions during each of the years ended June 30, 1926 and 1927, and my estimates of the prospective traffic for each year to and including the year ending June 30, 1937, after making allowances for the expected operation of the City's new Eighth Avenue Subway and other parts of the City's new system, are as follows:

Passengers

Fiscal year ending June 30th		Subway Division	Elevated Division	Total
1926	Actual	784 289 073	346 394 574	1 130 484 647
1927	Actual	814 626 506	359 019 000	1 173 646 256
1928	Estimated	867 000 000	358 000 000	1 225 000 000
1929	Estimated	904 000 000	362 000 000	1 266 000 000
1930	Estimated	947 000 000	366 000 000	1 313 000 000
1931	Estimated	896 000 000	317 000 000	1 213 000 000
1932	Estimated	885 000 000	303 000 000	1 188 000 000
1933	Estimated	873 000 000	327 000 000	1 200 000 000
1934	Estimated	881 000 000	350 000 000	1 231 000 000
1935	Estimated	896 000 000	355 000 000	1 251 000 000
1936	Estimated	912 000 000	357 000 000	1 269 000 000
1937	Estimated	917 000 000	359 000 000	1 276 000 000

[fol. 1101] It was estimated that the City's new Eighth Avenue Subway would be in operation from the north end to 14th Street on July 1, 1930, and to Fulton Street on July 1, 1931.

VI

Fifteen Million More Pasengers in 1932 (Future Lowest Estimated Year) Than in 1927

As shown in the above tabulation, the actual number of fare collections on the combined Interborough System for the year 1927 was 1,173,646,256 and it is estimated that this will have increased to 1,313,000,000 in 1930. The lowest estimated traffic thereafter is in the year 1932, when it is estimated that it will be decreased to 1,188,000,000 passengers or a decrease due to the operation of the City's new Eighth Avenue Line of 125,000,000 passengers.

This estimated traffic on the Interborough System in 1932 after making allowances for the effect of the operation of the City's new Eighth Avenue Subway will, however, be about 14,000,000 passengers greater than the traffic carried during the year ended June 30, 1927.

VII

Estimates Conservative

It was my intention in making these estimates to be conservative in the estimates of prospective traffic. For this reason I expect that the actual traffic in future years will be somewhat greater than that contained in my estimates. [fol. 1102] The probability that this will be so is indicated by the data on the actual traffic for the first seven months of the current fiscal year ending June 30, 1928.

The passengers carried, as reported by the Company, during the seven months from July, 1927, to January, 1928, both inclusive, on the Interborough System were 715,461,486. If we assume that there will be no increase in the passengers carried during the remaining five months, February to June, of the fiscal year ending June 30, 1928, over the corresponding period in 1927, and add the traffic for this period in 1927, which was 514,425,231 passengers, to that given above, 715,461,486 passengers, for the first seven months of the current fiscal year, the total would be 1,229,886,717 passengers, which is 4,886,717 in excess of my estimate, given in the foregoing tabulation, for the year ending June 30, 1928.

VIII

Estimates More Conservative Than Plaintiff's

The Interborough Rapid Transit Company introduced in evidence as Exhibit No. 64 in Case No. 2851 on service and equipment before the Transit Commission on December 15, 1927, a statement entitled "Estimated Results of Operation for the Three Fiscal Years, 1928 to 1930, inclusive," on page 3 of which the passengers for the year ending June 30, 1930, is given as 1,312,000,000. This is 138,000,000 passengers greater than the number of passengers carried during the year ended June 30, 1927. If it be assumed that the Company's estimate did not allow for any effect of the operation of the City's new Eighth Avenue Subway and if the estimated number of passengers per annum stated in the Starbard affidavit, folio 241, as 110,000,000 which will be taken from the Interborough lines is subtracted from the [fol. 1103] Company's estimate of its traffic in 1930, 1,312,000,000, there would still remain on the basis of its own figures, 1,202,000,000 passengers in 1930, even if the full effect of the operation of the City's new Eighth Avenue Subway were felt in that year, or about 28,000,000 more passengers than it carried during the year ended June 30, 1927.

Thus, it appears that on the basis of either the Company's estimate or that prepared by me, the Interborough System will have a greater traffic after the effect of the operation of the City's new Eighth Avenue Subway is felt, than it had in the year ended June 30, 1927. And the traffic on the Interborough System during the fiscal year ended June 30, 1927, was greater than in any other fiscal year in its history.

IX

Figures in Special Counsel's Report, Already in Evidence, Verified

The "Report and Recommendations of Special Counsel to the Transit Commission on Proposed Plan of Readjustment Directed by Legislature" is Exhibit "G," attached to the affidavit of Samuel Untermyer, verified March 12,

1928, and submitted in opposition to the motion before the Statutory Court for an interlocutory injunction.

I assisted Mr. Untermyer in the preparation of this report, and the figures in the text of the report were all inserted under my supervision and with my approval.

The estimates shown in Exhibits "B" through "L" in this report were made by me. These exhibits relate to estimated results of operation of various groups of rapid transit lines and are entitled as follows:

Exhibit "B"—Estimated Results of Operation—Interborough Rapid Transit—Subway and Manhattan (Ele-
[fol. 1104] vated) Division Lines Not to Be Recaptured—Company Operation.

Exhibit "C"—Estimated Results of Operation—Entire Interborough System (Subway and Elevated Divisions), New York Rapid Transit Recapturable Lines (Contract No. 4 and Elevated Extensions), and New City System—City Operation.

Exhibit "D"—Estimated Results of Operation—Interborough Subway Recapturable Lines (Contract No. 3) Except White Plains Road Line, New York Rapid Transit Recapturable Lines (Contract No. 4 and Elevated Extensions), and New City System—City Operation.

Exhibit "E"—Estimated Results of Operation—Entire Interborough Rapid Transit System (Subway and Elevated Divisions)—Purchase—City Operation.

Exhibit "F"—Estimated Results of Operation—Interborough Rapid Transit—Contract No. 3, Lines to be Recaptured—City Operation.

Exhibit "G"—Estimated Results of Operation—Interborough Rapid Transit—Subway Division (Contracts Nos. 1, 2 and 3)—Company Operation, Showing Estimated Distribution Between Lines Not to Be Recaptured and Lines to Be Recaptured.

Exhibit "H"—Estimated Results of Operation—Interborough Rapid Transit—Manhattan (Elevated) Division—Company Operation.

Exhibit "I"—Estimated Results of Operation—New York Rapid Transit—Contract No. 4 and Extensions Certificate Lines to Be Recaptured—City Operation.

Exhibit "J"—Estimated Results of Operation—New York Rapid Transit—Entire System—Company Operation,

Showing Estimated Distribution Between Lines Not to Be Recaptured and Lines to Be Recaptured.

Exhibit "K"—Estimated Results of Operation—New City System—City Operation.

Exhibit "L"—Estimated Results of Operation Under Existing Arrangement—Company Operation Under Contracts Nos. 3 and 4, City to Operate New City Lines, [fol. 1105] Amounts Available for City Fixed Charges, City's Fixed Charges, and Balance After City's Fixed Charges.

I further prepared or supervised the preparation of the figures set forth in Exhibits "O" and "P," entitled:

Exhibit "O"—Interborough Rapid Transit System—Comparison of Fixed Charges for Interest and Sinking Fund, Taxes, Etc., of the Company, with the Fixed Charges for Interest and Sinking Fund, Taxes, Etc., of The City of New York after Purchase in Accordance with Proposed Plan.

Exhibit "P"—Interborough Rapid Transit Company—Results of Operation, Year Ended June 30, 1927, Comparison of Results as Reported by the Company and as Adjusted on Basis of Assumed Refunding of Company Debt and Rental Obligations by the City; also Adjustments for Strike and 5% Wage Increase.

Mr. Isidor Spintad, Chief of the Division of Statistics and Accounts of the Transit Commission, furnished me with the figures set forth in Exhibits A, M, Q, R, S and T, as more fully appears in his own affidavit annexed hereto.

The basic figures in the text of the report were obtained from the exhibits appended thereto; from the sworn reports of the various companies filed with the Transit Commission; and from the records of the Transit Commission. The estimates on pages 40 and 41 of the report were prepared as stated therein.

I believe all the figures contained in the report to be accurate.

X

Assumptions on which Estimates in Report are Based

In making the estimates referred to in Exhibits "B" through "L" my assumptions were as follows:

[fol. 1106] "(1) The rate of fare on both the existing and

the new rapid transit systems would remain five cents during the entire period.

"(2) The present standards of service would continue.

"(3) The efficiency of management would remain constant, at the present standard, whether the operation is by the companies or by the City.

"(4) The wage scales in effect June 30, 1927, would remain unchanged.

"(5) There would be no strikes.

"(6) The average price of commodities used in the operation of the railroads would decline about 1% a year from the 1927 levels.

"(7) Bus operation would not materially affect traffic on rapid transit lines.

"(8) No independent system for the distribution of suburban (commuter) traffic would be placed in operation.

"(9) No extensions would be added to the existing rapid transit systems, if operation is continued by the companies, other than the Flushing Extension now under construction.

"(10) The uncompleted lines provided for in Contract No. 4 would be completed and placed in operation at the dates indicated in the details of the estimates.

"(11) The new City System would be constructed along the routes and at the costs, as described in the Board of Transportation reports to the Board of Estimate, dated May 26, 1925, and July 12, 1927, but would be placed in operation at the dates indicated in the details of this estimate.

"(12) No other rapid transit lines would be placed in operation during the period of these estimates.

[fol. 1107] "(13) After December 31, 1926, the City would include all interest and sinking fund payments in the budget, and that no bonds would be issued for interest purposes. That the interest and sinking fund on City's bonds issued subsequent to June 30, 1927, would be at the rate of 5%, approximately 4¼% for interest and ¾% for sinking fund, except as to such financing as may hereinafter be stated on a different basis.

"(14) The City would include all costs for administration and engineering during construction in the budget in the future.

"(15) Refunding by the companies would be without

change of interest rates, except as otherwise indicated in the details of the estimates.

"(16) That recapture of the parts of the Interborough and New York Rapid Transit Systems would be effected at the several dates indicated in the details of the estimates.

"(17) That purchase of the Interborough would be on the basis indicated under the heading "Estimated Fixed Charges."

"(18) That the station platforms of the Interborough would be lengthened and that the cost of construction would be paid by the City; the Company to pay the fixed charges on the City's investment as a rental.

"(19) That the combination of the various systems into one system and the regrouping of the different systems would have no substantial effect upon the total number of fares collected.

"(20) Such other assumptions as are stated in the various details of the estimates."

[fol. 1108]

XI

Plaintiff's Criticism of Report Unfair; Quotation of Assumptions Partial and Misleading

It will be noted in the affidavit of Mr. Berry, verified March 5, 1928, in reply to "Report to Transit Commission of its Special Counsel," dated September 30, 1927, and to Mr. Untermyer's affidavit of February 25, 1928, assumptions Nos. 7 through 11 were entirely omitted. This results in giving assumption No. 12, as contained in the Berry affidavit, an especially misleading effect for the reason that assumption No. 12 is "No other rapid transit lines would be placed in operation during the period of these estimates" and that assumption No. 9 to 11 inclusive, which were omitted in the Berry affidavit, describe other rapid transit lines which it was assumed would be placed in operation during the period of the estimates.

The Berry affidavit further states, folio 32:

"With each variation of the Basic assumptions, the conclusions necessarily change. This being true, it is obvious that failure to refer at all to the Assumptions in the 'report' reflects a desire or intent not to disclose the weak

foundation upon which Mr. Untermyer's entire report and recommendations were erected."

With regard to this statement, it is noted:

(1) That Mr. Berry's conclusion that "failure to refer at all to the assumptions in the 'report' reflects a desire or intent not disclose the weak foundation upon which Mr. Untermyer's entire report and recommendations were erected" does not appear to be borne out by his prior statement, in folio 26 of his affidavit, that "With the acquiescence and approval of Mr. Untermyer, plaintiff was furnished with a detailed report of Mr. Paul S. L. Bolger, Au-[fol. 1109] ditor of Rapid Transit Costs of the Transit Commission, containing the working data, comment and assumptions upon which said schedules (particularly Schedules C to L, inclusive), were based."

(2) That my report was dated October 10, 1927, and had not been completed until after Mr. Untermyer's report was published.

(3) That, in my opinion, all of my assumptions quoted by Mr. Berry were either specifically stated or clearly indicated in Mr. Untermyer's report.

Paul S. L. Bolger.

Sworn to before me this 27th day of March, 1928.
Louis Marder, Notary Public, New York County.

[fol. 1110] State of New York,

County of New York,
Southern District of New York, ss:

William P. Coleman, being duly sworn, says:

I am connected with the Accounting Department of the Transit Commission as Chief of its Division of Field Audits and have been employed by the Commission and its predecessors for upwards of fourteen (14) years past.

I am familiar with the Statements of "Results of Operation Contract No. 3—Subway Division" and with the financial reports filed by the plaintiff with the Commission.

[fol. 1111] Earnings Available for Payments on the City's Charges*

a. More Than Two and a Half Millions in 1926 and 1927

The balances of income under Contract No. 3, after deducting the plaintiff's current charges, that is to say, the earnings available for payments on the city's deficits, for the fiscal years ended June 30, 1926, and June 30, 1927, and for the seven months' period July 1, 1927, to January 31, 1928, as shown by the plaintiff's statements of "Results of Operation Contract No. 3—Subway Division," are as follows:

Fiscal Year Ended June 30, 1926	$2,903,508 88
Fiscal Year Ended June 30, 1927	**2,579,429 45
July 1, 1927 to January 31, 1928 (7 months)	2,601,717 25

b. Five Millions Anticipated for 1928

Amount reported for period July 1, 1927, to January 31, 1928 (above)			$2,601,717 25
Actual amounts reported as Balance of Income for the period February 1, 1927, to June 30, 1927:			
February,	1927	$374,098 11	
March,	1927	600,057 02	
April,	1927	507,355 73	
May,	1927	468,269 98	
June,	1927	328,506 00	
			2,278,286 84
Total			$4,880,004 09

[fol. 1112] Based upon the assumption that the balance of income for the five months' period, February 1, 1928, to June 30, 1928, will show an increase of $120,000 over the same period of the preceding fiscal year (which is very conservative considering that the five months' period, Feb-

*Assuming that the Plaintiff's accrued deficits have been paid.

**I estimate that the decrease in income, due to loss of revenue and extraordinary expenses incurred on account of the strike on the Subway Division in July, 1926, amounted to approximately $1,800,000, and that the balance of income that would have been available for payment on the City's Deficits for the fiscal year ended June 30, 1927, would have approximated $4,400,000 if such strike had not occurred in July, 1926.

ruary 1, 1927, to June 30, 1927, showed an increase of more than $500,000 over the period February 1, 1926, to June 30, 1926), I estimate that the earnings available for the City's charges will be approximately $5,000,000 for the fiscal year ending June 30, 1928.*

c. Five Million Available Annually Hereafter

It may be expected that, prior to the period of competition with new rapid transit lines and assuming that there will be no substantial increase in rates of wages, density of traffic and prices of materials, the sum of at least $5,000,000 will be available annually for payment of City's Charges under Contract No. 3.

d. Amounts Now Available, Based upon Objections Filed by the Transit Commission

Items removed from accounts and carried in Suspense Account, subject to adjudication, in accordance with Objections filed by the Transit Commission on January 4, 1928, under Article XXVII of Contract No. 3, with interest thereon to June 30, 1927	$7,336,332 71
[fol. 1113] Deficit under Contract No. 3 at June 30, 1927, as stated by Plaintiff ..	5,441,662 00
Amount available at June 30, 1927, for payment of City's Charges, based upon Objections filed by the Transit Commission	$1,894,670 71

Based upon the foregoing objections, there would be available for payment of City's Charges on Cost of Construction of the Railroad in operation under Contract No. 3 the amount of $1,894,670.71 at June 30, 1927, plus the balance of income under Contract No. 3, after deducting plaintiff's current charges, accruing from operation sub-

*This is a minimum amount, based on plaintiff's accounting and does not take in consideration any possible additional amounts that might be made available as the result of the Commission's audit of the results of operation under Contract No. 3 for the fiscal year ending June 30, 1928.

sequent to that date, which is estimated above at a minimum of $5,000,000 for the fiscal year ending June 30, 1928.

Plaintiff Now Receiving 8.33% on Investment Under Contracts Nos. 1, 2 and 3

The annual report of the plaintiff to the Transit Commission for the fiscal year ended June 30, 1927, page 20, schedule No. 201, shows the following charges to Fixed Capital, Contracts Nos. 1 and 2, at June 30, 1927:

Classification	Amount
Subway Equipment	$36,348,705 14
Replacement of Existing Equipment, Contracts 1 and 2	224,494 83
Cost of Leases	22,278,588 59
Real Estate	209,137 71
Contractor's Expense	1,302,817 11
Office Furniture and Fixtures	42,294 91
Total	$60,496,038 29

[fol. 1114] The account "Cost of Leases," as carried on the books of the plaintiff, consists of the following items, of which only the item "Payments to Rapid Transit Subway Construction Co.—$10,565,349.35" may seriously be considered for inclusion in a rate base as I am advised by counsel.

Capital Stock		
Issued to John B. McDonald for acquisition of remaining one-fourth interest to Subway Lease	$2,500,000 00	
Issued to August Belmont & Co. for shares of stock and bonds of the Pelham Park and City Island Railroad Companies, also as compensation for the services of August Belmont & Co. in connection with the acquisition by Interborough Rapid Transit Co. of the fifty-year lease of the subway contained in contract between John B. McDonald and City of New York, dated Feb. 21, 1900, and securing the cash subscriptions to $11,400,000 of the Capital Stock of the Company required to enable the Company to provide the equipment of the subway under Contract No. 1	1,500,000 00	
		$4,000,000 00

Expenses in connection with the acquisition of the Lease of the Manhattan Railway Company:		
Payment to Audit Co. Jan. 6, 1903	$1,250 00	
Payment to Joseph S. Auerbach and Walter G. Oakman Aug. 15, 1904	50,000 00	
		51,250 00
Payments to the Rapid Transit Subway Construction Co. on account of the Excess Cost of the Brooklyn Extension under Contract No. 2:		
Cash	$6,047,685 52	
Bonds	3,521,306 00	
Notes	996,357 83	
		10,565,349 35
Cost of the Belmont Tunnel in excess of $3,000,000.00		7,861,989 24
		$22,478,588 59
Deduct amount received from The City of New York for Leasehold Rights in Spur Track, Flatbush Ave., Brooklyn		200,000 00
Total		$22,278,588 59

Deducting the other items in the account "Cost of Leases" the sum of $48,782,799.05 is left as the most that can be considered investment under Contracts Nos. 1 and 2.

The plaintiff's preferential under Contract No. 3 is $6,335,000, agreed to be plaintiff's return on its investment under Contracts Nos. 1 and 2.

[fol. 1115] Investment and Return Under Contract No. 3

Group	Approximate average investment in operation during fiscal year	Interest and sinking fund charges
Construction of the Railroad	$57,883,000	$3,472,962
Equipment of the Railroad	22,000,000	1,320,000
Additional Equipment	39,000,000	2,849,105
Additions to Construction	177,000	10,598
	$119,060,000	$7,652,665

The totals for the three contracts are:

Investment	$167,842,799 05
Annual Return	13,987,665 00

The rate of return is 8.33 per cent.

City's Return Only 4%

The City's Investment under Contracts Nos. 1 and 2 at December 31, 1927, as shown below, is based on statements sent to the Interborough Rapid Transit Company by the

Department of Finance, The City of New York, copies of which are on file in the office of the Auditor of Rapid Transit Costs of the Transit Commission, and on estimates for Superintendence paid from Revenue bonds made by Paul S. L. Bolger, Auditor of Rapid Transit Costs:

Contract No. 1—		
Expenditures from the proceeds of corporate stock and corporate stock notes for work and materials, real estate, easements, and interest	$54,478,049 05	
Superintendence paid for from Revenue bonds (estimated)	5,000,000 00	
Total Investment under Contract No. 1		$59,478,049 05
Contract No. 2		
Expenditures from the proceeds of corporate stock and corporate stock notes for work and materials, real estate, easements, and interest	$6,667,517 14	
Superintendence paid for from Revenue bonds (estimated)	500,000 00	
Total Investment under Contract No. 2		$7,167,517.14
Total City's Investment under Contracts Nos. 1 and 2		$66,645,566 19

[fol. 1116] On the investment, as above stated, the City received the following amounts on account of Interest and Sinking Fund Rentals on bonds issued to pay for construction:

Interest and Sinking Fund Rentals

Period	Contract No. 1	Contract No. 2	Total
For Year Ended Dec. 31, 1927 (Interest)	$1,815,925 78	$269,660 96	$2,085,586 74
For Year Ended Oct. 31, 1927 (Sinking Fund)	512,130 49	59,196 56	571,327 05
Total	$2,328,056 27	$328,857 52	$2,656,913 79

The amount received annually by the City of New York for Interest and Sinking Fund Rentals is equal to approximately 4% on its total investment under Contracts Nos. 1 and 2.

William P. Coleman.

Sworn to and Subscribed before me this 27th day of March, 1928. Louis Marder, Notary Public, New York County.

[fol. 1117] AFFIDAVIT OF NORMAN C. HILL IN REPLY TO AFFIDAVIT OF HENRY T. BERRY OF MARCH 14, 1928

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

NORMAN C. HILL, being duly sworn, says:

I am Chief of the Division of Valuations and Maintenance of the Transit Commission and have been in the employ of the Transit Commission or its predecessors since 1913. I was connected with the Bureau of Valuation of the Transit Commission hereinafter mentioned and was and am familiar with the facts relating to the valuations, hereinafter mentioned, which were prepared by that Bureau.

[fol. 1118] Misrepresentation by the Plaintiff of Defendants' Estimated Values

Values given as those of Transit Commission Engineers are not those of Transit Commission Engineers except as to some items; totals very different.

I have read Mr. Berry's reply affidavit of March 14, 1928, submitted in support of plaintiff's motion for an interlocutory injunction giving special attention to that portion of it which is headed "Answering affidavit of Norman C. Hill of March 12, 1928," on pages 20 to 25 inclusive thereof. Upon following the explanations given therein and studying the detailed tables purporting to be based upon Transit Commission's Engineers' Reproduction Cost figures referred to, I find that the totals were made up by including certain items which the Transit Commission Engineers had estimated. But in arriving at grand totals, items are included that were not estimates of the Transit Commission's Engineers and which we think have no proper place in a computation of present value. Discussion of these items will appear in greater detail below.

In general and as more specifically referred to in my affidavit of March 12, 1928, the figures in Mr. Berry's affidavit of February 25, 1928, are not the figures of the Transit Commission's Engineers. Furthermore in the use and

arrangement of the figures purporting to represent or to be a proper basis of measuring present value, Mr. Berry's statements in the last mentioned affidavit are misleading.

It is believed that, on account of the various contractual rights and obligations, some importance should attach to the separation and arrangement of the many figures pre- [fol. 1119] sented purporting to bear upon values, so as to show where the ownership lies as to the properties represented.

Transit Commission Engineers' Figures as to Value Totals
(cf. pp. 51-52, Berry Affidavit)

The following is a summary of the unofficial estimates of Reproduction Cost as of June 30, 1926, made by the Transit Commission Engineers taken from the same source as referred to by Mr. Berry and also of the investment figures as of the same date shown at pages 51 and 52 of Mr. Berry's affidavit of February 25, 1928, all classified as to property ownership. Other tables below show these figures on different bases and in greater detail:

(Revising Berry Figures.)

	Investment	Estimated cost to reproduce new, 1926 (depreciation not subtracted)
Subway properties		
Owned by Interborough Rapid Transit Company	$41,689,484	$76,045,000
Owned by the City of New York	319,069,365	558,789,000
Total	$360,758,849	$634,834,000
Manhattan Elevated Properties		
Owned by Interborough Rapid Transit Co.	45,719,700	65,798,000
Owned by Manhattan Railway Co.	112,943,654	114,565,000
Total	$158,663,360	$180,363,000
Grand Total	$519,422,209	$815,197,000
Total owned by Interborough Rapid Transit Company	$87,409,190	$141,843,000
Total owned by City of New York	319,069,365	558,789,000
Total owned by Manhattan Railway Company	112,943,654	114,565,000
Grand Total	$519,422,209	$815,197,000

[fol. 1120] Plaintiff in 1927 earned 7.74% on valuation (reproduction cost less depreciation basis) of its property.

At the present time the Interborough Rapid Transit Company owns certain intangibles consisting of four leases (those of Contracts Nos. 1, 2 and 3 and the Manhattan lease) and certain rights under two grants, licenses or certificates. As to the tangible property owned by the Interborough Rapid Transit Company some basis can be conceived for giving consideration to estimates of Reproduction Cost less Depreciation in arriving at a determination of its value. The value of the intangibles just mentioned, however, is problematical for reasons more fully set forth below. The estimate of the Transit Commission Engineers for Reproduction Cost less Depreciation for the tangible property owned by the Interborough Rapid Transit Company is $110,461,000. The tables given below show how this result is reached.

The actual gross income during the year 1927 (Mr. Berry's affidavit of March 14, 1928, page 7) was $24,490,775 to which has been added $2,000,000 estimated loss suffered on account of the strike. Of this total income $17,942,521 was devoted to payment on account of the plaintiff's intangible property and miscellaneous items, leaving a balance available (adjusted for strike loss) of $8,549,254 or 7.74% as a return on plaintiff-owned tangible property of $110,461,000; if the expenditures under the Elevated Certificates be deemed to be applicable to tangible property so far as the plaintiff is concerned.

Plaintiff in 1927 earned 7.47% on value (basis as above) of all Company (Interborough and Manhattan) Owned Property; 8.85% on Original Cost.

[fol. 1121] As to properties owned by the Companies (Interborough Rapid Transit Company and Manhattan Railway Company) the Reproduction Cost less Depreciation is $180,580,000 and the figure upon Original Cost Basis (Less Expenditures to Recondition) is $152,528,700. Of the gross income of $26,490,775 for 1927 after adjustment for the strike the amount available for a return on the companies' property was $13,494,250, making a return of 7.47% on the Reproduction Cost less Depreciation for the

property owned by the Companies and a return of 8.85% on Original Cost Basis for the same property.

Although earnings ran at a rate slightly less than 8% in 1927 it should be remembered that due to increased density of traffic earnings have shown an appreciable gain in the 1928 fiscal year, while values have remained about the same, forecasting a distinctly higher rate of return.

The relative investments and values on various bases, and earnings available, according to classification by Ownership and Provision, are more fully set forth in tables given below.

Basis of Valuation Estimates

Reference is made in Mr. Berry's affidavit to the sources of the figures of the "Interborough, Manhattan property and miscellaneous Interborough Rapid Transit items" shown in his affidavit of February 25, 1928. It appears from the explanation given that such figures of the Transit Commission's engineers as were used as the basis of the figures shown in his tabulations and computations were for the year 1926 and "appear on exhibits 40 and 102, put in evidence by the Special Counsel to the Transit Com [fol. 1122] mission during the 1927 Transit Investigation by the Transit Commission."

My affidavit of March 12, 1928, outlined the purpose, basis and status of the tentative unofficial valuation figures which were prepared by the Commission's engineers and presented during the hearings of the Transit Investigation of 1927 and included a statement of the circumstances under which the former Bureau of Valuation was organized and functioned. Shown on the above mentioned Exhibit 102 are estimated costs to reproduce the properties included at 1926 prices together with estimates of Cost to Reproduce (1926 Price Basis) less Accrued Depreciation. With special reference to the properties which were provided under the Dual Contracts and Related Certificates, including Contracts Nos. 1 and 2, and more particularly to the properties in respect of which the lease or grant is subject to termination under the terms of the least or certificate, the estimates of Cost to Reproduce were pre-

pared and submitted mainly so that there could be no doubt as to the sufficiency of information which might be conceived to be pertinent to formal and technical compliance with that portion of Section 106 of the Public Service Commission Law as amended by Chapter 134 of the Laws of 1921; as follows:

• • • but such valuation shall not in any case exceed the fair reconstruction cost of the property less depreciation • • •

There are presented below tables showing figures of valuation as of June 30, 1926, appearing on Exhibits 40 and 102 referred to above.

[fol. 1123] I. Tables Showing Transit Commission's Engineers' (Unofficial) Valuation Estimates for Property as of June 30, 1926, Arranged to Show Items of Property According to Provision

Table 1

Original Cost Basis

By whom provided	Manhattan division	Subway division	Total	Expenditures necessary to place property in first-class operating condition
Interborough Co.				
Contracts Nos. 1 and 2		$10,366,000		
Construction		36,727,000		
Equipment				
Total Contracts Nos. 1 and 2		$47,093,000		$254,000
Contract No. 3		$58,037,000		
Construction		61,780,000		
Equipment				
Total Contract No. 3		$119,817,000		$375,000
Total Subway		$166,910,000	$166,910,000	$629,000
Elevated Certificates	$43,815,000		$43,815,000	$1,296,000
Working Capital	839,000	1,629,000	2,468,000	
Total I. R. T. Co.	$44,654,000	$168,539,000	$213,193,000	$1,925,000
Manhattan Railway Co.				
Original Elevated Property	$71,419,000		$71,419,000	$654,000
Total I. R. T. and Manhattan Ry. Cos.	$116,073,000	$168,539,000	$284,612,000	$2,579,000
City of New York				
Contracts Nos. 1 and 2		$66,561,000		
Contract No. 3		110,506,000		
Total City of New York		$177,067,000	$177,067,000	
Grand Total	$116,073,000	$345,606,000	$461,679,000	$2,579,000

[fol. 1124]

Table 2

On Basis of Cost to Reproduce New
(Before Any Allowance for Depreciation)

By whom provided	Manhattan Division	Subway Division	Total
Interborough Rapid Transit Co			
Contracts Nos. 1 and 2			
Construction		$28,581,000	
Equipment		74,416,000	
Total Contract Nos. 1 and 2		$102,997,000	$102,997,000
Contract No. 3			
Construction		117,315,000	
Equipment		73,013,000	
Total Contract No. 3		$190,328,000	$190,328,000
Total Subway		$293,325,000	$293,325,000
Elevated Certificates	$64,959,000		$64,959,000
Working Capital	839,000	1,629,000	2,468,000
Total Interborough Rapid Transit Company	$65,798,000	$294,954,000	$360,752,000
Manhattan Railway Company			
Original Elevated Property	$114,565,000		$114,565,000
Total Interborough Rapid Transit Co. and Manhattan Railway Co.	$180,363,000	$294,954,000	$475,317,000
City of New York			
Contracts Nos. 1 and 2		$142,687,000	
Contract No. 3		197,193,000	
Total City of New York		$339,880,000	$339,880,000
Grand Total	$180,363,000	$634,834,000	$815,197,000

[fol. 1125] **Table 3**

On Basis of Cost to Reproduce New, Less Depreciation

II. Tables Showing Transit Commission's Engineers' (Unofficial) Valuation Estimates for Property as of June 30, 1926, Arranged to Show Items of Property According to Ownership

By whom provided	Manhattan division	Subway Division	Total
Interborough Rapid Transit Co.			
Contracts Nos. 1 and 2:			
Construction		$28,524,000	
Equipment		50,816,000	
Total Contracts Nos. 1 and 2		$79,340,000	$79,340,000
Contract No. 3:			
Construction		$117,190,000	
Equipment		65,531,000	
Total Contract No. 3		$182,721,000	$182,721,000
Total Subway		$262,061,000	$262,061,000
Elevated Certificates	$59,313,000		$59,313,000
Working Capital	839,000	1,629,000	2,468,000
Total Interborough Rapid Transit Co.	$60,152,000	$263,690,000	$323,842,000
Manhattan Railway Company			
Original Elevated Property	$70,802,000		$70,802,000
Total Interborough Rapid Transit Co. and Manhattan Railway Co.	$130,954,000	$263,690,000	$394,644,000
City of New York			
Contracts Nos. 1 and 2		$142,405,000	$142,405,000
Contract No. 3		196,967,000	196,967,000
Total City of New York		$339,372,000	$339,372,000
Grand Total	$130,954,000	$603,062,000	$734,016,000

[fol. 1126]

Table 4
Original Cost Basis

	June 30, 1926			Expenditures necessary to place property in first-class operating condition
	Manhattan division	Subway division	Total	Total
Owned by Interborough Rapid Transit Co.				
Contracts Nos. 1 and 2:				
Construction		$36,727,000		
Equipment				
Total Contracts 1 and 2		$36,727,000	$36,727,000	$226,000
Elevated Certificate Property:				
Additional Tracks	$21,971,000			
Elevated Extension	13,617,000			
M. P. P. I.	5,832,000			
Additions to Existing Man. Ry	2,395,000			
Total Certificate Property	$43,815,000		43,815,000	1,297,000
Working Capital	839,000	1,629,000	2,468,000	
Total Owned by I. R. T. Co.	$44,654,000	$38,356,000	$83,010,000	$1,523,000
Owned by Manhattan Ry. Co.				
Original Elevated Property	71,419,000		71,419,000	654,000
Owned by City of New York:				
Contracts Nos. 1 and 2—Construction:				
Provided by I. R. T.		10,366,000		
Provided by City		66,561,000		
Construction No. 3—Construction:				
Provided by I. R. T.		58,037,000		
Provided by City		110,506,000		
Contract No. 3—Equipment:				
Provided by I. R. T.		$307,250,000	307,250,000	403,000
Total Owned by City	$116,073,000	$345,606,000	$461,679,000	$2,580,000
Grand Total				
Recapitulation				
Owned by I. R. T. Co.	$44,654,000	$38,356,000	$83,010,000	$1,523,000
Owned by Manhattan Co.	71,419,000		71,419,000	654,000
Owned by City		307,250,000	307,250,000	403,000
Total	$116,073,000	$345,606,000	$461,679,000	$2,580,000

[fol. 1127]

Table 5

On Basis of Cost to Reproduce New

	June 30, 1926		
	Manhattan division	Subway division	Total
Owned by Interborough Rapid Transit Co.			
Contracts Nos. 1 and 2:			
Construction	.....	.....	
Equipment	.....	$74,416,000	
Total Contracts 1 and 2	.....	$74,416,000	$74,416,000
Elevetated Certificate Property:			
Additional Tracks	$35,318,000		
Elevated Extensions	18,110,000		
M. P. P. I	9,111,000		
Additions to Existing Manhattan Ry	2,240,000		
Total Certificate Property	$64,959,000	.....	64,959,000
Working Capital	839,000	1,629,000	2,468,000
Total Owned by I. R. T. Co.	$65,798,000	$76,045,000	$141,843,000
Owned by Manhattan Ry. Co.			
Original Elevated Property	114,565,000	.....	114,565,000
Owned by City of New York			
Contracts Nos. 1 and 2—Construction:			
Provided by I. R. T. Co	.....	28,581,000	
Provided by City	.....	142,687,000	
Contract No. 3—Construction:			
Provided by I. R. T. Co	.....	117,315,000	
Provided by City	.....	197,193,000	
Contract No. 3—Equipment:			
Provided by I. R. T. Co	.....	73,013,000	
Total Owned by City	.....	$558,789,000	558,789,000
Grand Total	$180,363,000	$634,834,000	$815,197,000
Recapitulation			
Owned by I. R. T. Co	$65,798,000	$76,045,000	$141,843,000
Owned by Manhattan Ry. Co	114,565,000		114,565,000
Owned by City of New York		558,789,000	558,789,000
Total	$180,363,000	$634,834,000	$815,197,000

[fol. 1128] Table 6

On Basis of Cost to Reproduce New—Less Depreciation

	June 30, 1926		
	Manhattan division	Subway division	Tottal
Owned by Interborough Rapid Transit Co.			
Contracts Nos. 1 and 2:			
Construction			
Equipment		$50,816,000	
Total Contracts 1 and 2		$50,816,000	$50,816,000
Elevated Certificate Property:			
Additional Tracks	$35,187,000		
Elevated Extension	16,136,000		
M. P. P. I	5,655,000		
Additions to Existing Manhattan Ry	2,355,000		
Total Certificate Property	$59,313,000		59,313,000
Working Capital	839,000	1,629,000	2,468,000
Total Owned by I. R. T. Co.	$60,152,000	$52,445,000	$112,597,000
Owned by Manhattan Ry. Co.			
Original Elevated Property	70,802,000		70,802,000
Owned by City of New York			
Contracts Nos. 1 and 2—Construction:			
Provided by I. R. T. Co		28,524,000	
Provided by City		142,405,000	
Contract No. 3—Construction:			
Provided by I. R. T. Co		117,190,000	
Provided by City		196,967,000	
Contract No. 3—Equipment:			
Provided by I. R. T. Co		65,531,000	
Total Owned by City		$550,617,000	550,617,000
Grand Total	$130,954,000	$603,062,000	$734,016,000
Recapitaulation			
Owned by I. R. T. Co	$60,152,000	$52,445,000	$112,597,000
Owned by Manhattan Ry. Co	70,802,000		70,802,000
Owned by City of New York		550,617,000	550,617,000
Total	$130,954,000	$603,062,000	$734,016,000

The figures above set forth were based upon continuous research and study as more fully explained in my former affidavit, verified March 12, 1928, and appearing on pages 65 to 71 inclusive of Transit Commission affidavits in opposition to motion before statutory Court for a temporary injunction.

[fol. 1129] III Tables Showing Computations of Rate of Return Based upon the Transit Commission's Engineers' (Unofficial) Valuation Estimates on Various Bases and upon the Earnings Statements on Pages 6 and 7 of Mr. Berry's Affidavit Verified March 14, 1928

Table "A"

Transit Commission Engineers' Valuation Estimates for Property Provided by the Companies, Exclusive of Other Property Provided by the City of New York and Rate of Return Earned Thereon Under Five-cent Fare

	Original cost basis		Basis of cost to reproduce new, less depreciation	
	1926	1927	1926	1927
Company Owned Property				
Company Property, Contracts 1 and 2	$36,727,257 95	$36,872,337 68	$50,816,000 00	$49,222,000 00
Company Property, Contract 3	43,815,486 21	44,123,923 97	59,313,000 00	58,920,000 00
Company Property, Elevated Certificates	71,419,000 00	71,419,000 00	70,802,000 00	70,119,000 00
Manhattan Railway, Original Property	2,467,577 16	2,318,517 96	2,468,000 00	2,319,000 00
Materials and Supplies				
Cash Working Capital				
Total Company Owned Property	$154,429,321 32	$154,733,779 61	$183,399,000 00	$180,580,000 00
Company Provided Property				
Company Property Provided Under Construction, Contract No. 2				
Company Property Provided Under Contract No. 3	$119,817,228 12	$120,977,873 29	$182,721,000 00	$170,635,000 00
Excess Cost of Belmont Tunnel				
Total Company Provided Property	$119,817,228 12	$120,977,873 29	$182,721,000 00	$170,635,000 00
Total Property Owned and Provided by Company	$274,246,549 44	$275,711,652 90	$366,120,000 00	$351,215,000 00
Amount Necessary to Recondition	2,580,000 00	2,580,000 00	.....	.....
Present Value of Company Property	$271,666,549 44	$273,131,652 90	$366,120,000 00	$351,251,000 00
Gross Income	25,094,198 36	26,490,775 31	25,094,198 00	26,490,774 00
Deductions				
Excess Maintenance	$891,345 00	$1,479,821 00	$891,345 00	$1,479,821 00
Interest and Sinking Fund on City Bonds	2,665,186 00	2,655,569 00	2,665,186 00	2,655,569 00
Miscellaneous	364,131 00	338,192 00	364,131 00	338,192 00
Total Deductions	$4,010,662 00	$4,473,582 00	$4,010,662 00	$4,473,582 00
Balance Available as a Return on the Present Value to the Company of Company Owned and Provided Property	$21,083,536 36	$22,017,193 31	$21,083,536 00	$22,017,193 00
Per cent of Return Earned on Rate Stated	7.76%	8.06%	5.76%	6.27%

Table "B"

Transit Commission Engineers' Valuation Estimates for Property Owned by the Companies, Exclusive of Property Provided by Them or Owned by City of New York, and Rate of Return Earned Thereon Under Five-cent Fare

	Original cost basis		Basis of cost to reproduce new, less depreciation	
	1926	1927	1926	1927
Company Property Contracts 1 and 2	$36,727,257 95	$36,872,337 68	$50,816,000 00	$49,222,000 00
Company Property Elevated Certificates	43,815,486 21	44,123,923 97	59,313,000 00	58,920,000 00
Manhattan Railway Original Property	71,419,000 00	71,419,000 00	70,802,000 00	70,119,000 00
Materials and Supplies	2,467,577 16	2,318,517 96	2,468,000 00	2,319,000 00
Cash Working Capital				
Total Company Owned Property	$154,429,321 32	$154,733,779 61	$183,399,000 00	$180,580,000 00
Amount Necessary to Recondition	2,205,000 00	2,205,000 00		
Present Value of Company Property	$152,224,321 32	$152,528,779 61	$183,399,000 00	$180,580,000 00
Gross Income	$25,094,198 36	$26,490,775 31	$25,094,198 00	$26,490,775 00
Deductions				
Excess Maintenance	$981,345 00	$1,479,821 00	$981,345 00	$1,479,821 00
Interest on 5% Bonds Issued for Contract No. 3	3,998,075 00	4,010,057 00	3,998,073 00	4,010,057 00
Interest on 7% Notes Issued for Contract No. 3	1,200,617 00	1,280,222 00	1,200,617 00	1,280,222 00
Sinking Fund on 5% Bonds Issued for Contract No. 3	1,239,488 00	1,200,188 00	1,239,488 00	1,200,188 00
Interest on 10-Year 6% Notes Issued for Contract No. 3	504,999 00	517,347 00	504,999 00	517,347 00
Interest on Equipment Trust Issued for Contract No. 3	291,322 00	215,825 00	291,322 00	215,825 00
Interest and Sinking Fund on City Bonds	2,655,186 00	2,655,569 00	2,655,186 00	2,655,569 00
Miscellaneous	364,131 00	338,192 00	364,131 00	338,192 00
Interest and Sinking Fund on 5% Bonds for Brooklyn Extension and Belmont Tunnel	1,306,754 00	1,299,304 00	1,306,754 00	1,299,304 00
Total Deductions	$12,631,915 00	$12,996,525 00	$12,631,915 00	$12,996,525 00
Balance Available as a Return on Present Value of Company Property	$12,462,283 36	$13,494,250 31	$12,462,283,00	$13,494,250.00
Per cent of Return Earned on Basis Stated	8.19%	8.85%	6.80%	7.47%

Table "C"

Transit Commission Engineers' Valuation Estimates for Property Owned by the Interborough Rapid Transit Co., Including the Manhattan Elevated Improvements and the Rate of Return Earned Thereon Under Five-cent Fare

	Original cost basis		Basis of cost to reproduce new, less depreciation	
	1926	1927	1926	1927
Company Property Contracts 1 and 2	$36,727,257 95	$36,872,337 68	$50,816,000 00	$49,222,000 00
Company Property Elevated Certificates	43,815,486 21	44,123,923 97	59,313,000 00	58,920,000 00
Material and Supplies	2,467,577 16	2,318,517 96	2,468,000 00	2,319,000 00
Cash Working Capital				
Total Property Owned by I. R. T. Co	$83,010,321 32	$83,314,779 61	$112,597,000 00	$110,461,000 00
Amount Necessary to Recondition	1,551,000 00	1,551,000 00		
Present Value of Property Owned by I. R. T. Co	$81,459,321 00	$81,763,779 00	$112,597,000 00	$110,461,000 00
Gross Income	$25,094,198 36	$26,480,775 31	$25,094,198 00	$26,480,775 00
Deductions				
Excess Maintenance	$981,345 00	$1,479,831 00		
Interest Dividends and Cash Rentals on Manhattan Railway Original Property	4,924,726 00	4,944,996 00		
Interest on 5% Bonds Issued for Contract No. 3	3,998,073 00	4,010,057 00		
Interest on 7% Bonds Issued for Contract No. 3	1,260,617 00	1,280,222 00		
Sinking Fund on 5% Bonds Issued for Contract No. 3	1,239,488 00	1,200,188 00		
Interest on 10-Year 6% Notes Issued for Contract No. 3	504,999 00	517,347 00		
Interest on Equipment Trust Issued for Contract No. 3	291,322 00	215,825 00		
Interest and Sinking Fund on City Bonds	2,655,186 00	2,655,569 00		
Miscellaneous	364,131 00	338,192 00		
Interest and Sinking Fund on 5% Bonds for Brooklyn Extension and Belmont Tunnel	1,336,754 00	1,299,304 00		
Total Deductions	$17,556,641 00	$17,941,521 00	$17,556,641 00	$17,941,521 00
Balance Available as a Return on Property Owned by I. R. T. Co	$7,537,557 00	$8,549,254 00	$7,537,557 00	$8,549,254 00
Per cent of Return Earned on Basis Stated	9.25%	10.46%	6.69%	7.74%

Transit Commission Engineers' Valuation Estimates for Property Owned by the Interborough Rapid Transit Co., Excluding Manhattan Elevated Improvements Provided by it, and Rate of Return Earned Thereon Under Five-cent Fare

	Original cost base		Basis of cost to reproduce new, less depreciation	
	1926	1927	1926	1927
Company Property, Contracts 1 and 2	$36,727,257.95	$37,872,337.68	$50,816,000.00	$49,222,000.00
Materials and Supplies	2,467,577.16	2,318,517.96	2,468,000.00	2,319,00.000
Cash Working Capital				
Total Property Owned by Interborough Rapid Transit Co.	$39,194,835.11	$39,190,855.64	$53,284,000.00	$41,541,000.00
Amount Necessary to Recondition	254,000.00	254,000.00		
Present Value of Property Owned by Interborough Rapid Transit Co.	$38,940,835.11	$38,936,855.64	$53,284,000.00	$51,541,000.00
Gross Income	$25,094,198.36	$26,490,775.31	25,094,198.00	26,490,775.00
Deductions:				
Excess Maintenance	$981,345.00	$1,479,821.00		
Interest on 5% Bonds Issued for Elevated Certificates	1,445,244.00	1,457,159.00		
Interest on 7% Notes Issued for Elevated Certificates	1,088,456.00	1,082,563.00		
Sinking Fund on 5% Bonds Issued for Elevated Certificates	631,949.00	611,810.00		
Interest on 10-Year 6% Notes Issued for Elevated Certificates	21,300.00	31,300.00		
Interest, Dividend and Cash Rentals, on Manhattan Railway Original Property	4,924,726.00	4,944,906.00		
Interest on 5% Bonds Issued for Contract No. 3	3,998,073.00	4,010,057.00		
Interest on 7% Bonds Issued for Contract No. 3	1,280,617.00	1,280,222.00		
Sinking Fund on 5% Bonds Issued for Contract No. 3	1,239,488.00	1,200,188.00		
Interest on 10-Year 6% Notes Issued for Contract No. 3	504,900.00	517,347.00		
Interest on Equipment Trust Issued for Contract No. 3	291,322.00	215,825.00		
Interest and Sinking Fund on City Bonds	2,655,186.00	2,655,569.00		
Miscellaneous	364,131.00	338,192.00		
Interest and Sinking Fund on 5% Bonds for Brooklyn Extensions and Belmont Tunnel	1,306,754.00	1,299,304.00		
Total Deductions	$20,744,190.00	$21,124,443.00	$20,744,190.00	$21,124,443.00
Balance Available as a Return on Property Owned by Interborough Rapid Transit Co.	$4,350,008.36	$5,366,332.31	$4,350,008.00	$5,366,332.00
Per cent of Return Earned on Basis Stated	11.17%	13.78%	8.16%	10.41%

[fol. 1133] The basis of the tables presented above are the figures of value tentatively estimated by Transit Commission Engineers and earnings figures found on pages 6 and 7 of Mr. Berry's affidavit, verified March 14, 1928, adjusted in 1927 for estimated loss on account of strike and supplemented by analysis of fixed charges obtained from reports and other analytical earnings data received from the company. The 1926 figures of value come from the same sources as the Transit Commission's Engineers' estimates of Reproduction Cost, which were used by Messrs. Berry and Gorsuch in their affidavits verified February 25, 1928. The 1927 figures of value were arrived at, for the purpose of constructing this table, by adjusting the 1926 figures for changes in property and investment during the year 1927.

Plaintiff Favored in Valuations Above

a. Item Relating to Contracts Nos. 1 and 2 Construction Explained

Appearing in the above tables of valuation under Interborough Rapid Transit Company, there is an item shown as "Contracts Nos. 1 and 2 Construction." Title to the property to which this is applicable is vested in the City of New York and the property is leased to the Interborough Rapid Transit Company. The amount shown against the item in the first table represents mainly that part of the cost to the contractor under Contract No. 2, which was in excess of the amount paid by the City. The value to the company of this item carried by it as an item of cost of leases depends almost entirely upon the value of the lease. At least in the estimates of cost to Reproduce New and Less Depreciation, it has appeared that there would be a more reasonable basis for including the total estimated [fol. 1134] amount for the Construction under Contracts Nos. 1 and 2, under the City's Investment than for distributing it, as has been done, pro rata with respect to the proportionate amounts originally paid by the Company and City respectively. This is due to the fact that the full ownership by the City of New York is subject only to the lease and is also due to difficulties which are inherent in in the reproduction theory and particularly to its applica-

tion in this case. With regard to the latter there arises the element of speculation and conjecture as to what would be the arrangement as to financing the cost to reproduce as between the or a company and the City, if the property were to be reproduced; or what would be the contractor's price and loss, if any.

b. City Lien on "Equipment" Item

The item "Equipment" where it appears under Interborough Rapid Transit Company, Contracts Nos. 1 and 2, refers to property owned by the Interborough Rapid Transit Company and provided by it under those contracts. It is, however, subject to a lien of the City as indicated in Chapter I, of Contract No. 1, where it is provided:

"The City shall also have a first lien upon the Equipment as further security for the faithful performance by the Contractor of the covenants, conditions and agreements of this contract on its part to be fulfilled and performed. Such lien shall arise immediately upon the acquisition by the Contractor of any part of the Equipment for use on or in connection with the Railroad or any part of it, or intended for such use, whether or not such equipment be set up or delivered upon or at the railway."

Chapter III, The Lease, provides:

"The lien of the City upon the Equipment shall be applicable to all equipment at any time provided by the [fol. 1135] Contractor during the term of the lease in like manner as to the Equipment provided by the Contractor prior to the commencement of said term."

Also:

"At the termination of the Lease, (or if the same shall, at any time not less than one (1) year before the expiration of the term of the present lease,—be renewed by agreement between the City and the Contractor, then upon the expiration of said renewal thereof) the City shall buy and the *the* Contractor shall sell, the whole of the property of the Contractor employed in and about the equipment, maintenance and operation of the Railroad. The right of the City so to buy shall be protected by its lien upon Equipment as

aforesaid. Such purchase and the sale shall be at a reasonable price, due regard being had to the condition, wear and tear of the property. Such price may be fixed by agreement between the Board and the Contractor; but if they shall not agree then such price shall be fixed by arbitration, or if either party shall object to arbitration, or if the terms or procedure of arbitration shall fail,—then by appropriate suit or proceedings in the Supreme Court of this State. The City shall have the right at the termination of the Lease, whether or not the price shall have been ascertained or paid, to take possession and use and operate all such property of the contractor, but, subject, however, to its liability to pay the value thereof to be ascertained as aforesaid with interest from the time taking possession."

c. Contingent Features of Contract No. 3 Construction

Referring to the item of "Construction" listed in the above tables under the Interborough Rapid Transit Company, Contract No. 3, the same sort of difficulties arise. The amount stated under Original Cost Basis represents the amount provided in the contract ($58,000,000) to be [fol. 1136] contributed by the Company towards the cost of construction of the Railroad for Initial Operation together with the Company's share (one-half) of the cost of additions to the Construction. Title to the property is vested in the City. The value to the Company of its contribution to and share of cost depends largely upon the value of the lease and upon the contingency of termination upon notice and payment to the Company by the City of the amounts to be arrived at in accordance with the provisions of Contract No. 3; which include a formula showing the amount to be paid to be a determinable function of the *Cost* as determined by the Chief Engineer of the Commission. There is no indication that either the value of the lease or the amount to be paid upon termination earlier than the expiration of the full term are in any way dependent upon any estimated cost to reproduce. Here again the difficulties of the reproduction cost theory enter in with respect to the assumptions as to the conditions which would obtain in respect to financing and contract terms, *if the Railroad were to be reproduced, which it is not.*

d. Contingent Features of Item "Equipment" under Contract No. 3

Similar comments might be made in respect of the item shown as "Equipment" under Interborough Rapid Transit Company, Contract No. 3. According to the terms of the contract, the Company furnished the money for and provided all of the equipment, title to which is vested in the City. The value to the Company of this part of its contribution under the contract depends upon the value of the lease and the contingency of termination upon notice and payment by the City of the amounts provided to be paid under the terms of the contract.

[fol. 1137] The item shown as "Elevated Certificates" represents amounts pertaining to improvements and extensions to the original Manhattan Railway Company's property, which were provided by the Interborough Rapid Transit Company. The improvements involved the removal of substantial items of original property, and the status of the liability of the Interborough Rapid Transit Company to the Manhattan Railway Company on this account is not known to me, nor shown by any affidavit or other proof offered by the plaintiff. Furthermore, in respect of the Additional Tracks and the Elevated Extensions, the value to the Company is dependent upon the terms of the certificates, including the contingency of termination of the grant upon notice and payment by the City of amounts provided therein to be so paid. As to reproduction, the probabilities are all against any assumption that these Elevated Railroads would be reproduced today under any circumstances.

The item shown under City of New York as "Contracts Nos. 1 and 2" represents that portion of the property owned by the City and leased to the Interborough Company, which is applicable to the City's investment therein.

The same comment applies to the item "Contract No. 3" except that the lease with respect to the latter item is subject to the terms of Contract No. 3, which provides for termination upon notice.

Six Million Dollar Item Entirely Misrepresented by Plaintiff; Explanation

In the ninth paragraph of Mr. Berry's affidavit (folio 69), Mr. Berry states that to the Transit Commission Engineer's reproduction cost figures there were added "overheads ommitted by the Transit Commission Engineers and refer-[fol. 1138] ence is made also therein to tables to be found on page 111 of the affidavit of Mr. William S. Gorsuch (forming a part of the plaintiff's application for an interlocutory injunction and temporary restraining order).

Apparently the basis for the addition of this item by Mr. Gorsuch is found on page 109 of said affidavit (folio 325 and 326) where mention is made of "certain items of undistributed structural costs or overheads aggregating $6,173,000 as set forth on Sheet No. 2 of Exhibit 40 of the 1927 Transit Investigation, the propriety of allowing which items is not disputed by the Transit Commission's Engineers."

If Mr. Gorsuch or Mr. Berry will refer to Sheet 1 (not Sheet 2 of Exhibit 40, it will be found that the figures on that sheet are all on "Original Cost Basis" as shown in the main heading of the sheet. Against the figure of $47,093,000 appearing on the line "Contracts Nos. 1 and 2" in the tabulation, there is set the note reference mark (c). Note (c) (shown below on the same sheet) reads as follows:

"(c) Stated exclusive of certain overhead expenses such as Organization and debt discount and expense, shown on the company's books and claimed by the company to be properly includible in its investment in Contracts Nos. 1 and 2, as follows:

Organization:	
Capital Stock issued to August Belmont & Co. as compensation for services and for shares of stock and bonds of the Pelham Park and City Island Railroad Company	$1,500,000
[fol. 1139] General Office Furniture and Fixtures:	
Purchased during the construction period	42,295

Financing Expense:	
Pro rata proportion of the unamortized Debt Discount and Expense in connection with the issuance of Securities, applicable to Contracts Nos. 1 and 2	3,328,471
Contractor's Expense account, including financing, legal, interest and miscellaneous expense	1,302,317
Total	$6,173,083

Overhead items of the above nature were not included in the original valuation. The propriety of allowing for such items is not disputed. Final determination of the amounts has not yet been reached.

It is now stated for the information of Mr. Berry that the estimate of the Transit Commission Engineers of Reproduction Cost for Contracts Nos. 1 and 2 as of June 30, 1926 (namely, $102,997,000), does include items of the above nature in amounts considered to represent a full and adequate allowance. Furthermore, no decision has yet been reached by the Transit Commission engineers as to the amounts which might properly be allowed and included in the Original Cost Basis.

Mr. Gorsuch therefore was in error in adding to the Transit Commission's Engineers' estimates of Reproduc-
[fol. 1140] tion Cost the aforesaid amount of $6,173,083.

Figures used in this affidavit are either known to me of my own knowledge or have been furnished to me by Messrs. Isidor Spinrad, William P. Coleman, and/or Paul S. L. Bolger, whose qualifications are fully stated in their own affidavits hereto annexed; other matters are constructions of the contracts and certificates herein involved either my own or those of my associates (including counsel).

Norman C. Hill

Sworn to and subscribed before me this 27th day of March, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co., No. 33, Reg. No. 2824; cert. filed in N. Y. Co. No. 116, Reg. No. 8088. Commission expires March 30, 1928.

[fol. 1141] State of New York,
County of New York, ss:
Southern District of New York,

Isidor Spinead, being duly sworn, says:

I am connected with the Accounting Department of the Transit Commission as Chief of its Division of Statistics and Accounts and have been employed by the Commission and its predecessors for upward of ten (10) years last past.

I am familiar with the financial reports filed by the plaintiff with the Transit Commission.

[fol. 1142] Tremendous Increases in Traffic, Together with Economies Resulting from Introduction of Labor Saving Devices, Since 1919, when Operation under the Lease Contract No. 3) Commenced, Have Greatly Decreased the Cost of Operation and Produced Steadily Income from Operation.

Mr. Henry T. Berry, Comptroller of the Interborough Rapid Transit Company, the plaintiff in this action, states in his reply affidavit to the affidavit of Dr. John Bauer, at folios 53, 54, 55 and 56, that economies by introduction of mechanical devices have not overcome increased operating costs and makes comparisons on the basis of car mileage costs between 1913 and 1927.

The use by Mr. Berry of the car mileage unit for his comparisons does not give proper weight to the tremendous increases in traffic carried on the lines operated by the plaintiff. Furthermore a comparison of 1927 with 1913 gives full weight to the increased level of operating costs due largely to the World War but does not show the effect of post war deflation.

The attached Schedule I based on the company's own sworn reports to the Transit Commission summarizes the pertinent operating statistics from 1919 to 1927.

Increase in Passengers

The number of passengers carried by the plaintiff increased from 809,335,658 in 1919 to 1,173,646,256 in 1927, an increase of 45.01%. If there had been no strike in 1927 it is estimated that approximately 20,000,000 more passen-

gers would have been carried, or a true increase of 47.48% in the nine-year period.

[fol. 1143] Decrease in Number of Employees

At the close of 1919 the number of employees aggregated 16,302, whereas at the close of 1927, despite the fact that traffic had increased 45.01%, the number of employees was only 14,835, a decrease of 9.00%.

Increase in Operating Revenues Faster Than That in Wages

Wages charged to Operating Expenses increased from $18,854,400.01 in 1919 to $26,268,202.57 in 1927, an increase of $7,413,802.56 or 39.32%. In the same period operating revenues increased from $43,207,209.83 to $63,316,087.90, an increase of $20,108,878.07 or 46.54%.

Decrease in Wages Per Passenger

Reduced to terms of wages per passenger, there has been a decrease from 2.33¢ in 1919 to 2.24¢ in 1927. It should be again borne in mind that if the plaintiff had not suffered a loss in passenger traffic in 1927 the reduction in wages per passenger would have been greater.

Decrease in Price of Coal and Power

The cost of coal per long ton in 1919 was $6.04 and only $5.62 in 1927, a decrease of 6.95%. At the same time, the pounds of coal per kilowatt hour of power generated decreased from 1.91 in 1919 to 1.65 in 1927. The combination of a lower cost per ton of coal with a smaller amount of coal necessary to produce a given amount of electrical energy resulted in substantial savings in the cost of production. This is reflected in the lowered cost of coal consumed per kilowatt hour generated which in 1919 was 0.51¢ and in 1927 only 0.41¢, a decrease of 19.61%.

[fol. 1144] Decrease in Operating Ratio (Per Cent Expenses to Revenues)

The net effect of all these factors is shown in the decrease in the operating ratio, which measures the relation-

ship of operating expenses to operating revenues. In 1919 the percentage of operating revenues needed for operating expenses was 62.74 whereas in 1926 it was only 55.94. In 1927 the operating ratio was 58.52%, a substantial reduction over 1919. If 1927 had been a normal year, it is estimated that there would have been almost $1,000,000 more in revenues and $967,876.37 less in expenses. Under normal conditions, therefore, the operating ratio would have been approximately 56.11% or about the same as in 1926.

The foregoing figures show the results of increasing traffic and economies in operation in terms of unit costs. In terms of dollars and cents, the actual results of operation are equally significant.

Net Income from Subway Doubled

In 1919 on the subway division there was left after deducting actual operating expenses from the total operating revenues the sum of $9,869,232.71 and after a further deduction on account of taxes charged by the plaintiff the sum of $8,987,057.42. In 1927 there was left, on the same basis, $20,441,824.62 before charges for taxes, and $19,364,223.87 after charges for taxes. The net income from operations on the subway division in 1927 was therefore more than double the amount in 1919. If there had been no strike, the net income on this division would have been approximately $1,800,000 greater in 1927.

[fol. 1145] Net Income from System Greatly Increased

On both divisions combined, the balance for 1919 after deducting operating expenses from total operating revenues but before charges for taxes was $16,098,910.90 and after tax charges $12,964,754. In 1927 net income from operations before tax charges was $26,260,601 and after tax charges $22,753,778.39. If there had been no strike, the net figures for 1927 would probably have been at least $1,500,000 more.

The foregoing analysis of the figures in Schedule I attached to this affidavit indicates clearly the improvement in the net earnings of the plaintiff over 1919, which is the year when operations under the lease (Contract No. 3) began.

Isidor Spinrad.

(Ex. 1166)

SCHEDULE I

Interborough Rapid Transit Company

Statement Showing Comparative Operating Data for the Period 1919 to 1927

(Based on Reports Filed by the Company with the Transit Commission and Its Predecessors)

Fiscal Year Ended June 30

	1919	1920	1921	1922	1923	1924	1925	1926	
Number of Passengers Carried:									
Subway Division	461,147,058	586,098,633	639,385,780	644,975,474	676,650,431	714,933,187	736,820,672	784,280,073	
Elevated Division	348,188,600	369,034,477	374,293,051	348,517,216	348,524,700	359,410,056	352,723,553	346,204,574	
Total	809,335,658	955,133,110	1,013,678,831	993,492,690	1,025,175,131	1,074,343,243	1,089,544,225	1,130,484,647	1,1
Number of Employees at June 30th:									
Officers and Clerks	1,209	1,016	762	776	801	813	810	818	
Other	15,093	13,694	13,886	13,681	14,325	13,577	13,784	13,478	
Total	16,302	14,980	14,648	14,457	15,126	14,390	14,594	14,296	
Amount of Wages Charged to Operating Expenses	$18,854,400 01	$22,925,420 11	$25,803,106 82	$23,209,204 76	$24,030,832 15	$25,365,399 08	$24,790,725 95	$25,171,819 71	$26
Wages Per Passenger (Cents)	2 33	2 40	2 55	2 34	2 34	2 36	2 28	2 23	
Operating Ratio (Per Cent) (a):									
Subway Division	59 93	54 47	60 22	56 68	60 00	57 51	55 08	51 74	
Manhattan Division	66 46	70 18	72 85	65 78	67 77	68 06	67 73	65 35	
Total	62 74	60 53	64 86	59 89	62 69	61 05	59 19	55 94	
Cost of Coal Per Long Ton:									
Subway Division	$6 06	$6 40	$8 11	$6 64	$7 86	$6 64	$5 90	$5 53	
Elevated Division	6 02	6 31	8 06	6 96	7 95	6 63	5 90	5 50	
Total	$6 04	$6 36	$8 08	$6 79	$7 91	$6 64	$5 90	$5 51	
Kilowatt Hours Generated									
Subway Division	349,270,890	393,764,340	445,385,500	430,496,850	456,885,090	481,693,840	564,991,720	563,917,840	
Elevated Division	438,310,360	429,091,280	397,148,150	444,859,960	481,618,860	521,057,090	496,790,720	514,926,460	
Total	787,581,250	822,855,620	842,533,650	875,356,810	938,503,950	1,002,750,930	1,061,782,440	1,078,844,300	1,0
Cost of Coal Consumed per K W Hour Generated									
Subway Division	0 57	0 53	0 66	0 57	0 66	0 49	0 40	0 41	
Elevated Division	0 46	0 49	0 66	0 51	0 62	0 49	0 43	0 40	
Total	0 51	0 51	0 66	0 54	0 64	0 49	0 41	0 41	
Lbs. of Coal Consumed per K W Hour Generated									
Subway Division	2 14	1 87	1 83	1 90	1 89	1 65	1 55	1 68	
Elevated Division	1 72	1 74	1 85	1 71	1 76	1 66	1 63	1 61	
Total	1 91	1 81	1 84	1 80	1 82	1 66	1 59	1 65	
Subway Division									
Operating Revenues	$24,632,207 96	$31,622,973 04	$34,827,414 85	$34,642,840 87	$36,344,258 46	$38,392,634 61	$39,430,613 22	$42,643,648 84	$43
Operating Expenses (a)	14,762,975 25	17,224,019 60	20,974,091 17	19,635,639 73	21,807,515 83	22,081,348 58	21,720,030 39	22,062,158 96	23
Balance	$9,869,232 71	$14,398,953 44	$13,853,323 68	$15,007,201 14	$14,536,742 63	$16,311,286 03	$17,710,582 83	$20,581,489 88	$20
Taxes Charged to Street Railway Operations	882,175 29	436,765 37	435,403 59	447,290 15	450,976 39	595,262 71	835,401 24	915,278 01	1
Income from Street Railway Operations	$8,989,057 42	$13,962,188 07	$13,417,920 09	$14,559,940 99	$14,085,766 24	$15,716,023 32	$16,875,181 59	$19,666,211 87	$19
Elevated Division									
Operating Revenues	$18,525,091 87	$19,885,437 77	$20,204,526 48	$18,898,018 38	$19,215,177 44	$19,381,140 44	$18,988,377 53	$19,065,165 61	$19
Operating Expenses (a)	12,345,323 68	13,935,434 15	14,719,585 72	12,430,739 11	13,022,190 47	13,190,269 13	12,860,650 62	12,459,999 34	13
Balance	$6,229,078 19	$5,930,003 62	$5,484,940 76	$6,467,279 27	$6,192,986 97	$6,190,871 31	$6,127,726 91	$6,605,166 27	$5
Taxes Charged to Street Railway Operations	2,251,981 61	2,186,645 17	2,380,290 75	2,355,563 57	2,211,334 16	2,168,266 96	2,464,188 48	2,435,504 86	2
Income from Street Railway Operations	$3,977,096 58	$3,733,358 45	$3,184,650 01	$4,111,715 70	$3,981,652 81	$4,022,604 35	$3,663,538 43	$4,169,661 41	$3
Subway and Elevated Divisions Combined									
Operating Revenues	$43,207,299 83	$51,478,410 81	$55,031,941 33	$53,540,859 25	$55,559,435 90	$57,773,775 05	$58,418,990 75	$61,708,814 45	$63
Operating Expenses (a)	27,108,298 93	31,159,453 75	35,693,676 89	32,066,378 84	34,829,706 30	35,271,617 71	34,580,681 01	34,522,158 30	37
Balance	$16,098,910 90	$20,318,957 06	$19,338,264 44	$21,474,480 41	$20,729,729 60	$22,502,157 34	$23,838,309 74	$27,186,656 15	$26
Taxes Charged to Street Railway Operations	3,134,156 90	2,623,410 54	2,735,694 34	2,802,823 72	2,662,310 55	2,763,529 67	3,299,589 72	3,350,782 87	3
Income from Street Railway Operations	$12,964,754 00	$17,695,546 52	$16,602,570 10	$18,671,656 69	$18,067,419 05	$19,738,627 67	$20,538,720 02	$23,835,873 28	$22

(a) Figures for operating expenses have been adjusted to include actual expenditures for maintenance but no depreciation.

SCHEDULE I

Interborough Rapid Transit Company

Statement Showing Comparative Operating Data for the Period 1919 to 1927

(Based on Reports Filed by the Company with the Transit Commission and Its Predecessors)

Fiscal Year Ended June 30

	1919	1920	1921	1922	1923	1924	1925	1926	1927
s Carried:	461,147,058	586,098,633	639,385,780	644,975,474	676,650,431	714,933,187	736,820,672	784,280,073	814,626,596
	348,188,600	369,034,477	374,293,051	348,517,216	348,524,700	359,410,056	352,723,553	346,204,574	359,019,660
	809,335,658	955,133,110	1,013,678,831	993,492,690	1,025,175,131	1,074,343,243	1,089,544,225	1,130,484,647	1,173,646,256
s at June 30th:	1,309	1,016	762	776	801	813	810	818	826
	15,093	13,694	13,886	13,681	14,325	13,577	13,784	13,478	14,009
	16,302	14,980	14,648	14,457	15,126	14,390	14,594	14,296	14,835
Charged to Operating	$18,854,400 01	$22,925,420 11	$25,803,106 82	$23,209,204 76	$24,030,832 15	$25,365,399 08	$24,790,725 95	$25,171,819 71	$26,268,202 57
(Cents)	2 33	2 40	2 55	2 34	2 34	2 36	2 28	2 23	2 24
Cent) (a):	59 93	54 47	60 22	56 68	60 00	57 51	55 08	51 74	53 33
n	66 46	70 18	72 85	65 78	67 77	68 06	67 73	65 35	70 19
	62 74	60 53	64 86	59 89	62 69	61 05	59 19	55 94	58 52
Ton:	$6 06	$6 40	$8 11	$6 64	$7 86	$6 64	$5 90	$5 53	$5 63
	6 02	6 31	8 06	6 96	7 95	6 63	5 90	5 50	5 62
	$6 04	$6 36	$8 08	$6 79	$7 91	$6 64	$5 90	$5 51	$5 62
rated	349,270,860	393,764,340	445,385,500	430,496,850	456,885,080	481,693,840	564,991,720	563,917,840	568,544,360
	438,310,390	429,091,280	397,148,150	444,859,960	481,618,860	521,057,090	496,790,720	514,926,460	521,215,430
	787,581,250	822,855,620	842,533,650	875,356,810	938,503,950	1,002,750,930	1,061,782,440	1,078,844,300	1,089,759,790
rned per K. W. Hour	0 57	0 53	0 66	0 57	0 66	0 49	0 40	0 41	0 42
	0 46	0 49	0 66	0 51	0 62	0 49	0 43	0 40	0 40
	0 51	0 51	0 66	0 54	0 64	0 49	0 41	0 41	0 41
rned per K. W. Hour	2 14	1 87	1 83	1 90	1 89	1 65	1 55	1 68	1 68
	1 72	1 74	1 85	1 71	1 76	1 66	1 63	1 61	1 62
	1 91	1 81	1 84	1 80	1 82	1 66	1 59	1 65	1 65
Subway Division									
	$24,632,207 96	$31,622,973 04	$34,827,414 85	$34,642,840 87	$36,344,258 46	$38,392,634 61	$39,430,613 22	$42,643,648 84	$43,796,409 84
	14,792,975 25	17,224,019 60	20,974,091 17	19,635,639 73	21,807,515 83	22,081,348 58	21,720,030 39	22,062,158 96	23,354,585 22
	$9,836,232 71	$14,398,953 44	$13,853,323 68	$15,007,201 14	$14,536,742 63	$16,311,286 03	$17,710,582 83	$20,581,489 88	$20,441,824 62
eet Railway Operations	882,175 29	436,765 37	435,403 59	447,260 15	450,976 39	595,262 71	835,401 24	915,278 01	1,077,600 75
Street Railway Oper-	$8,989,057 42	$13,962,188 07	$13,417,920 09	$14,559,940 99	$14,085,766 24	$15,716,023 32	$16,875,181 59	$19,666,211 87	$19,364,223 87
Elevated Division									
	$18,575,001 87	$19,885,437 77	$20,204,526 48	$18,808,018 38	$19,215,177 44	$19,381,140 44	$18,988,377 53	$19,065,165 61	$19,519,678 06
a)	12,345,323 68	13,935,434 15	14,719,585 72	12,430,739 11	13,022,190 47	13,190,269 13	12,860,650 62	12,459,999 34	13,700,901 68
	$6,229,678 19	$5,920,093 62	$5,484,940 76	$6,407,279 27	$6,192,986 97	$6,190,871 31	$6,127,726 91	$6,605,166 27	$5,818,776 38
eet Railway Operations	2,251,981 61	2,186,645 17	2,300,290 75	2,355,563 57	2,211,334 16	2,168,290 96	2,464,188 48	2,435,504 86	2,429,221 86
Street Railway Oper-	$3,977,696 58	$3,733,358 45	$3,184,650 01	$4,111,715 70	$3,981,652 81	$4,022,604 35	$3,663,538 43	$4,169,661 41	$3,389,554 52
Subway and Elevated Divisions Combined									
	$43,207,209 83	$51,478,410 81	$55,031,941 33	$53,540,859 25	$55,559,435 90	$57,773,775 05	$58,418,990 75	$61,708,814 45	$63,316,087 90
a)	27,108,298 93	31,159,453 75	35,693,676 89	32,066,378 84	34,829,706 30	35,271,617 71	34,580,681 01	34,522,158 30	37,055,486 90
	$16,038,910 10	$20,318,957 06	$19,338,264 44	$21,474,480 41	$20,729,729 60	$22,502,157 34	$23,838,309 74	$27,186,656 15	$26,260,601 00
eet Railway Operations	3,134,156 90	2,623,410 54	2,735,694 34	2,802,823 72	2,662,310 55	2,763,529 67	3,299,589 72	3,350,782 87	3,506,822 61
Street Railway Oper-	$12,964,754 00	$17,695,546 52	$16,602,570 10	$18,671,656 69	$18,067,419 05	$19,738,627 67	$20,538,720 02	$23,835,873 28	$22,753,778 39

(a) Figures for operating expenses have been adjusted to include actual expenditures for maintenance but no depreciation.

Subscribed and sworn to before me this 27th day of March, 1928. Louis Mrder, Notary Public, New York County.

(Here follows schedule I marked side folio 1146.)

[fol. 1147] State of New York,
County of New York,
Southern District of New York, ss:

Charles Dickerman Williams, being duly sworn, deposes and says:

I am of counsel to the defendants Gilchrist, Godley and Lockwood.

I am informed and believe that in the year 1925 the plaintiff submitted to the Governor and Legislature of the State of New York the Memorial quoted below. The source of my information is the Hon. Courtlandt Nicoll, at that time a member of the Senate of the State of New York.

The memorial follows:

[fol. 1148] To the Honorable the Governor and the Legislature of the State of New York:

Sirs:

The report of Mr. Justice McAvoy, which was submitted to the Legislature by the Governor on February 16, 1925, contains recommendations of improvements upon the rapid transit lines operated by the Interborough Rapid Transit Company which, if installed, will necessitate additional capital expenditures by the company aggregating about twenty-five million dollars and additional fixed charges and operating expenses amounting to about four million dollars a year. The company would be glad to comply with the recommendations but it will be impossible to do so unless and until its credit shall be restored by the establishment of a rate of fare which will produce sufficient revenue to cover the cost of the service rendered, including a return which will attract the new capital required.

For the purpose of carrying out its obligations under the contracts made with the City of New York in 1913, the com-

pany sold to the public $160,000,000 of its 5% refunding bonds. It became necessary during the war to sell, in addition, approximately $40,000,000 of 7% notes secured by the 5% bonds as collateral. The proceeds of these $200,000,000 of securities have been devoted to the construction, improvement and equipment of the subway and elevated rapid transit railroads operated by the company. The credit of the company was such that these bonds and notes sold at prices averaging between 93½ and 95½. But the changed economic conditions brought about by the war so affected the income of the company that its credits decreased to such an extent that it could no longer procure loans from the public for either capital expenditures or [fol. 1149] ordinary operating expenses during the fiscal years 1919 to 1922, inclusive. In order to avoid a receivership a plan was proposed to security holders in 1922 by which the annual sinking fund of $2,100,000 on the bonds was waived for five years or until July 1, 1926, the rental for the elevated lines was reduced from 7% upon the stock of the lessor to 3%, 4% and 5% for the fiscal years 1923, 1924 and 1925, and, in addition, the holders of the stock of the Interborough paid into its treasury $10,500,000 of new money for which they took its ten-year 6% unsecured notes due in 1932.

While negotiations for the readjustment plan were under way, the employees of the company, over 15,000 in number, voluntarily reduced their wages 10%, or at the rate of $2,000,000 a year. This reduction, which they could ill afford, enabled the company to avoid a receivership. One-half of the reduction was restored in 1923, but it has been impossible so far to make any further advance in the rate of pay. The plan was adopted almost unanimously and it was believed that the company could carry out its contract at the agreed rate of fare. Indeed, its credit was affected favorably enough to enable it to purchase 350 new subway cars through the sale of its car equipment certificates aggregating $6,500,000. But the title to the cars remains in the trustee as security until they are paid for, which plan cannot be followed in the case of other improvements, such, for illustration, as the lengthening of the station platforms. Such improvements immediately become the property of the City of New York, which owns the subway.

The expected increase in traffic, especially upon the elevated lines, has not been realized, and notwithstanding extraordinary operating economies due to mechanical devices, [fol. 1150] such as turnstiles and multiple unit door control, the company has continued to operate at a loss.

As a result, while the market price of its bonds has advanced from 47 in 1921 to 71 in 1925, the company cannot sell its bonds at a price which will enable it to raise $25,000,000 or any other large capital sum. Nor could it meet the additional fixed charges upon any considerable additional capital expenditure. Notwithstanding the reductions effected by the readjustment of 1922, the deficit for the year ended June 30, 1923, was $131,794.86; for the year ended June 30, 1924, was $359,025.81; for the seven months ended January 31, 1925, was $136,301.66.

During these periods the company has been carrying one billion passengers a year. It has carried passengers at a loss since 1918 aggregating to January 31, 1925, $9,242,159. Since the beginning of pooling the revenues of the old and of the new subways on January 1, 1919, no dividend has been earned or paid upon the Interborough stock. The company has sold at great sacrifice practically all of its real estate and has exhausted other available assets during the past six years to procure cash to carry on its operations. It has now no source of income of consequence except its daily receipts from operation. However, if there be no substantial new burdens to meet it is probable that the company can just manage to carry on its operations at the existing rate of fare. But it is equally plain that the imposition of additional burdens, such as those recommended in the report of Mr. Justice McAvoy, of which no complaint is made, will require an immediate restoration of the credit of the company to enable it to procure the necessary funds.

[fol. 1151] The Transit Commission in a communication to Governor Smith on March 2, 1925, announces its belief that the recommendations in the report of Mr. Justice McAvoy should be met without exceptions. There are also other matters now pending before the Commission which will lead to additional financial burdens upon this company.

The Mayor and the Board of Estimate and Apportionment of the City of New York have insisted for a long time

that this company should run more trains and in other ways increase its financial burdens for the purpose of rendering additional service to the public.

These two public bodies have the legal power by concurrent action to amend the contracts between the city and the company in such manner as to permit it to procure the funds with which to carry out their proposals, but all efforts in that direction have failed to accomplish any such result. They have both publicly declared their opposition to any change in the rate of fare prescribed in the contracts of 1913. In 1918, 1919 and 1920 this company, without success, urged the city administration to consent to a change in the rate of fare. In 1921 statutes were enacted which authorized the Transit Commission to increase the rate of fare in a proper case without the consent of the city administration, but the Transit Commission declined to exercise that authority in 1921 and again in 1922. Indeed, in 1922 and in 1923 the Transit Commission procured changes in the statute of 1921 which were intended to deprive the Commission of such authority. Thereupon this company carried through its readjustment plan of 1922 and upon its consummation a public announcement was made that it was the purpose of the company to carry out the contracts with the city without change and without further request for change. That purpose has been strictly [fol. 1152] adhered to up to the present time. The company assert its willingness even now to continue along the same lines and do the best it can in the circumstances, but it cannot meet the additional requirements proposed without additional revenue.

For this reason this memorial is addressed to the supreme executive and legislative branches of the government of the state. The sovereign power of the state rests in those branches. That power, commonly called the police power of the state, is paramount. Its exercise, with the consent of this company, establishing a just and reasonable rate of fare, is binding upon the city administration according to the decisions of the Supreme Court of the United States, any provision in the contracts between the city and this company as to the rate of fare to the contrary notwithstanding. Contract rights of the city must give way when the public welfare requires a change in order to produce

rates which are reasonable and necessary in the public interest. Indeed, all contracts of the city relating to the subways are entered into subject to the exercise of the police power of the state in a proper case.

His Excellency, the Governor, and the Honorable, the Senators and Members of the Assembly of the State of New York, are therefore respectfully advised of the facts stated herein and requested to enact such statutes as to them may seem fitting and appropriate in the circumstances.

Up to this point this memorial has stated only the plight of this company. But the interest of the City of New York and of the public require even greater consideration. The McAvoy report sets forth the necessity for more subways at the earliest possible moment. That is the real and only [fol. 1153] solution of the transit problem. There should be in operation to-day two new trunk line subways, one upon the east side and another upon the west side of Manhattan Island, each with appropriate branches. The facts in the record before Mr. Justice McAvoy show that it will take at least five years to get even one such subway ready for operation. And the same record shows that it can be done within five years only by obligating the city in the sum of at least $400,000,000 during the years 1925 and 1926. The city will not have one-half that sum available, according to the testimony of Comptroller Craig. The amendment to the Constitution advocated by Mr. Justice McAvoy and recommended by the Governor, if passed by two legislatures and if adopted by the people of the state in 1927, will not furnish any new credit before 1928, or three years hence. But the city now has $251,500,000 invested in the existing subways. The enactment of a statutory rate of fare sufficient to make that investment self-sustaining will almost immediately make it available as a revolving fund for new subway construction and equipment. By such a course of subway relief could be expected by 1930. Any other method will postpone such relief until 1933 or later.

If this investment of $251,500,000 be permitted to remain unproductive because of the continuance of a rate of fare inadequate to pay its interest and sinking fund, the annual tax to meet such debt service will continue to be between ten and eleven million dollars—nearer eleven.

The amount proposed to be freed from the debt limit by amendment to the Constitution is stated at $275,000,000, which, added to the existing non-self-sustaining investment, will aggregate over $526,500,000, the interest and sinking [fol. 1154] fund of which must be carried in the annual tax budget. Indeed, that is not all, because in the meantime it is proposed to expend each year as many millions (sixty millions in 1925) as can be allocated to subway purposes each year hereafter. If the average be the same as this year's reservation, there will be $300,000,000 additional debt to be carried for the next five years. In sum, it is proposed to create a debt of $826,500,000 which must remain an annual burden of upwards of $43,500,000 upon the taxpayers so long as the five-cent fare remains the maximum chargeable. It will be remembered that the statute of 1924 under which the new subways are to be built restricts the fare to five cents for the first three years of operation, which means until 1935 in all probability. In the meantime the taxpayers and not the passengers will furnish the interest and sinking fund.

But more important than any financial aspect of the matter is the matter of time in its relation to relief from congestion. Relief measures should be started at once to be effective. A comprehensive plan of building should be instituted forthwith. Piecemeal construction should not be the program. Yet that will happen unless the necessary city credit be made available this year. Comptroller Craig reports that the available borrowing capacity of the city as of March 1, 1925, was about one hundred and eight millions. Sixty millions of this amount was reserved informally for subway construction by the city administration on March 2, 1925. Without doubt the remainder of the available credit will have to be used for schools and other similar public improvements during 1925. The Comptroller testified before Mr. Justice McAvoy that Chairman Delaney had announced that he would require a reservation of three hundred and forty millions in 1926, or four hundred mil- [fol. 1155] lions for the next two years. Even if one hundred millions could be obtained in 1926 and added to the sixty millions in 1925, there would still be a shortage of two hundred and forty millions.

On this subject Mr. Justice McAvoy in his report made the following comment:

'The comprehensive program of the new subways which the Chairman of the Board of Transportation states is proposed to be built by the city cannot be financed so as to be built with speed and completed for operation as a whole without undue delay, except by increasing by constitutional amendment the city's borrowing capacity. Without such constitutional relief (unless increased assessments were levied and thus the taxes inordinately increased to provide the construction funds which is not within the realm of probability), the work would have to be done in sections according to the available means of the city and its completion and operation as an entirety under such circumstances appear to be quite distant and there would not be left sufficient borrowing capacity to make provision for the other municipal needs of a growing city which will arise from time to time'' (pp. 27-28).

While stressing the importance of speed, the report assumes that no way can be found to avoid the three years' delay incident to the amendment of the Constitution. It assumes also that such an amendment will be adopted. If, however, the Legislature, or the people, should not deem it wise to extend the debt limit as now fixed by the Constitution, the delay will be several years longer. The way to avoid all delay is through a statutory increase in the rate of fare sufficient to release immediately the frozen credit of $251,500,000 and make it available for Mr. Delaney's 1926 requirement. That is the only way to insure the completion of a new subway within five years.

[fol. 1156] It seems impossible to believe that passengers will want to continue to be carried at the expense in part of taxpayers and in part of stockholders if they appreciate, as they will in the near future, if they do not now, that thereby they are postponing for many years relief from increasing congestion, to say nothing about the effect of the continuation of such congestion upon the development and upon the dignity of the City of New York.

The other great cities of this country have met the transit problem in a businesslike way. New York is the only large city on the continent where the pre-war rate of fare continues to be demanded by the public authorities.

The Court of Appeals has decided that

"the city owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted [by the legislature] to build and operate the road. * * * In other words, the subway is a business enterprise of the city, through which money may be made or lost the same as if it were owned by an ordinary railroad corporation. It was built and belongs to the city as a proprietor, not as a sovereign" (197 N. Y. 81).

There is therefore, no question of local sovereignty or of home rule involved, any more than if the Legislature and Governor were to enact a statute prescribing the rate of fare to be charged upon the rapid transit lines leased from the Manhattan Elevated Railway Company. The city as a railroad corporation has leased the subway for a rental to be paid when and if earned. The revenues are insufficient to produce a return to the lessor railroad corporation and the lessee has requested the lessor to consent to a higher fare and it will not consent. The public welfare requires a higher fare. In such a case should the Legislature and [fol. 1157] Governor hesitate about enacting a statute fixing a reasonable rate of fare? Should the public comfort be ignored or postponed a day longer than necessary because the Board of Directors (known as the Board of Estimate and Apportionment) of the lessor city railroad corporation is unwilling to manage their corporation in a businesslike way?

If it be suggested that the remedy is political and that the citizens may elect a different board to manage the affairs of the city, the answer is that railroad operation is business and not politics. And even if a change of personnel will result in changed methods (of which there is no present assurance), nevertheless, a priceless year will be lost and this ordinary business problem will be left to the vicissitudes of a political campaign.

It is with the hope of taking the subject out of politics that this appeal is made to the Governor and to the Legislature. A statute of the state cannot be an issue in a city campaign. No matter which party may elect its candidates, they will not be able to repeal a law of the state.

This company is willing and requests that the statute shall provide for impounding the amount of increase in the

rate of fare enacted so that it may receive no return greater than what the statute may declare necessary to enable it to render adequate service and make such additions and betterments as may be found necessary or advisable by the public authorities having jurisdiction of the matter. Provision should be made that the city investment at once become self-sustaining and that the credit thus available be used for subway building on a large scale.

The directors of this company, a majority of whom had no connection with the company prior to the year 1923, are [fol. 1158] the trustees for over 3,300 separate holders of 350,000 shares of its stock. They represent over 15,000 employees and are charged with the responsibility of carrying over one billion passengers a year. Three of the directors were elected in 1922 upon the nomination of the Transit Commission as representatives of the public. The board submits this address with a conviction that it is its duty to the public to present the facts before the end of the present legislative session.

Respectfully submitted by order of the Board of Directors.

Dated March 3, 1925.

Interborough Rapid Transit Company, by Horace M. Fisher, Secretary, 165 Broadway, New York City.
Charles Dickerman Williams.

Sworn to before me this 27th day of March, 1928.
Dorothy Voigt, Notary Public, New York County.

[fols. 1159 & 1160] In United States District Court

[Titled omitted]

Affidavit of Henry T. Berry, Comptroller of the Interborough Company, Replying to Matters Contained in the "Reply" Affidavits of the Defendant Transit Commission in Opposition to the Plaintiff's Motion for an Interlocutory Injunction—Filed Mar. 31, 1928

United States of America,
State and County of New York, ss:

Henry T. Berry, being duly sworn, deposes and says:

1. I reside in Chatham, N. J., and am the Comptroller and chief accounting officer of the Interborough Rapid

[fol. 1161] Transit Company, the plaintiff herein. I submit this affidavit in reply to the so-called "reply" affidavits of the defendant Transit Commission, served during the afternoon of March 28, 1928, in opposition to the plaintiff's motion for an interlocutory injunction.

Reply to First Affidavit of Mr. Isidor Spinrad as to Service Conditions on the Subway Lines

The first affidavit of Mr. Isidor Spinrad, of the Accounting Department of the Transit Commission, quotes excerpts from the testimony of the physicians who were called by Special Counsel for the Transit Commission in Case No. 2851, involving a hearing in regard to a proposal to require the plaintiff to purchase 432 additional cars.

The excerpts are quoted evidently for the purpose of showing that the crowded condition of the subway cars is such as to produce health disorders. Mr. Spinrad, however, does not quote all of the testimony of Dr. Harris, Health Commissioner, and particularly the statement which he made that New York City was to-day the healthiest city in the world and growing better each year. (See page 1081 of the transcript of testimony in Case No. 2851.)

There might well have been incorporated in Mr. Spinrad's affidavit some of the numerous statements which were made by the Transit Commission's own witnesses that the overcrowded condition which Dr. Harris refers to in his testimony was confined mainly to the rush-hour period, and, further, that all of the Transit Commission's own witnesses stated that during the rush hours the plaintiff could not operate along the main arteries of the Subway System any more cars than it is operating at the present time. In other words, the tracks are about as congested, [fol. 1162] during the rush-hour periods, as would be desirable in the interest of safety and proper operation.

Mr. Untermyer, himself, on page 65 of his "Report and Recommendations," which is before this Court, states:

"The roads are now carrying during those hours (rush hours) the utmost load and are being operated on the shortest headway consistent with safety."

Based upon the track mileage "Under construction, authorized and contemplated" for the City Subway System,

as stated on page 25 of the "Report and Recommendations" of Special Counsel to the Transit Commission, the estimated passengers indicated by the estimated revenue shown in Exhibit K for the year 1941, in the same report, will be equivalent to more than 4,000,000 passengers per track mile per annum. The congestion thus pictured by Mr. Untermyer, which the engineers of the Commission have estimated will exist on the new City System in 1941, compares with a traffic density, for the year ended June 30, 1927, of 2,589,768 passengers per single-track mile on the plaintiff's Elevated Division, and of 3,266,476 passengers per single-track mile on the plaintiff's Subway Division for the same fiscal year.

The impression sought to be created by the defendants, of dangerous and unhealthful conditions in the present subway operated by the plaintiff, which could be remedied by the plaintiff in some way, is nullified by the defendants' own data showing that the plaintiff is not only doing all that can be reasonably expected, but that the conditions anticipated on the new City System will be far worse than they are at the present time on the plaintiff's lines.

[fol. 1163] Reply to Affidavit of Mr. Harry S. Fischer as to the Inadequacy of the Five-cent Fare

In his affidavit, Mr. Fischer quotes excerpts from the testimony of Mr. James L. Quackenbush, General Counsel for the plaintiff, in the Transit Investigation of 1927, when he made it clear that a five-cent fare is inadequate under present conditions.

Mr. Fischer also quotes excerpts from the testimony of Mr. George Keegan, Assistant to the President and General Manager of the plaintiff, in which Mr. Keegan is reported as having stated that no more cars could be used effectively or advantageously in the present subways of the plaintiff, which bear out the plaintiff's contention and that of Mr. Untermyer, hereinabove quoted, that what we need is more subways and not more cars in the present subways.

Mr. Fischer might also have quoted further from the same record, at S. M. page 235, wherein it is shown that Mr. Quackenbush, in testifying to further answers to ques-

tions propounded by Mr. Untermyer, stated that the plaintiff desired more revenue.

"Just enough more to restore the credit of the Interborough Rapid Transit Company in the markets of the world, so that we can sell our bonds for the capital obligations that this Commission is constantly requiring us to furnish in the way of improvements and additions and betterments; and until we can get a return on that stock which, in the opinion of the investing public throughout the world, makes those bonds worth more than 77, what they are selling at to-day, you have got the dead hand on the Interborough Rapid Transit Company."

[fol. 1164] Reply to Affidavit of Mr. Paul S. L. Bolger as to Estimates of Traffic Increases

All of the first part of Mr. Bolger's affidavit up to folio 85 is an argument that the competition from the new City subways will not take place as early as might be expected from the facts set out in the affidavit of Mr. Earl S. Starbard, Vice-President of the plaintiff, dated February 25, 1928.

Mr. Starbard's affidavit showed that the completion of the various contracts for the new Municipal System, at least from 207th Street south to the neighborhood of 14th Street, was near at hand and that the competition would soon affect the traffic and revenue on the plaintiff's Subway and Elevated Lines.

The plaintiff has not contended that such competition would be in full swing before July 1, 1930, and in all of its estimates of expected traffic that date has been used for the beginning of the competition from the new City System. Consequently, the heading in Mr. Bolger's affidavit that "Plaintiff's assertion as to such competition is most misleading" is self incriminatory.

A statement is contained in Mr. Bolger's affidavit, at folio 86, that "Plaintiff's passengers will not be fewer than in 1927."

To test the accuracy of this statement, and generally as bearing upon the unreliability of such traffic estimates, I respectfully compare the estimates of Mr. Bolger of the probable traffic upon the entire Interborough System for

the years 1931 and 1932, with the estimates made for the same System, by Engineers of the Board of Transportation (based upon competition from completed City System), as shown in the report of the Board of Transporta-
[fol. 1165] tion of the City of New York to the Board of Estimate and Apportionment, under date of May 26, 1925:

	1931	1932
Mr. Bolger's estimate of Interborough traffic	1,213,000,000	1,188,000,000
Board of Transportation's estimate of Interborough traffic	886,000,000	897,000,000

This shows that Mr. Bolger's estimates of traffic for the Interborough System after commencement of operation of the new City System for those two years is 618,000,000 more passengers than the estimates of the Board of Transportation. In dollars this would represent at a five-cent fare a decrease of $30,900,000. In other words, if the Board of Transportation's figures are correct, the Interborough System will fall short by $30,900,000 of the revenue which Mr. Bolger has estimated the plaintiff would receive, which is another reason why the various estimates contained in Mr. Untermyer's "Report and Recommendations" are utterly worthless.

On page 24 of Mr. Bolger's affidavit, Mr. Bolger himself states that the operation of the new City System will produce a drop of 125,000,000 passengers in the year 1932 on the Interborough System, or a decrease, on a five-cent fare, of $6,250,000.

On pages 28 et seq., of his affidavit, Mr. Bolger quotes at length the twenty assumptions which were used by him as a basis for the development of the various tables used in the "Report and Recommendations" of Special Counsel to the Transit Commission, and he finds fault that I did not, in my affidavit, refer to all of the assumptions. What I did was to direct specific attention to the fact that Mr. Untermyer's "Report and Recommendation," which he submitted to the Court, did not state any of the basic assumptions upon which the various tables were based, and to show that there was justification for the statement which
[fol. 1166] I made at folio 32 of my affidavit of March 5, 1928, as follows:

"With each variation of the basic assumptions the conclusions necessarily change."

It is true that Mr. Bolger did furnish to the plaintiff the working sheets which contained the estimates referred to, but Mr. Untermyer did not inform this Court through his "Report and Recommendations" just what kind of a foundation had been used in the basic tables shown in such report. He failed to do this although he knew that a variation of any one of the important basic assumptions would upset his entire utopian structure. For example, if Mr. Bolger is wrong on his traffic estimates to the extent above indicated by the engineers of the Board of Transportation, then all of Mr. Untermyer's tables are destroyed.

I disagree with the opinion expressed in the last paragraph of Mr. Bolger's affidavit that "all of my assumptions quoted by Mr. Berry were very specifically stated and was clearly noted in Mr. Untermyer's report."

Reply to Affidavit of Mr. William P. Coleman as to Investment in and Value of Property Used by Plaintiff and Return Earned Thereon

On page 38 of Mr. Coleman's affidavit, the plaintiff's investment (actual original cost) is given by Mr. Coleman as $167,842,799.05. In arriving at this investment, or original cost, Mr. Coleman first arbitrarily eliminates $11,713,239.24, notwithstanding the fact that Sheet 2 of Exhibit 40, put in evidence by Special Counsel to the Transit Commission during the 1927 transit investigation and heretofore referred to in the plaintiff's complaint and affi- {fol. 1167} davits in support of an interlocutory injunction, it is admitted that "overhead items (aggregating $6,173,083) were not included in the original valuation. The propriety of allowing for such items is not disputed." Furthermore, Mr. Coleman, in arriving at his total investment above referred to made no allowance whatever for materials and supplies and cash working capital. In addition, he has used only actual book charges to fixed capital, and has ignored altogether the present value of the property involved in his setup, and the investment in permanent property not charged to the accounting classification of fixed capital, although I am advised that the predominant element, in fixing a proper rate base, is reproduction

cost rather than original cost, actual cost or prudent investment.

In addition, in fixing the amount of money available as a return on the investment, Mr. Coleman treated the entire preferential of $6,335,000 as though that money were available as a return to the plaintiff. The fact of the matter is that, of the income from subway operation $3,157,000 of the amount of $6,335,000 must be used to meet the charges on the company's securities issued to provide its investment under Contracts Nos. 1 and 2, and the remainder, or $3,178,000, has been and is still being utilized to meet the company's obligations in connection with the operation of its elevated lines.

Even, then, those charges have only been met by a reduction in the rental payable for the use of the Manhattan Railway Company's property and by the application of amounts collected from the Subway revenue as a return on the money invested by the Company for which no securities have been issued and by the further application of [fol. 1168] some of the Company's preferential under Contract No. 3 accrued in the previous years.

These last two mentioned elements have not been taken into consideration in the following computations showing a return on the present value of the Subway property. If they had been taken into consideration in these calculations the return would be less than that stated herein.

This Court will find the correct computations as to valuation and rate of return actually earned, clearly set out on pages 51 to 56, inclusive, of my affidavit bound in "Affidavits in Support of Plaintiff's Motion for an Interlocutory Injunction," dated February 25, 1928.

Furthermore, this plaintiff is relying upon the estimates of value made by its own engineers, and the estimates of present value of certain property elements made by the Commission's engineers have been presented to this Court only in support of its contention that upon any basis the present rate of fare is confiscatory.

On page 6 of my affidavit (reply affidavit in support of plaintiff's motion for an interlocutory injunction) will be found the present value of the property provided by both the Interborough and Manhattan Companies, and the rate of return earned thereon under a five-cent fare. If the present value figures there shown for the subway alone

(excluding all City provided property) be combined, we get a rate base of $346,169,610. If then we also deduct the estimate of the amount required to recondition, or a total of $629,000, as shown on Sheet 1 of Exhibit 40, hereinabove referred to, we get a final rate base of $345,540,610. After reducing materials and supplies and cash working capital to the point where such items apply only to the Subway Division, we apply the amount which Mr. Coleman sets [fol. 1169] forth as the amount available as a return on subway property, to wit, $13,987,665, it will be found that the return on the Subway Division amounts to only about 4 per cent. on such present value. But in view of the fact, as heretofore stated, that $3,178,000 of the subway revenue is actually used to meet the obligations against the plaintiff's elevated lines, the amount available as a return to the plaintiff on the present value of the company property for the Subway Division is reduced to $10,809,665, and, if this amount is applied to the above present value figure of $345,540,610, we get a return of approximately only 3 per cent. on the present value of the subway property.

If Mr. Coleman's estimate of earnings available for the City's charges under Contract No. 3 of approximately $5,000,000 for the fiscal year 1928 were added to the interest and sinking fund rentals shown in the last paragraph of his affidavit, as rental payable to the City under Contracts Nos. 1 and 2, the result will be a return to the City of approximately 4½ per cent. upon its entire subway investment, or slightly over 2 per cent. on the cost to reproduce City provided property.

[fol. 1170] Reply to Affidavit of Mr. Norman C. Hill as to the Reproduction Cost and Present Value of the Property Used by the Plaintiff

The table at the bottom of page 42 of Mr. Hill's affidavit shows an attempt to treat as City owned property all property provided by the Interborough Company for construction under Contracts 1 and 2 and for both construction and equipment under Contract 3, and to exclude such property from the quantum upon which a return must be earned by the plaintiff, notwithstanding the fact that the plaintiff has the obligation to meet fixed charges on all of such property.

In the second column in the same table an attempt is made to set up a reproduction cost of all of such property for the year 1926 still segregated in the manner above indicated between the plaintiff and the City. A rate base is obtained according to Mr. Hill's own admission, in which all property is included, of $815,197,000. Treating all property used by the plaintiff in the public service as a rate base and applying that to the amount available (the amount available being determined without any allowance for depreciation) we get a return of less than 3 per cent. for that year; so that, using the present value figures set up by Mr, Hill for all of the property used by the plaintiff in the public service, as shown on page 42 of his affidavit, it clearly appears that the plaintiff has fallen short of an 8 per cent. return on Mr. Hill's own figures by approximately $41,800,000. It further appears that on the basis of Mr. Hill's investment figures, shown in the first column at the bottom of page 42, the plaintiff earned a return of 4.56 per cent. on Mr. Hill's total esti-[fol. 1171] mated investment of both companies and the City, all of which property is used in the public service by the plaintiff.

Before going further into the various tables shown on pages 46 to 55, inclusive, of Mr. Hill's affidavit, it should be pointed out that on page 47 Mr. Hill sets up the cost to reproduce all property of both companies and the City, as follows:

Contracts Nos. 1 and 2	$102,997,000
Contract No. 3	190,328,000
Elevated Certificates	64,959,000
Working Capital (Material and Supplies)	2,468,000
Cash Working Capital	
Manhattan Railway Property	114,565,000
Total Interborough and Manhattan Property on a Reproduction Cost basis	$475,317,000
Add to the above property provided by the City of New York, contracts Nos. 1, 2 and 3.	339,880,000
Total	$815,197,000

This table is set up for the purpose of indicating to the Court that these are the same figures used by Mr. Gorsuch and me in our affidavits, dated February 25, 1928, forming a part of the application of this plaintiff for its interlocutory injunction, to which was added overheads improperly omitted by the engineers of the Transit Commission, cash working capital for which the engineers of the Transit Commission made no allowance and the cost of the Belmont Tunnel over and above the $3,000,000 allowed under the terms of Contract No. 3; and from this total we subtracted the Transit Commission engineers' own estimate of $2,580,000 representing the amount necessary to put the property in first class operating condition, and in this way we obtained the rate base shown at page 55 of my said affidavit. If the Court will examine page 55 of that said affidavit it will ap- [fol. 1172] pear that on the minimum present value thus obtained of $827,561,597, the per cent. of return actually earned by this plaintiff for the year 1926 was 2.86 per cent., while the corresponding figures for the year 1927 show the plaintiff actually earned only 2.72 per cent.

It should further be noted that the above reproduction cost figures used by Mr. Hill in his affidavit, at page 47, are the same figures shown on Exhibits 4 and 102 hereinbefore referred to and also referred to in prior affidavits submitted by Mr. Gorsuch and me.

Mr. Hill, in the table on page 48 of his affidavit, sets up a cost to reproduce new less depreciation, but he does not state that Exhibits 40 and 102 hereinbefore referred to, show that the depreciation deduction was computed on a straight-line basis—a basis which I am advised has been uniformly condemned by the Courts throughout the country, and notwithstanding the fact that the engineers of the Transit Commission have estimated that the amount necessary to put the property in first class operating condition was only $2,580,000. To be more exact, the amount of theoretical or straight-line depreciation used by Mr. Hill in reducing his reproduction cost figures aggregated $81,181,000, although the uncontradicted affidavit of Mr. Frank Hedley, president and general manager of the plaintiff, shown on page 118 of "Reply Affidavits in support of plaintiff's motion for an Interlocutory Injunction," makes the direct statement (at p. 44) that "all property of the Interborough

Rapid Transit Company, cars, motive power equipment, structures, tunnels, bridges, viaducts, shops and yards are in as good condition to-day as they were at the commencement of operation under the respective contracts; in fact [fol. 1173] they are in a condition as good as new, in so far as operating efficiency is concerned and this applies not only to the property provided under Contract No. 3 and the Elevated Extension and Improvements Certificates, but it also applies to all property operated by the Interborough Company and provided under Contracts Nos. 1 and 2 and the property provided by the Manhattan Railway Company."

However, taking Mr. Hill's table (p. 48 of his affidavit) for what it is worth, in which he arrives at a rate base (after deducting straight-line depreciation) of $734,016,000 as representing the present value of the property used by the plaintiff, it will be found that for the year 1926 the amount actually available produced a return of only 3.2 per cent. on such rate base.

Mr. Hill states, at the top of page 43 of his affidavit, that: "plaintiff in 1927 earned 7.74 per cent. on valuation (reproduction cost less depreciation) of its property." This statement is based upon a computation of a return on the property owned by the Interborough Company valued at $110,461,000, after deducting straight-line depreciation. This valuation omits the property provided by the company at a cost in excess of $140,000,000. We do not accept this valuation but the computation based thereon is clearly erroneous. In the second paragraph on this page the balance available for a return thereon after adjustment for a strike loss for the year 1927 is shown at $8,549,254. On page 34 of Mr. Coleman's affidavit the statement is made that for the fiscal year ended June 30, 1927, the amount payable to the City under Contract No. 3 would, if the strike had not occurred, have approximated $4,400,000. It is evident, therefore, that the amount stated by Mr. Hill should be reduced by the amount of $4,400,000 referred to by Mr. Cole- [fol. 1174] man, with the result that the amount available for a return will be for 1927 $4,149,254, or 3.76 per cent. upon the above valuation fixed by Mr. Hill.

At the bottom of page 43 of Mr. Hill's affidavit the statement is made: "plaintiff in 1927 earned 7.47 per cent. on

value (base as above) of all property (Interborough and Manhattan owned property); 8.85 per cent on original cost." In making this calculation the value is restricted to the property owned by the company omitting entirely the property furnished by the company to which it does not hold complete title. The amount available for a return shown at $13,494,25 is subject to the same reduction of the amount payable to the City as computed by Mr. Coleman of $4,400,000, leaving the balance available as a return for the year 1927 of $9,094,250, or 5 per cent. on the valuation of $180,580,000 (arrived at by deducting straight-line depreciation) instead of 7.47 per cent. indicated by Mr. Hill.

Similar correction would indicate that on the original cost basis the return for 1927 was 5.9 per cent. instead of 8.85 per cent. stated in Mr. Hill's affidavit.

Referring to Table "A" shown on page 52 of Mr. Hill's affidavit, we desire to point out that Mr. Hill has entirely omitted all expenditures by the company for construction under Contract No. 2, and he has made no allowance whatever for cash working capital, and he has entirely omitted more than $6,000,000 of the overheads heretofore referred to (and shown on Exhibit 40, put in evidence by the Special Counsel for the Transit Commission) as having been omitted by the engineers of the Transit Commission, although conceding that they are properly a part of the valuation; nor has Mr. Hill made any allowance for approximately [fol. 1175] $6,000,000 representing the cost of the Belmont Tunnel over and above the $3,000,000 which was allowed as a part of the construction cost of Contract No. 3. This automatically affects the rate of return on the original cost basis and renders Mr. Hill's computation worthless. By the same token the columns under the heading "Basis of Cost to Reproduce New Less Depreciation" shown on the same page (52), Mr. Hill again falls into error in deducting straight-line depreciation.

As to the table shown on page 53, in developing the so-called original cost basis he excluded the overheads heretofore referred to, the excess cost of the Belmont Tunnel and cash working capital and again Mr. Hill's computation is rendered worthless. He again made the same error on page 53 in the last two columns of the table in his reproduction cost basis by deducting straight-line depreciation and

omitting the same items hertofore enumerated, and consequently his rate return would fall accordingly. Substantially the same criticisms can be made of tables C and D shown on pages 54 and 55 of Mr. Hill's affidavit and for the same reasons the alleged rates of return shown at the foot of those tables are worthless. Furthermore in all these tables, A to D, inclusive, no allowance has been made by way of deduction from the balance available as a return on the company's property for the amounts shown in Mr. Coleman's affidavit heretofore referred to as payable to the City for the fiscal year 1926, $2,903,508.88, and for the fiscal year 1927, after allowing for the strike, of $4,400,000. Had these deductions been made in these tables all of the rates of return shown would have been very materially reduced. If the eliminations of property values, arbitrarily deducted by Mr. Hill from his various tables, were restored, as they [fol. 1176] should be, then the rates of return would be still further substantially reduced.

If Mr. Hill follows his straight-line method of computing depreciation to its logical conclusion he should consistently deduct from the annual amounts available as a return the large sums for depreciation which would be accrued on a straight-line basis for each year considered.

If this be done the return available will be reduced to such a small amount that in 1926 and 1927 it will only be sufficient to provide a most meager return on the value of the property devoted to the public service. The reduction in the amount available for a return on the companies' owned property, only, for accrued depreciation on a straight-line basis for the year 1927 as computed from Mr. Hill's figures is $2,974,000. Such a deduction from the amount available as a return on the companies' owned property, only, will show a startling reduction in the percentage of such return.

At the conclusion of Mr. Hill's affidavit he calls attention to the overhead items which have been used by the plaintiff in computing the total rate basis and he states at page 62 that the reproduction cost figure of $102,997,000 "does include items of the above nature," but Mr. Hill does not contradict our contention that these items were entirely excluded from his original cost basis and so far as reproduc-

tion cost or present value basis is concerned the elimination of such items would not materially affect the very low rates of return which are shown in our tables at pages 51, 52, 53, 54, 55 and 56 of the plaintiff's application for an Interlocutory Injunction and Restraining Order.

In concluding my comments upon Mr. Hill's affidavit, I desire to direct specific attention to the fact that he has uniformly deducted the Transit Commission's engineers' estimate of cost to recondition ($2,580,000) from his orig- {fol. 1177} inal cost valuation tables, while in the case of his valuation tables, based upon cost to reproduce, he has deducted straight-line depreciation aggregating for all property $81,181,000, and this latter statement can be verified by referring to Sheet No. 8 of Exhibit 102, put in evidence by special counsel to the Transit Commission during the 1927 Transit investigation, wherein it appears from footnote "F" there was deducted "straight-line depreciation based on the annual depreciation rates given in memorandum on depreciation, dated May 7, 1920, by Commissioner Delaney."

There is no evidence before this Court in the plaintiff's case to show that the life tables which were used for the purpose of computing this straight-line depreciation were in any way based upon an examination or inspection of the property. In any event an estimate of expenditures necessary to recondition the property used by the plaintiff in the public service, or, as they put it, "to place the property in first-class operating condition," completely nullifies and destroys any computation based upon assumed life tables.

Finally, Mr. Hill does not explain why he deducts the estimate of the amount found to be necessary to recondition the property from original cost and why he deducts the larger sum of $81,181,000 from his estimate of cost to reproduce. It must be obvious to this Court that if $2,580,000 represents the amount found to be necessary to put the property in first-class operating condition, then this is the sum, if any, which should be deducted from the rate bases set up by Mr. Hill.

[fol. 1178] **Reply to the Second Affidavit of Mr. Isadore Spinrad of the Accounting Department of the Transit Commission as to Comparative Costs of Operation**

The contention is made in this affidavit by Mr. Spinrad that comparison should be made between 1919 and 1927, instead of between the years 1913 and 1927 as was done in my affidavit in the "Reply Affidavits Supporting the Plaintiff's Motion for an Interlocutory Injunction," dated March 14, 1928, because such a comparison gives full weight to the increased level of operating costs due largely to the world war, but does not show the effect of the post-war deflation. Certainly a comparison of 1913, the year before the world war started, with 1927, eight years after the world war ended, must reflect the post-war deflation is so far as it has accrued during that period.

Furthermore, the comparison with 1913, the year in which the contracts for the extended subways and elevated systems were signed, gives a more accurate reflection of the changes which have occurred in the conditions which existed at the time when a five-cent fare provided an adequate return.

In place of this comparison Mr. Spinrad compares the year 1919 with the year 1927. Evidently the year 1919 has been selected because it is the year during which the extended subway operation under Contract No. 3 was begun with its inevitable increase in operating expenses—the beginning of such an extended operation being more expensive than the continuance thereof after the operation has become thoroughly settled and unified.

[fol. 1179] It should also be remembered that in 1919 the Interborough Company's operations showed a deficit of $3,810,340.

A comparison of the operating data for the year 1913 with the year 1927 along the lines of Schedule I, accompanying Mr. Spinrad's affidavit, is as follows:

[fol. 1180] Interborough Rapid Transit Company

Comparison of Operating Data for 1913 with 1927

	Year ended June 30th	
	1913	1927
Number of Passengers Carried:		
Subway Division	327,471,510	814,626,596
Elevated Division	306,845,006	359,019,660
Total	634,316,516	1,173,646,256
Number of Employees at June 30th:		
Officers and Clerks	498	826
Others	10,057	14,009
Total	10,555	14,835
Amount of Wages Charged to Operating Expenses	$8,120,040 24	$26,208,302 57
Wages Per Passenger (Cents)	1 28	2 24
Operating Ratio (Per Cent):		
Subway Division	34 26	53 33
Elevated Division	41 52	70 19
Total	37 77	58 52
Cost of Coal Per Long Ton:		
Subway Division	$3 23	$5 63
Elevated Division	3 23	5 62
Total	$3 23	$5 62
Kilowatt Hours Generated:		
Subway Division	308,886,230	568,544,360
Elevated Division	164,003,205	521,215,430
Total	472,889,465	1,089,759,790
Cost of Coal Consumed per K. W. Hour Generated (Cents):		
Subway Division	0 30	0 42
Elevated Division	0 33	0 40
Total	0 31	0 41
Lbs. of Coal Consumed per K. W. Hour Generated:		
Subway Division	2 09	1 68
Elevated Division	2 32	1 62
Total	2 15	1 65

NOTE.—The income from Street Railway Operations for

1927	$22,753,778
1913	18,106,735
Increase	$4,647,043

or an increase in income from Street Railway Operations of 20.85%, whereas the increase in the number of passengers carried was 85%.

[fol. 1181] A careful consideration of the entire affidavit of Mr. Spinrad inevitably leads to the conclusions that it is a splendid argument for the present efficiency of the Interborough Company's management, which was described by the Special Counsel for the Transit Commission in his "Report and Recommendations" as "extravagant and wasteful."

Notwithstanding all the economies and efficiency which are shown in the statement contained in Mr. Spinrad's affidavit, the Company has been unable, as has heretofore been shown, to maintain its credit so that it could procure additional moneys for improvements and extensions, because even under these extraordinary conditions it has been impossible to earn a reasonable return on the present value of the property devoted to the public service.

Henry G. Berry.

Sworn to before me this 31st day of March, 1928. J. C. Norris, Notary Public, Nassau County. Certificate Filed in New York County No. 165. N. Y. County Register's Office No. 9111. Term Expires March 30, 1929. (Seal.)

[fols. 1182 & 1183] In United States District Court

[Title omitted]

Answer and Cross-petition of the Defendant Manhattan Railway Company

Manhattan Railway Company, one of the defendants in this cause, for an answer to the bill of complaint, or to the parts thereof to which this defendant is advised it is necessary or material to make answer, and as a basis for its claim for relief against the other defendants herein, alleges, on information and belief, as follows:

1. The said Manhattan Railway Company is a domestic railroad corporation, having been incorporated on or about December 29, 1875, pursuant to the provisions of the Rapid Transit Act, Chapter 606 of the Laws of 1875, with authority to construct, maintain and operate certain elevated

railroads along routes laid out and designated by the Rapid Transit Commission duly acting under the authority of that Act. It has its principal office in the Borough of Manhattan, in the City, County and State of New York. It is a "common carrier" and a "street railroad corporation," as such terms, respectively, are defined by the said Public Service Commission Law. As a common carrier of per- [fol. 1184] sons and property for hire, the defendant Manhattan Railway Company owns, and for many years past has owned, certain elevated rapid transit railroads lying exclusively within the City of New York, leased by it to the plaintiff and operated by the plaintiff as a part of its system of elevated and subway rapid transit railroads. As such common carrier, the defendant Manhattan Railway Company is, and at all times since July 1, 1907, has been, subject to the provisions of the Public Service Commission Law of the State of New York.

II. The said Interborough Rapid Transit Company is a domestic railroad corporation, having been incorporated on or about May 1, 1902, pursuant to the provisions of the Railroad Law of the State of New York and Chapter 4 of the Laws of 1891 of the State of New York as amended, and having its principal office in the Borough of Manhattan, City and County and State of New York, in the Southern District of New York. It is a "common carrier" and a "street railroad corporation," as such terms, respectively, are defined by the Public Service Commission Law of the State of New York, hereinafter mentioned. As a common carrier of persons and property for hire, the said Interborough Rapid Transit Company operates and manages, and for many years past has operated and managed, certain rapid transit railroads lying exclusively within the City of New York, parts of which are owned by the defendant The City of New York, other parts of which are owned and leased to it by your defendant, the said Manhattan Railway Company, and still other parts of which are owned by the said Interborough Rapid Transit Company, all of which are parts of a comprehensive system of elevated and subway rapid transit railroads. As such common carrier, the said Interborough Rapid Transit Company is, and at all times since July 1, 1907, has been, subject to the provisions of the Public Service Commission Law of the State of New York, hereinafter mentioned.

III. The defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood constitute the Transit Commission, being the Metropolitan Division of the Department of Public Service of the State of New York, and the defendant William A. Prendergast is the Chairman of the Public Service Commission and the head of the said Department of Public Service, and when acting in such capacity is known as the Chairman of the Department of Public Service. The said defendants were duly and severally appointed, and are now acting in their said respective capacities, under and by virtue of Chapter 343 of the Laws of 1926 of the State of [fol. 1185] New York, known as the State Department Law, also known as Chapter 78 of the Consolidated Laws, in effect January 1, 1927, as amended by Chapter 350 of the Laws of 1926, also in effect January 1, 1927, and the provisions of Chapter 48 of the Consolidated Laws, known as the Public Service Commission Law, which was originally enacted as Chapter 429 of the Laws of 1907, in effect July 1, 1907, and which was made Chapter 48 of the Consolidated Laws by Chapter 480 of the Laws of 1910, in effect June 14, 1910, as the said Acts have been amended and supplemented by several acts of the Legislature of the State of New York. The defendants are citizens of and reside in the State of New York, and at least one of the defendants resides within the Southern District of New York.

IV. The defendant The City of New York is a municipal corporation created and existing under and by virtue of Chapter 378 of the Laws of 1897 of the State of New York, also known as the Greater New York Charter, as amended and supplemented by several Acts of the Legislature of the State of New York; and it claims to have some interest in the subject matter of this action.

V. Pursuant to agreement on or about August 1, 1884, the New York Elevated Railroad Company (successor by conveyance to the West Side Elevated [Patented] Railway Company [of New York City], formerly the West Side & Yonkers Patented Railway Company), and the Metropolitan Elevated Railway Company (formerly The Gilbert Elevated Railway Company) became merged with your defendant, the said Manhattan Railway Company; and on or about April 1, 1891, the Suburban Rapid Transit Company (successor to the New York, Fordham and Bronx Railway Com-

pany) became merged with the defendant Manhattan Railway Company; and, by virtue of such mergers and the several Acts and agreements in connection therewith, the defendant Manhattan Railway Company became vested with all rights, franchises, consents, privileges and property of those companies, including the ownership and operation of certain elevated railroads in the Boroughs of Manhattan and The Bronx, New York City, constructed by the companies so merged, or by the latter, including the various railroad lines on the Manhattan Division of the plaintiff, the said Interborough Rapid Transit Company.

[fol. 1186] Corporate History and Present Capital Structure of this Defendant

VI. As of January 31, 1928, and substantially since then, your defendant, the Manhattan Railway Company, had outstanding consolidated common capital stock of the par value of $60,000,000; Manhattan consolidated 4 per cent bonds of the principal amount of $40,671,000; Manhattan second mortgage bonds of the principal amount of $4,523,000, and certain other liabilities amounting to $13,080, making the aggregate of the specified liabilities $105,207,080. As of January 31, 1928, the fixed capital of the defendant Manhattan Railway Company amounted to $112,943,654.16 in addition to other resources of $1,726,502.91 making the aggregate of such resources $114,670,157.07.

Interest of Defendant Manhattan Railway Company in This Action Arising from Lease of Elevated Railroads to the Plaintiff

VII. On or about January 1, 1903, your defendant, the Manhattan Railway Company, duly executed and delivered a lease of all its rights, franchises and property in the elevated railroads to the said Interborough Rapid Transit Company, which became effective April 1, 1903, and runs for a period of 999 years from November 1, 1875; and, by virtue of the aforesaid Acts, agreements and leases, the said Interborough Rapid Transit Company, as lessee, entered into the possession of, and has since been engaged in the operation and management of, the elevated railroads in the Borough of Manhattan and The Bronx, New York City.

VIII. By the terms of such lease, mentioned in the preceding paragraph of this answer, the lessee (the plaintiff Interborough Rapid Transit Company) paid to the lessor (the defendant Manhattan Railway Company), as rental, prior to the 1922 Readjustment hereinafter mentioned, the following:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Company	$1,627,320 00
Interest upon Second Mortgage Bonds of the Manhattan Company	180,920 00
Cash rental	35,000 00
7% guaranteed dividend rental on $60,000,000 of Manhattan Railway Company stock	4,200,000 00
Total	$6,043,240 00

[fol. 1187] Incidental to a certain Interborough-Manhattan Readjustment Plan of 1922, agreements were made by the plaintiff, the Interborough Rapid Transit Company: (a) With the defendant Manhattan Railway Company, increasing the amount paid annually as cash rental to $50,000; and (b) with the holders of over 90 per cent. of the outstanding capital stock of the defendant Manhattan Railway Company, whereby, as to such stock, the guaranteed dividend rental rate of 7 per cent. per annum was reduced to 3 per cent. for the year ending June 30, 1923, 4 per cent. for the year ending June 30, 1924, and 5 per cent. thereafter, with the further provision that in any fiscal year in which neither the net earnings of the Interborough Rapid Transit Company nor the net earnings of the Manhattan Leased Lines, as defined in the Plan, are sufficient to pay the whole of such dividend rental, the plaintiff shall pay and distribute on account of such dividend rental an amount equal to the net earnings of the plaintiff's entire properties, subway and elevated, or the net earnings of the Manhattan Leased Lines, whichever amount may be the larger.

In and by the said Readjustment Plan, it is further provided that such dividend rental shall be payable quarterly and shall be cumulative, so that if the earnings of any quarter do not justify the rental at the rate provided in the

Plan the subsequent earnings shall be applied to make up the deficiency, and the earnings of each year shall be applied to such cumulative rentals until the same are paid in full. Such application of the earnings shall be mandatory.

For the year ending June 30, 1927, the revised rental so payable was as follows:

Interest upon the outstanding Consolidated Mortgage Bonds of the Manhattan Railway Company	$1,627,320.00
Interest upon Second Mortgage Bonds of the Manhattan Railway Company	180,920.00
Cash rental	50,000.00
7% dividend rental on certain stock of the Manhattan Railway Company not participating in the plan	303,898.00
5% dividend rental on the remainder of Manhattan Railway Company stock participating in the plan	2,782,858.00
Total	$4,944,996.00

The said Plan of Readjustment was adopted with the full concurrence and approval of the said Transit Commission or its predecessor.

[fol. 1188] In the creation in 1913, jointly with the plaintiff of the system of railways, subway and elevated, which the plaintiff now operates, The City of New York has taken and now holds the position of a fiduciary, not only under the contract with the plaintiff in respect of the subways constituting part of the system, but also under the certificate to the plaintiff in respect of the elevated properties constituting part of the system and in respect of the system as a whole. The five-cent fare limitation in the Contract and in the Certificate does not destroy the fiduciary relation of the City nor lessen or interfere with the City's duties as such fiduciary. From the nature of this relation the fare limitation must continue only so long as the City can and does perform and discharge its duties as fiduciary under the five-cent fare limitation. In the present circumstances, the City cannot discharge such fiduciary duties if the five-cent fare limitation continues, as the City requires new and additional subways. New subways constructed

by the City itself, unless subsidized, cannot be operated on a five-cent fare and the City in order to furnish the necessary subways is in fact competing with the arrangement created in 1913 for the present Interborough system. The City by its own conduct has demonstrated that the time has been reached when the five-cent fare limitation conflicts with the discharge of its fiduciary duties, and has by its conduct shown that the five-cent fare limitation is no longer a binding obligation on the plaintiff.

IX. The fulfillment by the plaintiff Interborough Rapid Transit Company, of its obligation arising under the lease referred to in paragraph VII of this answer, to make to the defendant Manhattan Railway Company the substantial payments specified in paragraph VIII of this answer, is dependent upon and, under the Interborough-Manhattan Readjustment Plan of 1922, referred to above, such payments are in part measured by, and the amount of the net earnings to be applied to the dividend rental are limited by the ability of said plaintiff Interborough Rapid Transit Company to earn a reasonable return from the operations of the elevated lines so leased by the defendant Manhattan Railway Company to the plaintiff Interborough Rapid Transit Company, and upon other rapid transit lines now operated by the plaintiff Interborough Rapid Transit Company. The defendant Manhattan Railway Company has other claims against the plaintiff Interborough Rapid Transit Company, arising by reason of certain reversionary interests vested in it, in the subject matter of the lease referred to in paragraph VII of this answer. The defendant Manhattan Railway Company is informed and believes that by reason of the facts and conditions hereinafter, and [fol. 1189] in the bill of complaint in this cause alleged and set forth, the plaintiff Interborough Rapid Transit Company has been injured and impaired in its rights and properties and in its operation of its properties, including the elevated lines so leased by the defendant Manhattan Railway Company to the plaintiff Interborough Rapid Transit Company, and that by reason of said facts, conditions, injuries and impairments, the plaintiff Interborough Rapid Transit Company has been, is, and will be hindered and prevented from fully and faithfully discharging its

financial and other obligations to the defendant Manhattan Railway Company, arising under and by virtue of said lease referred to in paragraph VII of this answer. That by reason of said facts, conditions, injuries and impairments, the plaintiff Interborough Rapid Transit Company has defaulted, from time to time, in the payments of large sums of money due to the defendant Manhattan Railway Company under and by reason of said lease, and that the rights and interests of the defendant Manhattan Railway Company in and to the property which is the subject matter of the lease referred to in paragraph VII of this answer, and in and to the rentals, net earnings, rights and other payments to accrue under said lease, have been, are and will continue to be imperiled and placed in jeopardy by said facts, conditions, injuries and impairments, and that the defendant, Manhattan Railway Company, has been caused to suffer, still suffers and will continue to suffer large losses and damage thereby, for which it has or can have no adequate remedy or relief in any action or proceeding at law.

Statutory Provisions Applicable to Fare upon Elevated Railroads

X. (a) By Chapter 489 of the Laws of 1867, authorizing the West Side & Yonkers Patented Railway Company (later changed to West Side [Patented] Railway Company [of New York City], and subsequently succeeded by New York Elevated Railroad Company) to proceed with the construction of an elevated railroad in the Counties of New York and Westchester, it was authorized and provided, in Section 8 thereof that—

"The said company shall be authorized to demand and receive from each passenger within the limits of the City of New York the rates of fare not exceeding, for any distance, less than two miles, five cents; for every mile or fractional part of a mile in addition thereto, one cent. Provided that when said railway is completed and in opera- [fol. 1190] tion between Battery Place and the vicinity of the Harlem River the said company may, at its option, adopt a uniform rate not exceeding ten cents for all distances upon Manhattan Island; and may also collect said last-

named rate for a period of five years from and after the passage of this Act."

By Chapter 855 of the Laws of 1868, entitled "An act supplementary to chapter 489 of the laws of 1867, and to provide for the collection and application of Revenue in the County of New York, in certain cases," it is provided as follows:

"§ 3. It shall be the duty of the Constructing Company aforesaid, before opening its railway to public use, to file with the Comptroller of the city of New York, in form to be approved by the Mayor of the city of New York, its bond in the penal sum of $100,000, conditioned upon the true and faithful payment of the revenue, in amount thereof shall be the legal compensation in full for the use and occupancy of the streets by said railway as provided by law, and shall constitute an agreement in the nature of a contract between said City and Constructing Company, entitling the latter or its successors to the privileges and rates of fare heretofore or herein legalized, which shall not be changed without the mutual consent of the parties thereto as aforesaid; and the Mayor, in behalf of said city, may, in case of any default in payment as aforesaid, sue for and collect at law any arrearages in such payment, and the claims of the city therefor shall constitute a lien on the railway of said company, having priority over all others. Provided, that it shall not be lawful for the corporate or other authorities to authorize or permit any structures or thing which by crossing or overhanging the track of such Elevated Railway, or otherwise, shall impede or endanger its use for its public transit purposes."

By Chapter 595 of the Laws of 1875, entitled "An Act to authorize and require the New York Elevated Company to continue and complete its railroad in the City of New York, and to regulate the construction, operation and management thereof," it is provided as follows:

"§ 6. The said company may demand and receive from each passenger on its railroad not exceeding ten cents for [fol. 1191] any distance of five miles or less, and, with the assent required by section three of chapter eight hundred

and fifty-five of the laws of eighteen hundred and sixty-eight, not exceeding two cents for each additional mile or fractional part thereof."

(b) By Chapter 885 of the Laws of 1872, incorporating The Gilbert Elevated Railroad Company (later changed to the Metropolitan Elevated Railway Company) for the purpose of constructing an elevated railway through the streets of the City of New York to be designated by the Board of Rapid Transit Commissioners, The Gilbert Elevated Railway Company was authorized to collect and receive not exceeding ten cents for any distance less than four miles and for additional distances two cents per mile or any fraction or part of a mile, but between the hours of 5 and 8 A. M. and 5 and 8 P. M. said cars and trains shall be run in which the fare shall not exceed one-half of the above-named rate.

(c) The articles of incorporation of the defendant Manhattan Railway Company organized on or about December 29, 1875, pursuant to the Rapid Transit Act (Chapter 606 of the Laws of 1875), authorize and provide for a rate of fare for any distance under five miles not to exceed ten cents, and not to exceed two cents per mile for each mile or fraction of a mile in excess of a mile over five miles, until the fare shall amount to, but not to exceed, fifteen cents for a through passage from and between the Battery, or any point to the north thereof, and the intersection of the Third Avenue and Harlem River, and from and between the Battery, or any point to the north thereof, and the High Bridge (running upon whether the easterly or the westerly side of the City), not to exceed seventeen cents for a through passenger. For the entire distance, or any part of it, from and between the Battery and either East or West 59th Street, it was provided that the fare shall not exceed ten cents; but in what are designated as "commission" cars or trains to be run during certain hours "for the accommodation of the public and of the laboring classes, the rate of fare shall not exceed five cents from and between the Battery or any point to the north thereof, and either East or West 59th Street, and shall not exceed fives cent for any distance, not exceeding five miles, and shall not exceed seven cents for a through passenger from and between the Bat-

tery or any point to the north thereof and the Harlem River, and shall not exceed eight cents for a through passenger on any of said 'commission' trains or cars from and and between the Battery, or any point to the north thereof, and the High Bridge.

[fol. 1192] (d) The articles of association of the New York, Fordham & Bronx Railway Company, prescribed October 10, 1881, by the Board of Commissioners pursuant to the Rapid Transit Act of 1875, authorize and provide for a maximum rate of fare of ten cents per passenger for conveyance over all or any portion of the route of the Company, except during "commission" hours, for which the rate was fixed at five cents per passenger.

(e) The articles of association for the Suburban Rapid Transit Company, prescribed May, 1880, by the Commissioners under the Rapid Transit Act of 1875, authorized and fixed a maximum rate of fare for any distance between 129th Street and the Bronx River of ten cents per passenger, except during "commission" hours, for which the rate was fixed at six cents.

(f) Section 229 of the Railroad Law of the State of New York (Laws of 1910, Chapter 481; formerly Rapid Transit Act of 1875, Laws of 1875, Chapter 606) provided in March of 1913, and still provides, in part, as follows:

"§ 229. Powers.—Subject to the provisions of the Public Service Commissions law, every such corporation shall have power, in addition to the powers conferred by the general and stock corporations laws and by subdivisions two, five and seven of section eight of this chapter:

"1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compenation therefor."

XI. By Chapter 743 of the Laws of 1894, entitled "An Act to facilitate travel upon elevated railroads in the City of New York" it was enacted by way of statutory limitation upon the rate of fare upon certain elevated lines of your defendant, Manhattan Railway Company:

"Section 1. Any passenger upon the Manhattan elevated railway who has paid the fare required for passage from

any point on said railway east of Broadway, between the Battery and One hundred and Twenty-ninth Street, not exceeding five cents, shall be entitled to a continuous passage, without change of cars, on the suburban rapid transit railway or on any railway owned or operated by the Manhattan railway company, within the city of New York, in connection with said Manhattan elevated railway from One Hundred and Twenty-ninth Street, or other termini of the [fol. 1193] lines of said Manhattan elevated railway south of the Harlem river, to any station on the route of said suburban rapid transit railroad, or such other elevated railroad as may be operated by the Manhattan railway company north of the Harlem river, without the payment of additional fare; and any passenger on the suburban rapid transit railroad, or any elevated railway owned or operated by the Manhattan railway company in connection with the Manhattan elevated railroad, within the city of New York, running southward to One Hundred and Twenty-ninth street, or other termini of the Manhattan railroad, who has paid the fare required on said suburban rapid transit railroad to One Hundred and Twenty-ninth street in the city of New York, not exceeding five cents be entitled to a continuous passage, without change of cars, over the Manhattan elevated railway to any station on its route east of Broadway, between One Hundred and Twenty-ninth street and the Battery, without the payment of additional fare."

Statutory Provisions Pertaining to the Rates of Fare of the Plaintiff

XII. By Section 430 of the said State Departments Law, it is provided that there shall be in the State government of New York State a Department of Public Service; that the Chairman of the Public Service Commission shall be the head of such department and when acting in such capacity shall be known as the Chairman of the Department of Public Service, and that there shall be in the Department of Public Service a division to be known as the State Division and a division to be known as the Metropolitan Division.

By Section 431 of the said State Departments Law, it is provided:

"There are hereby assigned to the Department of Public Service all the functions of the Public Service Commission and of the Transit Commission, as now existing, and of the office of Public Service Commissioner and of Transit Commissioner; and all their powers and duties as now prescribed by law, whether in terms vested in either such Commissions or in such Commissioners, are hereby transferred to and hereafter shall be exercised and performed in the Department of Public Service by or through the head of the Department of Public Service or the State Division or [fol. 1194] the Metropolitan Division, respectively, as prescribed by law."

By Section 433 of the said State Departments Law, it is provided that the head of the Metropolitan Division shall be a Transit Commission, to consist of three Commissioners, who shall be appointed as therein provided, and that the Metropolitan Division, by the Transit Commission and Commissioners, shall have, exercise and perform the jurisdiction, supervision, functions, powers and duties of the Transit Commission and Commissioners, as provided by law when the article (to wit, Article XVI, providing for the Department of Public Service, added by Chapter 350 of the Laws of 1926, in effect January 1, 1927) takes effect.

By Section 436 of the said State Departments Law, it is provided:

"The provisions of the Public Service Commission law in their application to the existing Public Service Commission, in so far as they are not inconsistent with this article and in so far as they may be made applicable, shall apply to the State Division and to the Public Service Commission provided for by this article. The provisions of such law, in their application to the existing Transit Commission, in so far as they are not inconsistent with this article and in so far as they may be made applicable, shall apply to the Metropolitan Division and to the Transit Commission provided for by this article."

XIII. By Section 26 of the said Public Service Commission Law it is provided that

"All charges made or demanded by any such corporation, persons or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter."

By Section 28 of the said Public Service Commission Law, it is provided as follows:

"§ 28. Tariff schedules; publication.—Every common carrier shall file with the Commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation [fol. 1195] of passengers and property within the state between each point upon its route and all other points therein; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every

station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the Commission and shall conform in the case of railroad corporations as nearly [fol. 1196] as may be to the form of schedule required by the Interstate Commerce Commission under the Act of Congress entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. The Commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions."

By Section 29 of the said Public Service Commission Law, it is provided as follows:

"§ 29. Changes in schedule; notice required; power of suspension by the Commission.—Unless the Commission otherwise orders, no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the Commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the

changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The Commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the Commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or [fol. 1197] other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. The Commission may as authorized by subdivision one of section forty-nine estab-

lish temporary rates for any period of suspension under this section. At any hearing involving a rate the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate, if on motion of the Commission or in a complaint filed with the Commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the Commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 33, subdivision 1, of the said Public Service Commission Law, provides as follows:

"§ 33. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited.—1. No common carrier subject to the provision of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of [fol. 1198] passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

By Section 49, subdivision 1 of the said Public Service Commission Law, it is provided, in part, as follows:

"§ 49. Rates and service to be fixed by the Commission. —1. Whenever either Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation

or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the Commission shall with due regard among other things to the estimated prospective earning capacity of such property at the rate of fare at the time fixed and existent and to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged [fol. 1199] for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. At any hearing involving a rate, the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate, if on motion of the Commission or in a complaint filed with the Commission it is proposed to reduce the rate is just and reasonable shall be upon the common carrier; and the Commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Sections 26, 28 and 29, Section 33, subdivision 1, and Section 49, subdivision 1, of the Public Service Commission Law, in the respects and portions thereof above quoted, read and provided in substance as above set out, throughout March of 1913 and theretofore.

XIV. By Chapter 4 of the Laws of 1891, entitled "An Act to Provide for Rapid Transit Railways in Cities of over One Million Inhabitants," in effect January 31, 1891, also

known as the Rapid Transit Act, as amended and supplemented by various acts of the Legislature of the State of New York, provision was made for the establishment of rapid transit railroads, in cities having over one million inhabitants, for the conveyance and transportation of persons and property, either by private construction, equipment and operation, or by municipal construction and either municipal or private equipment and construction.

The said Rapid Transit Act contained, in March of 1913, and still contains, the following provision relative to municipal railroads (originally numbered Section 63 and since renumbered Section 58):

"Any railroad or railroads, so constructed by and at the City's expense shall be and remain the absolute property of the City so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the Board of Rapid Transit Railroad Commissioners in said city or by the Public Service Commission" (former Sec. 63, as added by Laws of 1894, Chap. 752; Sec. 9, and [fol. 1200] amended by Laws of 1895, Chap. 519; Sec. 30, and Laws of 1909, Chap. 498, Sec. 19, and renumbered by Laws of 1915, Chap. 604).

The said Rapid Transit Act contained, in March of 1913, and still contains, the following provision relative to contracts for equipment, maintenance and operation of municipal railroads:

"§27. Contract for Equipment, Maintenance, and Operation of Road.—* * *

"3. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said Commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said Commission, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the

contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the Public Service Commission may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the Commission may be enabled to make a single operating contract or lease of the entire road" (former Sec. 34-a, as added by Laws of 1906, Chap. 472; Sec. 6, and amended by Laws of 1909, Chap. 498; Sec. 10, Laws of 1910, Chap. 504, and Laws of 1912, Chap. 226, Secs. 6-14).

The said Rapid Transit Act, in its provisions relating to extensions, etc., of non-municipal railroads, contained in March of 1913, and still contains, no authorization or requirement for the fixing of a rate of fare applicable to extensions or additional tracking of railroads not municipally owned and operated.

XV. Section 57 of the Railroad Law of the State of New York (being Chapter 481 of the Laws of 1910, formerly Railroad Law of 1890, Section 37, as amended by Chapter 676 of the Laws of 1892) provided in March of 1913, and still provides:

"§57. Rates of Fare.—Subject to the provisions of the Public Service Commissions Law, every railroad corpora- [fol. 1201] tion may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile: * * *

"5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents."

Orders of the Regulatory Commissions Operating to Impose Five-cent Fare upon Elevated Railroad Lines

XVI. (a) On or about August 28, 1908, the Public Service Commission for the First District made an order, identified as Order No. 708, directing that the regulations contained in a certain Tariff Circular No. 1 be adopted by the

said Commission prescribing from and after September 1, 1908, the form, and governing the construction and filing of schedules of fares for passenger service of street railroad corporations subject to the jurisdiction of said Commission; and that such street railroad corporations file, in conformity with said circular and on or before September 15, 1908, schedules, effective upon filing, showing fares, transfers and all regulations relating thereto actually in effect for thirty days prior to September 15, 1908, changes therefrom to be filed in accordance with the regulations with full notice unless otherwise ordered.

(b) On or about April 15, 1913, the said Public Service Commission for the First District made an order, in its Case No. 1670, directing that the regulations contained in Tariff Circular No. 3 (which superseded said Tariff Circular No. 1), annexed to and made part of the said order, be adopted by the said Commission, prescribing from and after June 1, 1913, the form governing the construction and filing of schedules, fares and charges for the transportation of passengers by street railroad corporations subject to the jurisdiction of the said Commission; and that such street railroad corporations shall file, in conformity with said tariff circular, schedules showing rates, fares and charges for the transportation of passengers and all regulations relating thereto and shall file changes therefrom in accordance with the regulations with full notice unless otherwise ordered; and further directing that the provisions of the said Order No. 708 made by the Commission on August 28, 1908, and of Tariff Circular No. 1 be abrogated from and after June 1, 1913, and that the order shall take effect on [fol. 1292] April 25, 1913, and it shall continue in effect until changed or abrogated by the Commission.

(c) On or about February 18, 1918, the said Public Service Commission for the First District made an order in its Case No. 1670, providing, in part, as follows:

"An order having been adopted by the Commission on April 25, 1913, governing the construction and filing of schedules of rates of street railroad corporations, which said order superseded the order adopted by the Commission on August 28, 1908, and it appearing to the Commission that

said order of April 25, 1913, should be changed and revised, it is

"Ordered that every street railroad corporation subject to the jurisdiction of this Commission, from the date of this Order to and including the 31st day of May, 1918, shall comply either with the requirements of the said Order of April 25, 1913, or with the requirements of this Order, and on and after the 1st day of June, 1918, every such street railroad corporation shall comply with the requirements of this Order.

"Further ordered that said Order of April 25, 1913, shall be abrogated on and after June 1, 1918.

"Further ordered that the regulations herein below set forth be, and hereby are, prescribed as to the form, construction and filing of schedules, fares and charges for the transportation of passengers and their property by street railroad corporations subject to the jurisdiction of this Commission.

"Effective Date

"Section 23. This order shall take effect February 18, 1918, and shall continue in force until abrogated or modified by the Commission.

"Notice of Acceptance

"Section 24. Every street railroad corporation within the jurisdiction of the Public Service Commission for the First District shall notify the Commission within ten days after service of this Order whether the terms of this Order are accepted and will be obeyed."

[fol. 1283] The regulations set forth in the said order of February 18, 1918, in Section 19 thereof, under the caption "Filing of Schedules," contained and contains the following provision, among others:

"(i) If publication is not according to these regulations this may be considered by the Commission sufficient cause for rejection of schedule or sheet when tendered for filing."

(d) In compliance with the direction of the said order of the Commission of February 18, 1918, the plaintiff duly

notified the said Commission, within the time prescribed by the said order, that it accepted and would obey the terms of the said order.

(e) It has been judicially determined by the Courts of the State of New York that orders and regulations prescribed by the said Public Service Commission for the First District, or by its successors in office, such as those governing the form, construction and filing of schedules of fares and charges for the transportation of passengers and their property by street railroad corporations, have the force of law.

(f) In compliance with and in pursuance of the said provisions of the Public Service Commission Law, the said several orders of the Public Service Commission, and the said tariff regulations adopted thereby, the plaintiff duly published, posted and filed with the said Transit Commission, or its predecessors in office, both prior to and after March 19, 1913, tariff schedules showing the rates, fares and charges for the transportation of passengers and all regulations relating thereto applicable to the rapid transit railroad lines operated by the plaintiff; and more particularly a tariff schedule identified as "I. R. T. No. 2—Cancelling No. 1," being Local Passenger Tariff No. 2; applicable within the Boroughs of Brooklyn, Manhattan, The Bronx, and Queens, New York City; issued under Order of Public Service Commission, First District, State of New York: Case No. 1670, Modifying Order of date February 18, 1918; issued August 15, 1925, by Frank Hedley, President and General Manager, 165 Broadway, Borough of Manhattan, City of New York; posted August 15, 1925, and effective September 15, 1925.

(g) In and by said Tariff Schedule I. R. T. Co. No. 2, and particularly by the sheets thereof identified as First Revised Sheets Nos. 3 and 3-A, issued August 15, 1925, and effective September 15, 1925, the rate of fare on the rapid transit railroad lines operated by the plaintiff, between any two stations of the same division (as therein described), [fol. 1204] or between a station of one division and a station of the other division as provided in the "Transfer Points" (as therein described), was fixed and prescribed at five cents per passenger.

(h) By operation of the provisions of the said Public Service Commission Law and of the said orders made by the said Public Service Commission for the First District, the plaintiff and this defendant each were required and obligated, under the penalties provided by the said law, to observe and charge, demand and collect, a rate of fare on its rapid transit railroads of five cents per passenger and were prohibited under like penalties, from charging, demanding, collecting or receiving a greater or different compensation for transportation of passengers than five cents per passenger.

Certificates Granted for Elevated Railroad Additional Tracks

XVII. On March 19, 1913, the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment of the City of New York, duly granted to this defendant Manhattan Railway Company, the right to construct certain additional tracks and facilities on the elevated railroads of this defendant, the same to be constructed, maintained and operated by and at the expense of the grantee. The rights under the certificate to this defendant were formally added to the property leased to the plaintiff for operation.

Compensation Payable to Defendant The City of New York for Elevated Railroad Additional Tracks

XVIII. The Certificate for Additional Tracks, so granted to the Manhattan Railway Company, provided that, as compensation, there should be payable by the Manhattan Railway Company to the City, annually, from the gross receipts of each station served by express trains upon each line of the railroads, a sum equal to 2 per cent. of the excess of such gross receipts over the gross receipts of the same station for the year ending June 30, 1911, and that such compensation should be readjusted at the end of twenty-five years and thereafter at intervals of twenty years. Upon the expiration of the full term of such authorization, the plant and property constructed pursuant to the certificate, except Additions, is to become the property of the City without other or further compensation.

[fol. 1205] No Rate Stipulation in Elevated Additional-Tracking Certificate

XIX. The Additional Track Certificate of March 19, 1913, granted to this defendant Manhattan Railway Company, contains no provision whatever fixing a rate of fare to be charged thereon.

Regulatory Authority as to Elevated Railroad Rates

XX. The said certificate of March 19, 1913, for elevated additional tracks, was executed by the Public Service Commission for the First District, acting for and in behalf of the defendant The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891 as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, subsequent to the enactment of the said Public Service Commission Law, by Chapter 429 of the Laws of 1907, and the revision and amendment thereof by Chapter 480 of the Laws of 1910, and the acts supplemental thereto and amendatory thereof. The said Public Service Commission Law conferred power, and prescribed the manner of the exercise thereof, to regulate and fix reasonable rates of fare to be charged upon all elevated and other street railroads in the City of New York. The rates, fares and charges chargeable by the plaintiff and by this defendant for the transportation of persons upon the said elevated railroads, or any part thereof, are not, in any case, fixed as a condition of a constitutional consent of the local authorities under Section 18, Article III of the Constitution of the State of New York, to the construction or operation of any part of said railroads.

It is the law of the State of New York, as judicially construed and determined by the decisions of the Courts thereof, that the elevated railroads described in the said certificate are subject to regulation at all times by such power as the State possesses.

It is also the law of the State of New York, as judicially construed and determined by the Courts thereof, that the rate regulatory provisions of the law entered by implication into the terms of the certificates, agreements and authorizations covering the elevated railroads; that they

formed part of the obligations of those instruments, and that they were notice to the parties thereto that those instruments were coupled wih a provision that the Legislature, in the exercise of its powers, either itself, or acting through another, might regulate the rates thus fixed, and, particularly, with the provision of the statute that a common carrier such as the plaintiff was empowered to abrogate the same as to the rates stipulated therein and was [fol. 1206] allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service, upon notice, filing and publication as provided by law.

Conditions Which Render the Five-cent Fare Inadequate, Unreasonable, Confiscatory, and Invalid as to the Elevated Lines Owned by this Defendant and Operated by the Plaintiff

XXI. Since 1913, the expenses of operating the rapid transit railroads vastly increased, owing to radical economic changes produced by the World War, which were wholly unforeseen by the parties to the instruments at the time of their execution, and the value of the five-cent rate of fare became greatly impaired; and, since the beginning of the operation, and for an indefinite future period of the operation, of the elevated railroads, the said five-cent fare has failed, and will continue to fail, to be sufficient to defray the several charges and provide the return which it was contemplated should be defrayed and provided from year to year during the term of the grant of rights to the plaintiff and the defendant Manhattan Railway Company.

XXII. Summaries of the actual expenses and income in the operation by the plaintiff of this defendant's rapid transit railroads, in each of the years ending June 30, 1921, to 1927, both inclusive; the income deductions, including rentals paid by the plaintiff under the lease from this defendant to the plaintiff; the amounts available as return on the plaintiff's properties, and the balance of such income, are set forth in the schedules hereto annexed and made part hereof, marked, respectively, Schedules "A," "B," "C," "D," "E," "F," "G."

XXIII. The known facts afford no ground for expecting that the prices of material and the wages paid for labor by the plaintiff will, on the whole, be reduced from those now prevailing. On the contrary, there will be required increases in operating expenses for the following major items and amounts:

There is a requirement, under an existing order of the Transit Commission, for the installation of signals, in 1936 and 1937, on local tracks on the elevated lines at an estimated cost of $6,960,000, for which the plaintiff has no funds provided.

There is a further requirement for prospective increases in operating expenses, as follows:

[fol. 1207]

Summary Showing Increased Operating Expenses on Manhattan Division in Immediate Prospect

	First annual period	Second annual period	Third annual period
Additional wages	$1,600,000	$1,600,000	$1,600,000
Additional service	540,000	567,000	567,000
Additional maintenance	500,000	500,000	500,000
Total	$2,640,000	$2,667,000	$2,667,000

Confiscatory Effect and Unconstitutionality of the Five-cent Fare Limitation as Applied to Elevated Lines Owned by This Defendant and Operated by the Plaintiff

XXIV. By reason of the facts and circumstances hereinafter stated, the said rate of fare of five cents per passenger on the elevated lines owned by this defendant and devoted to the public service has become, was during at least 1926 and 1927, now is, and will continue to be for the future, unreasonable, inadequate and confiscatory of the property used and useful in the business of transporting passengers upon the said elevated lines; and the said five-cent fare has jeopardized and will continue to jeopardize the right and interest of this defendant in and to such property, and its right to receive the rental therefrom due to this defendant from the plaintiff under the lease referred to in paragraph VII of this answer, and has deprived and does now deprive and will continue to deprive, this defendant of a reasonable return upon the fair present value of such property, contrary to the Constitution of the State

of New York and of the United States, as hereinafter more fully alleged and shown.

Below is set forth a summary of the present value of the specified properties devoted to the public service in the operation of said elevated lines, the maximum amount of earnings from such operation actually available as a return thereon, and the deficiency in the actual earnings below the reasonable and required return thereon. The actual present value of the properties is greater than the sums hereinafter shown, and your defendant submits the following estimate without prejudice, and with reservation of right to prove the full and actual present value upon the trial of this action.

The properties embraced in the summary consist, in the main, of the property of your defendant, the Manhattan Railway Company, and certain construction and equipment provided by the plaintiff under certain Elevated Railroad Extension and Improvement Certificates of 1913; exclusive of property necessarily removed in order to perform the [fol. 1208] work required under those Certificates; together with a pro rata proportion of the cost of materials and supplies, as shown by the plaintiff's accounts and records, and of cash working capital based on one month's operating expenses of the Manhattan Division of the Interborough Rapid Transit Company's system. For the purpose of this computation, there has been deducted, without prejudice, from the reproduction cost of the property the expenditures estimated by the Transit Commission's engineers, as of June 30, 1926, to be necessary to recondition the property, a like deduction being made for each of the other periods stated in the summary, without conceding the correctness or propriety of such a deduction.

The stated amounts of present value are exclusive of the cost of the records pertaining to the elevated lines; the increases in the value of land since 1921; the going value; the cost of portions of the elevated lines as they existed in March, 1913, which were replaced and superseded in the making of the extensions and improvements thereon; the value of franchises, and other intangible elements of value. Easements of light, air and access have been included, at original cost.

Manhattan Division

Computation Based on Plaintiff's Present-value Figures

	Present value at least	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$212,193,515	$2,020,812	0.95	$16,975,481	$14,954,669
1922	191,566,893	3,012,439	1.57	15,325,351	12,312,912
1923	210,093,109	3,213,526	1.53	16,807,449	13,593,923
1924	212,189,743	3,586,458	1.69	16,975,179	13,388,721
1925	208,341,577	3,454,012	1.66	16,667,326	13,213,314
1926	208,514,309	3,936,397	1.89	16,681,145	12,744,748
1927	208,873,038	3,168,788	1.52	16,709,843	13,541,055
Total deficiency below an 8% return on present value during seven-year period					$93,749,342

Of the said properties of the Manhattan Division, for the year 1927, the property provided by this defendant represents a value of at least $142,894,000.

The deficiency in earnings on the said Manhattan Division (elevated lines), under the existing five-cent fare, below an 8% return upon such present value of the properties so used by the plaintiff and devoted by it to the public service, for the years 1921 to 1927, inclusive, aggregates at least $93,749,342.

[fol. 1209] The following summary sets forth the corresponding computations upon the minimum present value of the elevated railroad properties, comprising the said Manhattan Division, based principally upon estimates of the reproduction costs made by engineers of the Transit Commission, together with working capital, and after deducting the expenditures estimated by Commission engineers for reconditioning the property. The full actual present value of the properties, upon the basis of the Transit Commission's engineers' own figures is substantially greater than the sums here shown, when all proper elements are taken into account. This defendant accordingly submits this summary and computation without prejudice, and with reservation of right to prove the full and complete figures on the trial of this action.

Manhattan Division of Interborough Company

Computation Based on Transit Commission's Engineers' Figures of Reproduction Cost

	Minimum Present value	Earnings available as a return	Per cent of return actually earned on such value	Earnings required for 8% return at least	Deficiency in earnings below 8% return at least
1921	$168,924,294	$2,020,812	1.20	$13,513,944	$11,493,132
1922	161,087,229	3,012,439	1.87	12,886,978	9,874,539
1923	175,048,910	3,213,526	1.84	14,003,913	10,790,387
1924	175,144,743	3,586,458	2.05	14,011,579	10,425,121
1925	175,199,577	3,545,012	1.97	14,015,966	10,561,954
1926	179,450,309	3,936,397	2.19	14,356,025	10,419,628
1927	179,777,038	3,168,788	1.76	14,382,163	11,213,375
Total deficiency below an 8% return on minimum value during seven-year period					$74,778,136

Even upon the basis of such minimum present value of the elevated railroad properties, according to the estimates of reproduction cost thereof made by the Commission's engineers, the deficiency in earnings below an eight per cent. return for the years 1921 to 1927, inclusive, aggregates at least $74,778,136.

If operating expenses were increased, as the result of wage increases, additional service and additional maintenance, to the extent hereinabove shown, and if additional fixed charges were incurred on account of additions and improvements ordered or threatened by the Transit Commission, as detailed in a subsequent table, the deficiency in earnings of the elevated lines operated by Interborough Rapid Transit Company, below an eight per cent. return, indicated in the two foregoing computations, would be correspondingly greater.

[fol. 1210] XXV. A return of eight per cent. per annum upon the present value of the property used by the plaintiff in the public service is a reasonable return, and is the rate expected and usually realized in the locality where such property is located, upon the present value of investments in the property devoted to the public service, with due regard to the risks attending them.

Proceedings Heretofore Taken by Plaintiff to Secure a Compensatory Fare upon said Elevated Lines and to Protect from Confiscation the Property Interests of the Plaintiff and of This Defendant Therein

XXVI. A rate of fare of seven cents per passenger, on the said Manhattan Division operated by the plaintiff, constitutes no more than a just and reasonable rate of fare, and will yield no more than a fair and reasonable return upon the value of the properties actually used by it in the public service in its operation and devoted to the public service, and no more than a reasonable compensation for the service so rendered.

XXVII. (a) As a common carrier subject to the provisions of the Public Service Commission Law of the State of New York, the plaintiff therefore by action duly taken by its directors and officers, in pursuance of the authority and powers conferred by law, fixed, determined and established a fare of seven cents per passenger as the rate hereafter to be charged and collected, instead of a fare of five cents from each passenger, upon each the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the plaintiff, and accordingly filed, published and posted tariff sheets (copies of which are hereto annexed and made a part hereof, marked, respectively, Schedules H, I, J, K and L), establishing such fare of seven cents per passenger, issued February 1, 1928, and effective March 3, 1928, as follows:

I. R. T. Co. No. 2—Thirteenth Revised Sheet No. 1—Cancelling Twelfth Revised Sheet No. 1, effective January 21, 1928.

I. R. T. Co. No. 2—Original Sheet No. 2A.

[fol. 1211] I. R. T. Co. No. 2—Original Sheet No. 2B.

I. R. T. Co. No. 2—Second Revised Sheet No. 3—Cancelling First Revised Sheet No. 3, effective September 15, 1925.

I. R. T. Co. No. 2—Second Revised Sheet No. 3A—Cancelling First Revised Sheet No. 3A, effective September 15, 1925.

(b) The said Transit Commission took no action whatever rejecting the said tariff sheets, when tendered for filing, under the provisions of the regulation in Section 19,

subdivision (i) of the said order of the said Public Service Commission for the First District, in its Case No. 1670, made February 18, 1918, that, if publication is not according to the regulations prescribed by the said order, such fact might be considered by the Commission sufficient cause for rejection of schedule or sheet when tendered for filing.

(c) By virtue of the provisions of the said Public Service Commission Law, and particularly of Section 33, subdivision 1 thereof, the plaintiff, as a common carrier, is prohibited, under penalty, from charging, demanding, collecting or receiving a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges (to wit, of seven cents per passenger on the said Subway Division and seven cents per passenger on the said Manhattan Division) applicable to such transportation, as specified in its said filed tariff schedule sheets effective March 3, 1928.

The Plaintiff's Application to the Transit Commission for Immediate Relief

XXVIII. As such common carrier, the plaintiff, on February 1, 1928, duly filed an application to the said Transit Commission, under Section 29 of the Public Service Commission Law, in accordance with the well established practice of the Transit Commission and the Public Service Commission, asking that the said Transit Commission, pursuant to the powers which have been vested in it by law, approve the said Thirteenth Revised Sheet No. 1 to I. R. [fol. 1212] T. Co. No. 2, Original Sheet No. 2-A, Original Sheet No. 2-B, Second Revised Sheet No. 3, and Second Revised Sheet No. 3-A, cancelling Twelfth Revised Sheet No. 1 (effective January 21, 1928) and First Revised Sheet No. 3 and First Revised Sheet No. 3-A (effective September 15, 1925); and that it grant permission to the plaintiff to put the said tariff sheets into effect as to each the subway and the elevated divisions upon not more than five days' notice after publication at stations and filing with the Commission. Such application was based, substantially, upon the same grounds as those herein alleged concerning the five-cent rate of fare, and requested immediate relief by the Commission for the following reasons, among others:

"III. It is urgently necessary that such increased fares go into effect forthwith for the following reasons, among others:

"(1) The Interborough Company imperatively requires quick relief from its financial stringency, as appears more fully from the statements of receipts and expenditures and other pertinent facts, and for the purposes hereinafter set forth.

"(2) The Interborough Company has been suffering for some years, and now is suffering daily, from continuing confiscation of property under the maximum rate of five cents per passenger, and, by such a fare limitation upon it, the property devoted by it to the service of the public is taken for public use without just compensation; it is deprived of such property without due process of law, and it is deprived of the equal protection of the laws, all in contravention of the Constitution of the United States and the Constitution of the State of New York.

"(3) The five-cent maximum fare charged by the Interborough Company on the rapid transit lines operated by it has been for a number of years, and is now, insufficient and inadequate to provide a fair return upon the property used by it and devoted to the public service, over and above all expenses of operation, including the cost of maintenance and taxes, and is unjust and unreasonable as well as confiscatory of the property used by the Company in the public service.

"(4) The rate of return earned by it upon the property devoted by the Interborough Company to the public service, under the present fare, is not sufficient to support and maintain the credit of the Interborough Company and to enable it to raise money necessary for the proper discharge [fol. 1213] of its public duties; as, for example, to sell at a reasonable discount its long term first mortgage bonds and secure thereby capital funds for the purpose of providing for new construction and equipment on the railroad lines operated by it.

"(5) The Interborough Company requires additional revenue in order to meet reasonable and proper demands of its employees for improvement in wages and operating

conditions; to provide and insure adequate and efficient service upon the lines operated by it; to increase the expenditures for maintenance, repair and replacement of construction and equipment; to meet the fixed charges upon additional investment required for construction and equipment; to meet the practical situation produced by various orders of the Transit Commission, made or announced as in prospect, which undertake to require and compel approximately $40,000,000 of additional capital expenditures by the Interborough Rapid Transit Company, with increased fixed charges thereon, and which would impose additional operating expenses, without assurance of increased volume of business and earnings, and which could not in fact be financed or carried out at the present time under the existing five-cent fare; to make reservations for retirement or depreciation of property; to make adequate and proper provision for unliquidated accident and damage liability incident to past operation, and to create out of current revenues an effective reserve to cover such liability currently; and to assure proper provision for surplus and contingencies as provided by the Public Service Commission Law and by the Contracts and Certificates of 1913."

XXIX. Thereafter, and on February 8, 1928, the plaintiff duly filed a request in writing with the said Transit Commission for a hearing in respect to the application by the plaintiff for the approval of the schedule sheets setting forth the said increase in rate, and for the granting of the special permission prayed for by the plaintiff, which request was as follows:

[fol. 1214] "February 8, 1928.

"Honorable John F. Gilchrist, Chairman Transit Commission, 270 Madison Avenue.

Dear Sir: Some of yesterday afternoon's newspapers stated that the Transit Commission had notified the Interborough Rapid Transit Company that the Commission will hold a hearing today upon the application filed by this Company on February 1, 1928. Lest any public impression be created of default by this company in any desired appearance, I advise you that no notice of any public or other hearing upon this matter has been received by this Com-

pany. It may be that this inference of a hearing before you upon our application arose from its appearance as an item upon your calendar for today.

"In order to make our position altogether clear to you, however, I desire to inform you that representatives of this Company will be glad to appear before you in behalf of our application at any time you may appoint. The allegations of our petition are made under oath and will be supported with proof. According to the reports, the members of the Transit Commission have spent a large part of the past six days in conference with counsel for those opposing the petition then pending before you in a judicial capacity; in equal fairness now you may be willing to hear the facts and argument in support of the position, in the public manner hereinafter suggested.

"I have seen no reason suggested why our new schedules should not go into effect promptly as to our elevated lines. Commissioner Ryan of the Board of Transportation of the City of New York was publicly quoted on February first as recognizing the inadequacy of the five-cent fare on our elevated lines. Published statements of City Officials during the past six days have contained no facts or figures indicating that a five-cent fare on the subways is possibly sufficient for proper maintenance of the operating properties and the rendering of the best possible service to the public. Their statements as to our application have so far dealt mostly with a claim that, irrespective of the inadequacy of a five-cent fare and its effects on our patrons and all taxpayers and rent-payers, the City of New York should try to hold the Company to the fare stipulated in 1913. Whether such a present effect, as to any part of our subway system, is to be given to the 1913 contract, is, of course, a question of law which will have to be settled by the courts; but Sections 28 and 29 of the Public Service Commission law contain no such limitation on your jurisdiction, power and responsibility in acting upon our application and schedules as to each our elevated lines and [fol. 1215] our subway lines. The New York courts have held that a reasonable rate, higher than that stipulated by franchise or contract, may be made effective and lawful by the procedure which this Company has followed under the advice of counsel. The way must be deemed fairly open

to an adequate fare which will protect our patrons and our property; and, in the language of the United States Supreme Court (270 U. S. 587, 591-592), the Transit Commission is the 'tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation.'

"If this duty and responsibility is to be disregarded by you and action taken without consideration by you of the confiscatory character of the five-cent fare and its ruinous effects upon rapid transit service, the Interborough Company will have no recourse but to bring the indisputable facts before a tribunal which may not disclaim the power and jurisdiction which today is yours. If, however, as this Company hopes, you will definitely take jurisdiction of our rates and proceed upon any proper complaint to determine the facts which will show whether or not our filed 7-cent rate is excessive, counsel for this Company will be glad to attend before you and arrange for the presentation of our contentions and proofs in the orderly course as above suggested. If you are unwilling to do this and to face the facts as to the utter inadequacy of our present elevated and subway fares, then it will be your refusal which transfers future consideration of these fares to another tribunal. Yours also will be the clear responsibility for any public consequences of the traffic conditions made worse by your failure to grant prompt relief.

"Yours truly, J. L. Quackenbush."

Unlawful Action of the Transit Commission at its Meeting on February 14, 1928

XXX. Thereafter and after the commencement of this action, and after the filing of the bill of complaint herein on February 14th, the defendants constituting the Transit Commission convened at a special meeting and adopted a purported resolution directing its counsel to commence a summary proceeding to hinder and prevent the plaintiff, Interborough Rapid Transit Company, from establishing a compensatory rate of fare upon the elevated lines owned by this defendant, and operated by the plaintiff, and upon other rapid transit lines operated by the plaintiff, and also made a purported order rejecting the tariff sheets re-

[fol. 1216] ferred to in the complaint and duly published, posted and filed by the plaintiff in accordance with the provision of the Public Service Commission Law, for the purpose of establishing a rate of seven cents per passenger on and after March 3, 1928, subject, however, to such regulatory authority as was vested in the said Transit Commission.

Such action was taken by the said Transit Commission notwithstanding that the said tariff sheets had actually been accepted by the said Commission and had been filed by it, and been kept in its files, since February 1, 1928, and notwithstanding that the Public Service Commission Law of the State of New York, Section 16, provides that all documents and records in the possession of the said Transit Commission shall be public records. Such purported resolutions and purported order were adopted and made by the said Transit Commission ex parte and without any prior notice to the plaintiff or to this defendant, and without giving the plaintiff any opportunity to be heard in respect thereto, and were wholly unauthorized, and constituted a denial by a State agency of legislative or administrative relief, and thereby said Transit Commission has so misconstrued and misapplied the laws as to compel observance of the five-cent rate of fare and to prevent permanently a compensatory rate herein from which there is no relief available to the plaintiff or to this defendant, except by a resort to this Honorable Court; that said order is in conflict with the laws and Constitution of the State of New York and with the guaranties of the Constitution of the United States and the said proceeding so brought by the Transit Commission is wholly lacking in merit.

The direction given by the said Transit Commission to its counsel at its meeting on February 14, 1928, to commence an action or proceeding in the Supreme Court of the State of New York, was not given until after the bill of complaint in the original action had been filed in this Court and the jurisdiction of this Court had attached to the cause therein, and until after each of the defendants constituting the said Transit Commission and the defendant The City of New York had been served with the said subpoena ad respondendum.

[fol. 1217] Further Acts of the Other Defendants Calculated and Intended to Prevent the Securing of a Compensatory Rate of Fare Upon the Elevated Lines Owned by This Defendant and Operated by the Plaintiff and so to Impair and Destroy the Property Rights of This Defendant Therein

XXXI. After the original action herein had been commenced by the plaintiff and this Court had acquired jurisdiction of the subject-matter therein, as aforesaid, and after the service of the subpoena ad respondendum upon the defendants as aforesaid, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service, and the defendant The City of New York, contemporaneously undertook to bring two civil actions and a special summary civil proceeding, in the Supreme Court of the State of New York, respectively entitled as follows:

Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant;

The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant;

The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant.

XXXII. In and by the Civil Practice Act of the State of New York it is provided, in Section 218, that a civil action is commenced by the service of a summons, which is a mandate of the Court, and it has been judicially held and determined by the Courts of the State of New York that the action is commenced at the time of the service of the summons, and that an action is not begun until the summons has been served upon the defendant or the defendant has voluntarily appeared in the action.

XXXIII. The said summary proceeding and two actions brought by the defendants as aforesaid were not commenced until after the commencement of the original action

herein by the filing of the bill of complaint with this Court, [fol. 1218] and were not commenced until at or about 1.55 o'clock in the afternoon of the 14th day of February, 1928, when copies of the petition in the summary proceeding and of the summons and complaint in the two actions, in the New York State Court, were served upon the plaintiff by the delivery of copies thereof to the assistant general counsel for the plaintiff.

XXXIV. The subject matter of each the said summary proceeding and the said two actions, brought in the New York State Court by the said defendants, is comprised within the bill of complaint filed by the plaintiff in the original action in this Court, now pending before this Court undetermined, and no other matter is alleged in either of the pleadings in the said summary proceeding or the said two actions in the New York State Court. Each of the matters alleged or set forth in the said petition and the said two complaints in the New York State Court is comprised in the complaint filed by the plaintiff in the original action in this Court, either by affirmation or by negation.

XXXV. The actions brought in behalf of The City of Ney York in the New York State Court, as aforesaid were brought without any authorization by the Board of Estimate and Apportionment of The City of New York or by the legislative body of The City of New York to the Transit Commission or the Corporation Counsel, and were and are wholly unauthorized by any provision of law, and are wholly lacking in merit.

XXXVI. After the commencement of the original action in this Court, the filing of the bill of complaint, the attaching of the jurisdiction of this Court over the cause therein, and the service of the subpoena, as aforesaid, the defendants constituting the said Transit Commission and The City of New York, acting by their respective attorneys, counsel, agents, or representatives, applied to one of the Justices of the Supreme Court of the State of New York, ex parte and without any notice to the plaintiff, or to this defendant, for, and secured, orders to show cause for preliminary injunctions, which orders contained temporary restraining orders designed and intended to prevent the plaintiff herein from securing a compensatory rate of fare

upon the elevated lines owned by this defendant and operated by the plaintiff, and upon other rapid transit lines operated by the plaintiff.

In and by one order in the said summary proceeding brought by the defendants constituting the said Transit Commission, the plaintiff herein is directed to make answer [fol. 1219] to the petition and serve a copy of its answer upon the petitioner's attorney not later than February 17, 1928 (or not more than three days from the bringing of the said proceeding), and to proceed with a summary hearing to final judgment in the said proceeding on February 20, 1928, at Special Term, Part I, of the Supreme Court in and for the County of New York.

By another order in the said special summary proceeding, the plaintiff herein is directed to show cause before the said New York State Court on February 20, 1928, why an interlocutory injunction should not be granted, and the plaintiff herein is temporarily restrained pending the determination of the proceeding.

The said summary proceeding brought by the Commission is alleged to be brought under Section 57 of the Public Service Commission Law, which is a purely statutory proceeding, and restricted in scope, and there is no provision of law authorizing the granting of a preliminary injunction or a restraining order in, or in aid of, such special summary proceeding.

The orders to show cause granted in the said two actions brought by the other defendants in the New York State Court, as aforesaid, are likewise returnable before the said State Court on February 20, 1928; likewise require the plaintiff herein to show cause why an injunction pendente lite to the same effect should not be granted, and contain similar temporary restraining orders. Following the conerated by the plaintiff, and upon other rapid transit lines mencement by the plaintiff of an ancillary action, in this Honorable Court (In Equity No. E44-229), between the same parties, to protect and maintain the privacy and exclusiveness of the jurisdiction of this Honorable Court in this original action, the said motions in the New York State Court, under the said orders to show cause, have been adjourned by the said State Court, from time to time, pending a decision of a motion made by the plaintiff in

the said ancillary action to restrain the prosecution of the said State Court suits.

XXXVII. The plaintiffs in the said actions in the Courts of the State of New York, to wit, the other defendants in this action, constituting the Transit Commission and The City of New York, are wrongfully interfering with the exclusive jurisdiction and possession of this Court over the subject-matter of the said original action pending undetermined in this Court, and are unlawfully seeking to deprive this Court of its exclusive jurisdiction over the subject-matter of the said original action in this Court and over the individual defendants in said original action, and are seeking to frustrate and deprive the plaintiff herein of [fol. 1220] its constitutional right to resort to this Court for the relief contained in the complaint in the original action herein, and are thereby causing great damage to this defendant and impairing and jeopardizing its property rights in the elevated lines and the rentals therefrom, as hereinbefore set forth.

Prior Orders of the Regulatory Commissions Hindering and Preventing the Plaintiff Herein from Securing a Compensatory Rate of Fare Which Would Protect the Property Rights of This Defendant

XXXVIII. On or about March 22, 1922, the plaintiff presented to and filed with the said Transit Commission a complaint and application, verified March 22, 1922, showing that the maximum fare of five cents chargeable by it on the subway and elevated rapid transit railroads in the City of New York, including each the Subway Division and the Manhattan Division, had been for more than three years, and was then, insufficient to yield reasonable compensation for the service rendered, and had been, and was, unjust and unreasonable, and that, for the purpose of protecting and insuring safe, adequate and efficient service upon the lines operated by the plaintiff, and for the preservation of the plaintiff's system as an entity, the public interest required an immediate, reasonable, temporary increase in the existing five-cent rate of fare chargeable by the plaintiff, pending the final determination of the rate as therein prayed for. The said complaint and petition

requested that the said Transit Commission, pursuant to the powers vested in it by law, fix and determine the just and reasonable rate, fare and charge collectible by it at a figure which will yield a reasonable average return upon the property actually used by the plaintiff in the public service, and that, in the meantime, it authorize an immediate temporary increase in the rate, fare and charge collectible by the plaintiff upon such terms, conditions and safeguards as the Commission might deem proper.

Thereupon, on March 28, 1922, the said Transit Commission made an order in its Case No. 2632, directing that the said application of the plaintiff, verified March 22, 1922, be in all respects denied for lack of jurisdiction.

The said Public Service Commission for the First District and the said Transit Commission each has construed and interpreted the provisions of the said Public Service Commission Law so as to require and compel each the plaintiff and this defendant by the said orders of dismissal [fol. 1221] made by the said Commissions, respectively, to observe and charge upon the Elevated Division of the rapid transit lines a rate of fare of five cents per passenger, and no more; and, by reason of the tariff schedules theretofore published, posted and filed by the plaintiff establishing a rate of five cents per passenger on each of the said divisions of its rapid transit railroad lines, the provisions of the said Public Service Commission Law and the said orders made by the said Commission, respectively, relative to tariff schedules from which neither the plaintiff nor this defendant may deviate, and the dismissal of the said application or complaint, operated to require and compel each the plaintiff and this defendant to observe such fare of five cents per passenger and to prohibit each the plaintiff and this defendant from charging any rate of fare in excess of such rate of five cents per passenger.

Penalty Provisions of Public Service Commission Law

XXXIX. By Sections 57 and 58, respectively, of the said Public Service Commission Law, it is provided as follows:

"§ 57. Summary Proceedings—Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its

supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the [fol. 1222] facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

"§ 58. Penalties for Other Than Common Carriers.—1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the state of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or for-

feiture thereof shall be recovered in an action as provided in section twenty-four of this chapter.

"2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter, or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

"3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation."

[fol. 1223] XL. As a railroad common carrier, the plaintiff transports daily, on the average, about 1,082,245 passengers on the Manhattan Division of the railroads operated by it. The number of passengers carried by it during the year ended June 30, 1927, was 359,019,660 on the Manhattan Division. Many of such passengers are non-residents of the City of New York, or are transient visitors from other parts of the State of New York or from other States of the Union. There is no means by which the plaintiff can collect from the passengers transported by it any part of a fare charged by it unless paid in cash, or by a token issued in exchange for cash, upon or before the transportation of such passengers. If the plaintiff should make a charge to any passenger in excess of a fare of five cents without the protection of this Court, such passenger might refuse to pay such charge; and, if the plaintiff should remove such passenger who refuses to pay such charge from its cars or should refuse to admit them thereto, the plaintiff and this defendant would be subjected to a multiplicity of suits from such passengers, to compel transportation or for damages for breach of duty to transport, as

well as to prosecution for the fines and penalties prescribed by the Public Service Commission Law for failure to furnish transportation or for making a charge in excess of five cents. If the plaintiff should make a charge in excess of a fare of five cents per passenger, the aggregate of the penalties so incurred in one year would amount to enormous sums and the damage to the plaintiff would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure by the plaintiff to desist from charging a fare of more than five cents would involve a risk of confiscation of its property by reason of the enormous fines to which it would be exposed.

XLI. The Mayor of the defendant The City of New York has announced, through the public press, that the City will fight and prevent the taking effect of the said increased fares "to the last ditch," and various other officials of the defendant The City of New York have announced similar intentions and policy, by way of active steps to enforce the continuance indefinitely of the said confiscatory fare of five cents per passenger. On February 6, 1928, after conferences with various of the defendants, the Corporation Counsel of the defendant The City of New York announced that "We have fully determined what steps the City will take. They will be such as to protect the interests of the City of New York and the car riders and to maintain the five-cent fare. I am positive that the attempt of the Interborough to raise the fare will be pre-[fol. 1224] vented. The City will move at an opportune time, and that will be in a short period." The necessity that the plaintiff have relief from the present five-cent fare has several times, during 1927 and theretofore, been before the Board of Estimate and Apportionment of The City of New York, in various forms and phases, and the said Board and the members thereof have in each instance made clear their unwillingness to permit the increase, in any manner whatsoever, of the fare chargeable by the plaintiff, and have reiterated their policy and intention to refuse and deny to the plaintiff relief from its present confiscatory rate. According to the public press, the defendant members of the Transit Commission, with their special counsel, have been in daily and protracted conferences with the

various City officials whose intention to contest, obstruct and prevent the discontinuance of the said confiscatory rate; and the members of the Transit Commission and their special counsel have continued and participated in these conferences and action taken pursuant thereto, designed and intended to oppose and prevent any increase of the said five-cent fare.

As hereinabove and in the bill of complaint herein more fully shown, the enforced continuance of inadequate rates and confiscatory limitations on rates, on the said elevated lines inflict daily confiscation of the property of this defendant used in the operation thereof, as well as the property of the plaintiff, with the resulting continuous impairment of the plaintiff's ability to perform its obligations under the lease referred to in paragraph VII above, and there therefore is a daily and continuing confiscation of the property rights of this defendant in and to the elevated lines which are the subject matter of such lease and in and to the rentals accruing to it under the terms of said lease.

No Adequate Remedy Except in Equity

XLII. Your defendant is advised and believes, and, therefore, avers and claims, that there is no remedy, except in equity, to test adequately the validity of the limitation of the fare to be charged by the plaintiff to a rate of five cents per passenger or otherwise to protect from confiscation the property interest of this defendant in the elevated lines owned by it and operated by the plaintiff; and that, in the absence of such remedy in equity, this defendant would be deprived of its rights and properties without due process of law and without just compensation, and would likewise be denied the equal protection of the laws, in contravention of Section 10 of Article I of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State [fol. 1225] of New York; on which account your defendant invokes the jurisdiction of this Court, to protect it against the aforesaid threatened invasion by the other defendants hereto of its inherent rights under and guaranteed by the said Federal Constitution and the State Constitution.

Jurisdictional Allegation as to Value of Property Involved

XLIII. The value of the business and property of your defendant which is involved in this cause of action is, as hereinbefore more fully shown, greatly in excess of $3,000.

Prayer for Judgment

To the end that your defendant may have that relief which it can only obtain in a court of equity and that the other defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived, it hereby prays:

1. That it be adjudged and decreed that a maximum rate of five cents per passenger upon the Manhattan Division of the rapid transit railroad lines operated by the plaintiff, is illegal and void, because in contravention of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State of New York; and that the provisions of the said Chapter 743 of the Laws of 1894 of the State of New York, of the said Public Service Commission Law, of the said Railroad Law, of the said Rapid Transit Act, of the said other acts of the Legislature of the State of New York, of the said orders and directions of the said Public Service Commission, and the said tariff schedule published by the plaintiff prior to February 1, 1928, in so far as they prohibit, or operate to prohibit, the plaintiff or this defendant from charging or receiving for transportation of passengers a rate of fare in excess of five cents per passenger upon the said Manhattan Division of rapid transit railroad lines, or in so far as they require or compel, or operate to require or compel, the plaintiff or this defendant to charge such five-cent rate of fare, or in so far as the said Transit Commission or the said Public Service Commission have construed them so to prohibit, require or compel the plaintiff or this defendant, are each likewise illegal and void.

2. That it be adjudged and decreed that the Public Service Commission Law, as amended and supplemented, or any other provision of law, or any regulation prescribed under

[fol. 1226] any such law, or any order or direction made by the Transit Commission, or any tariff schedules published prior to February 1, 1928, in so far as they, or any of them, prohibit the plaintiff or this defendant from putting into effect forthwith a rate of fare upon the said Manhattan Division of the said rapid transit railroads such as will afford just compensation therefor, or in so far as they, or any of them, compel the plaintiff or the defendant to observe a rate of fare of not more than five cents per passenger, is likewise illegal and void.

3. That it be adjudged and decreed that your defendant has no adequate remedy at law for the injury which will result from the enforcement of said acts, orders, directions, regulations and tariff schedules, and that such injury will be irreparable.

4. That it be adjudged and decreed that your defendant be granted injunctions, both temporary and permanent, against the other defendants constituting the said Transit Commission, and The City of New York, and their successors, restraining them and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions, regulations or tariff schedules, or of either of them, or of any other provision of any law:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff or this defendant a rate of fare for the transportation of passengers upon the Manhattan Division of the said rapid transit railroad lines of not more than five cents per passenger, under the provisions of said acts, orders, directions, or tariff schedules, or otherwise;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, or tariff schedules, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff or this defendant from charging for the transportation of passengers on its rapid transit railroad lines, or upon the said Manhattan Division, a fare per passenger in excess of five cents;

(3) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, against the plaintiff or this de-
[fol. 1227] fendant; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff or this defendant with the provisions of the said acts, orders, regulations or tariff schedules, or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the charging of a rate of fare of seven cents per passenger, upon the said Manhattan Division of the said rapid transit railroads;

(4) From doing any act or thing interfering with the right or authority of the plaintiff or this defendant forthwith to charge or receive for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroad lines, any rate which the plaintiff or this defendant may lawfully charge or receive; any provisions of said acts, orders, regulations or tariff schedules, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

5. That the rights of the parties hereto in the premises be declared and adjudged by appropriate decree.

6. That your defendant may have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

Manhattan Railway Company, by James F. Hughes, Vice-President. Murray, Aldrich & Roberts, Solicitors for the Defendant Manhattan Railway Company, 37 Wall Street, Borough of Manhattan, New York City. William Roberts, of Counsel.

[fol. 1228] City and County of New York,
Southern District of New York, ss:

James F. Hughes, being duly sworn, deposes and says that he is the Vice-President of the Manhattan Railway Company, one of the defendants named in the above-entitled answer and cross-petition; that he has read the

foregoing answer and cross-petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The defendant Manhattan Railway Company is a corporation organized and existing under the laws of the State of New York.

James F. Hughes.

Sworn to before me this 29th day of February, 1928. Elita M. Hyde, Notary Public, New York County, No. 535. Comm. expires March 30, 1929.

[fol. 1229]

SCHEDULE "A"

Year Ended June 30, 1921

Manhattan Division

Gross Income		$3,768,565 27
Less		
Manhattan Cash Rental	$35,000 00	
Amortization of Debt Discount and Expense	853 22	
Interest on Unfunded Debt	124,602 68	
Other Rent Deductions	483,550 02	
Excess Maintenance	524,243 37	
Total		$1,168,249 29
Balance		$2,600,315 98
Additional Manhattan Income Taxes		579,504 02
Available for Charges on Company Property		$2,020,811 96
Charges:		
Interest on Bonds (Rental)	$1,808,232 67	
Manhattan Dividend Rental	4,200,000 00	
Interest on 5% Bonds	1,354,992 86	
Interest on 7% Notes	886,606 71	
Sinking Fund on 5% Bonds	469,021 69	
Total		$8,718,934 03
Balance After Actual Maintenance	(D)	$6,118,618 04
Deduct Additional Manhattan Income Taxes		579,504 02
Balance After Actual Maintenance and Additional Manhattan Income Taxes	(D)	$6,698,122 07
Passengers carried		374,293,051

D—Debit.

[fol. 1230] SCHEDULE "B"

Year Ended June 30, 1922

Manhattan Division

Gross Income		$4,705,567.27
Less:		
Manhattan Cash Rental	$35,000.00	
Amortization of Debt Discount and Expense	839.57	
Interest on Unfunded Debt	215,487.67	
Other Rent Deductions	336,790.58	
Excess Maintenance	522,654.16	
Total		$1,110,771.98
Balance		$3,594,795.29
Additional Manhattan Income Taxes		582,356.51
Available for Charges on Company Property		$3,012,438.78
Charges:		
Interest on Bonds (Rental)	$1,808,240.00	
Manhattan Dividend Rental	4,200,000.00	
Interest on 5% Bonds	1,394,492.91	
Interest on 7% Notes	1,013,122.08	
Sinking Fund on 5% Bonds	480,979.29	
Total		$8,896,834.28
Balance After Actual Maintenance	(D.)	$5,902,038.99
Deduct Additional Manhattan Income Taxes		582,356.51
Balance After Actual Maintenance and Additional Manhattan Income Taxes	(D.)	$5,884,395.50
Passengers carried		348,517,216

D—Deficit.

[fol. 1231] SCHEDULE "C"

Year Ended June 30, 1923

Manhattan Division

Gross Income		$4,647,353.94
Less:		
Manhattan Cash Rental	$50,000.00	
Interest on Unfunded Debt	105,586.61	
Other Rent Deductions	269,293.88	
Excess Maintenance	584,820.41	
Total		$1,009,700.90
Balance		$3,637,653.04
Additional Manhattan Income Taxes		424,126.81
Available for Charges on Company Property		$3,213,526.23
Charges:		
Interest on Bonds (Rental)	$1,808,240.00	
Manhattan Dividend Rental	1,710,000.00	
Interest on 5% Bonds	1,403,267.18	
Interest on 7% Notes	936,680.69	
Sinking Fund on 5% Bonds	496,389.76	
Interest on 6% Notes	2,545.50	
Total		$6,357,123.13

Balance After Actual Maintenance	(D.)	$2,719,470 69
Deduct Additional Manhattan Income Taxes		424,126 81
Balance After Actual Maintenance and Additional Manhattan Income Taxes	(D.)	$3,143,596 90
Passengers carried		348,524,700

D—Deficit.

[fol. 1232] SCHEDULE "D"

Year Ended June 30, 1924

Manhattan Division

Gross Income		$5,412,361 73
Less:		
Manhattan Cash Rental	$50,000 00	
Interest on Unfunded Debt	68,726 26	
Other Rent Deductions	238,485 27	
Excess Maintenance	1,305,487 15	
Total		$1,662,698 68
Balance		$3,749,663 05
Additional Manhattan Income Taxes		163,205 16
Available for Charges on Company Property		$3,586,457 89
Charges:		
Interest on Bonds (Rental)	$1,808,240 00	
Manhattan Dividend Rental	2,723,877 00	
Interest on 5% Bonds	1,438,169 21	
Interest on 7% Notes	954,919 96	
Sinking Fund on 5% Bonds	524,471 75	
Interest on 6% Notes	18,270 67	
Total		$7,467,948 59
Balance After Actual Maintenance	(D.)	$3,718,285 54
Deduct Additional Manhattan Income Taxes		163,205 16
Balance After Actual Maintenance and Additional Manhattan Income Taxes	(D.)	$3,881,490 70
Passengers carried		359,410,056

D—Deficit.

[fol. 1233] SCHEDULE "E"

Year Ended June 30, 1925

Manhattan Division

Gross Income		$5,094,860 61
Less:		
Manhattan Cash Rental	$50,000 00	
Interest on Unfunded Debt	21,529 10	
Other Rent Deductions	216,605 45	
Excess Maintenance	1,352,713 83	
Total		$1,640,848 38
Balance		$3,454,012 23
Additional Manhattan Income Taxes		
Available for Charges on Company Property		$3,454,012 23

Charges:		
Interest on Bonds (Rental)	$1,808,240 00	
Manhattan Dividend Rental	3,065,310 00	
Interest on 5% Bonds	1,442,138 87	
Interest on 7% Notes	1,084,361 70	
Sinking Fund on 5% Bonds	570,995 37	
Interest on 6% Notes	16,724 24	
Total		$7,987,770.18
Balance After Actual Maintenance	(D.)	$4,533,757.95
Passengers carried		352,723,553

[fol. 1234]

SCHEDULE "F"

Year Ended June 30, 1926

Manhattan Division

Gross Income		$5,410,969.19
Less:		
Manhattan Cash Rental	$50,000 00	
Interest on Unfunded Debt	27,771 92	
Other Rent Deductions	240,453 27	
Excess Maintenance	1,156,347 50	
Total		$1,474,572.69
Balance		$3,936,396.50
Additional Manhattan Income Taxes		
Available for Charges on Company Property		$3,936,396.50
Charges:		
Interest on Bonds (Rental)	$1,808,240 00	
Manhattan Dividend Rental	3,066,486 00	
Interest on 5% Bonds	1,445,243 54	
Interest on 7% Notes	1,088,456 20	
Sinking Fund on 5% Bonds	631,949 12	
Interest on 6% Notes	21,899 99	
Interest on Equipment Trust Certificates		
Total		$8,062,274.85
Balance After Actual Maintenance	(D.)	$4,125,878.35
Passengers carried		346,204,574

D—Deficit.

[fol. 1235]

SCHEDULE "G"

Year Ended June 30, 1927

Manhattan Division

Gross Income		$5,035,275 70
Less:		
Manhattan Cash Rental	$50,000 00	
Interest on Unfunded Debt	17,482 43	
Other Rent Deductions	228,717 91	
Excess Maintenance	1,570,287 08	
Total		$1,866,487 42
Balance		$3,168,788 28
Additional Manhattan Income Taxes		
Available for Charges on Company Property		$3,168,788 28
Charges:		
Interest on Bonds (Rental)	$1,808,240 00	
Manhattan Dividend Rental	3,086,756 00	
Interest on 5% Bonds	1,457,150 47	
Interest on 7% Notes	1,082,562 93	
Sinking Fund on 5% Bonds	611,809 92	
Interest on 6% Notes	31,389 62	
Total		$8,077,917 94
Balance After Actual Maintenance		(D) $4,909,129 66
Passengers carried		359,019,960

D—Debit.

SCHEDULE "H"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Thirteenth Revised Sheet No. 1

Cancelling Twelfth Revised Sheet No. 1. Effective January 21, 1928

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Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manger, 165 Broadway, New York City, N. Y.

[fol. 1237] SCHEDULE "I"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Original Sheet No. 2A

Standard Rates, Terms and Conditions of Service

(1) Rates of Fare

On routes of Subway Division 7 cents. Between any two stations of the same division, or between a station of one division and a station of the other division as provided in the "Transfer Points."

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fol. 1238] SCHEDULE "J"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Original Sheet No. 2B

Standard Rates, Terms and Conditions of Service (Continued)

(1) Rates of Fare (Continued)

On routes of Manhattan Division 7 cents. Between any two stations of the same division, or between a station of one division and a station of the other division as provided in the "Transfer Points."

Issued February 1, 1928. Effective March 3, 1928.
Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.
Issued on account of change in rate of fare from 5 cents to 7 cents.
Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fol. 1239] SCHEDULE "K"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Second Revised Sheet No. 3, Cancelling First Revised Sheet No. 3. Effective September 15, 1925

Standard Rates, Terms and Conditions of Service (Continued)

(2) Regulations as to the Issuance and Acceptance of Transfers

(a) Passengers must transfer at transfer points and board first car or train passing in the direction indicated.

(b) Transfers are good for a continuous trip only in the same general direction indicated, if presented before time cancelled at intersection of issuing line and on the date issued.

(c) Transfers which are mutilated or punched for more than one time limit will not be accepted.

(d) Transfers are good to any line named on the transfers at intersection of issuing line.

(3) Regulations as to Baggage and Bundles

Agents and gatemen will not allow passengers to enter a station with dogs, bulky baskets or bundles but only with ordinary hand satchels and such parcels as they can con-

veniently carry on their laps or under the seats without inconvenience to other passengers. Inflammable material must not be carried into the station or upon cars.

Section 302 of the Sanitary Code prohibits all persons from carrying or conveying upon or in any passenger car, except upon or on the front platform thereof, any soiled or dirty articles of clothing or bedding. Agents will see that it is enforced under penalty of arrest.

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fol. 1240] SCHEDULE "L"

I. R. T. Co. No. 2

Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Second Revised Sheet No. 3A, Cancelling First Revised Sheet No. 3A. Effective September 15, 1925

(4) Regulations as to Newspapers

Bundles of newspapers will not be allowed on station platform and will not be carried on the trains of the Subway and Elevated Division between the hours of 7.00 and 10.00 A. M. and 4.00 and 7.00 P. M., except under the following conditions:

1st. Each bundle of newspapers to contain not more than enough papers to make a package 18 inches long by 12 inches wide by aproximately 15 inches thick.

2nd. Each bundle is to be supplied with a strap and handle by which it can be conveniently carried in one hand.

3rd. One carrier with two of these bundles, one carried in each hand, will be allowed to enter the station, and pass

by the turnstile after depositing one fare for himself and one fare for the two bundles.

4th. Not more than one carrier in charge of two such bundles will be permitted to ride on the front platform of the rear car in each train and another carrier with two bundles permitted to ride on the rear platform of the car next to the rear car.

5th. Not more than two carriers and four such bundles shall be allowed on any train within the hours specified.

6th. The bundles are to be deposited on the car platform at the points indicated by the Guards and are to be carried off the train with one bundle in each hand.

7th. No sorting, separating or wrapping of papers will be permitted on the cars.

8th. Throwing of bundles or packages of paper from trains is strictly prohibited and offenders will be liable to arrest.

9th. In depositing bundles or packages on station platform they must be so placed that passengers entering or leaving the car cannot stumble or fall over them.

At hours other than those mentioned the maximum size bundle permitted shall not exceed 18 inches long by 12 [fol. 1241] inches wide by 36 inches high. One carrier is permitted to have charge of not more than two bundles when passing through the station or riding upon the car, and one fare will be collected for each bundle over 18 inches high and one fare for the caretaker.

(5) Other Matters

(a) Children to the number of three (3), five years of age or under, will be carried free when accompanied by an adult.

(b) New York City Policemen and Firemen and officers of either department in full uniform, or upon presentation of badge while in civilian clothes, will be carried free. Fire Prevention bureau representatives in full uniform will be carried free. Representatives of the Transit Com-

mission, and the Board of Transportation upon presentation of badge and identification card will be carried free.

Issued February 1, 1928. Effective March 3, 1928.

Issued under Order of Public Service Commission, First District, State of New York, Case No. 1670. Modifying Order of date February 18, 1918.

Issued on account of change in rate of fare from 5 cents to 7 cents.

Issued by Frank Hedley, President & General Manager, 165 Broadway, New York City, N. Y.

[fol. 1242] In United States District Court

[Titles omitted]

Application in Behalf of Defendant Manhattan Railway Company for Interlocutory Injunction and Restraining Order, Order to Show Cause and Affidavits in Support of Application.

Received March 9, 1928

[fol. 1243] Order to Show Cause

The application of the defendant Manhattan Railway Company for the issuance of an interlocutory injunction in this action having been presented to me, and the papers submitted in behalf of the application being filed herein; it is

Ordered, that said application be heard before the Court constituted in the manner prescribed by Section 380 of the Judicial Code of the Code of Laws of the United States (formerly Section 266 of the Judicial Code, as amended), on the 15th day of March, 1928, at 2:30 o'clock in the afternoon of that date, at the Court House, in the United States Post Office Building, in the Borough of Manhattan, City and State of New York, and that the plaintiff and the defendants other than the Manhattan Railway Company, and each of them, at such time and place Show Cause:

1. Why an order should not be made herein enjoining and restraining, pending the final decree in this action and until

the further order of this Court, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the [fol. 1244] State of New York, and the defendant The City of New York, and their officers, agents, servants and employes, and any and every person acting or attempting to act under and by virtue of the authority of the acts of Legislature of the State of New York, orders, directions, regulations or tariff schedules, or either of them, or of any other provision of law, referred to in the complaint herein:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff or the defendant Manhattan Railway Company a rate of fare for the transportation of passengers upon the Manhattan Division of the rapid transit railroads of not more than five cents per passenger, under the provisions of said acts, orders, directions, or tariff schedules, or otherwise;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff or the defendant Manhattan Railway Company the provisions of the said acts, orders, directions, or tariff schedules, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff or this defendant from charging for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroads a fare per passenger in excess of five cents;

(3) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, or the said orders or directions, against the plaintiff or this defendant; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff or this defendant with the provisions of the said acts, orders, regulations or tariff schedules, or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the charging of a rate of fare of seven cents per passenger, upon the said Manhattan Division of the said rapid transit railroads;

(4) From doing any act or thing interfering with the right or authority of the plaintiff or this defendant forthwith to charge or receive for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroads, any rate which the plaintiff or this defendant may lawfully charge or receive; any provisions of said acts, orders, regulations or tariff schedules, relative to [fol. 1245] the rate to be charged and received by the plaintiff to the contrary notwithstanding.

II. Why an order should not be made herein temporarily restraining the said defendants and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employes, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions or tariff schedules, or either of them, or of any other provision of law, until the hearing and determination of the application for an interlocutory injunction herein, from doing all or any of the acts hereinabove described.

III. And for such other and further relief as to the Court shall seem just and proper in the premises.

Further ordered, that any answering affidavits of any of the parties be served upon the solicitors for the defendant Manhattan Railway Company at least two days before the return day of this application; and that the defendant Manhattan Railway Company have leave to serve upon the other parties further or additional affidavits or pleading in support of the application on or before the day of the argument of this application, or at such time as may be fixed by the Court; and it is

Further ordered, that a copy of this order be served at least five days before the date mentioned herein upon the Governor of the State of New York; upon the Attorney General of the State of New York, and upon the other parties in this suit, or upon their respective solicitors.

Dated New York City, in the Southern District of New York, March 9th, 1928.

Wm. Bondy, United States District Judge.

[fol. 1246] APPLICATION BY DEFENDANT MANHATTAN RAILWAY COMPANY FOR PRELIMINARY INJUNCTION AND TEMPORARY STAY

To the Honorable the District Court of the United States for the Southern District of New York:

Upon the answer and cross-petition of the defendant Manhattan Railway Company, verified February 29, 1928, and filed herein; the annexed affidavits of James F. Hughes and William Roberts, each verified March 8, 1928; the complaint filed herein, verified February 14, 1928; the subpoena ad respondendum issued thereon; the amended and supplemental complaint filed herein, verified March 3, 1928; the application of the plaintiff filed herein, verified February 25, 1928; the affidavits annexed to the said application; any further pleadings or papers which may be filed herein, and all the papers and proceedings filed or had herein or in connection herewith;

[fol. 1247] The defendant Manhattan Railway Company hereby makes application—

1. For an order enjoining and restraining, pending the final decree in this action and until the further order of this Court, the defendant John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, and the defendant The City of New York, and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employes, and any and every person acting or attempting to act under and by virtue of the authority of the acts of Legislature of the State of New York, orders, directions, regulations or tariff schedules, or either of them, or of any other provision of law, referred to in the complaint herein:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff or this defendant a rate of fare for the transportation of passengers upon the Manhattan Division of the rapid transit railroads of not more than five cents per passenger, under the provisions of said acts, orders, directions, or tariff schedules, or otherwise;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff or the defendant Manhattan Railway Company the provisions of the said acts, orders, directions, or tariff schedules, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff or this defendant from charging for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroads, a fare per passenger in excess of five cents;

(3) From bringing and/or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, against the plaintiff or this defendant; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff or this defendant [fol. 1248] with the provisions of the said acts, orders, regulations or tariff schedules, or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the charging of a rate of fare of seven cents per passenger, upon the said Manhattan Division of the said rapid transit railroads;

(4) From doing any act or thing interfering with the right or authority of the plaintiff or this defendant forthwith to charge or receive for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroads, any rate which the plaintiff or this defendant may lawfully charge or receive; any provisions of said acts, orders, regulations or tariff schedules, relative to the rate to be charged and received by the plaintiff to the contrary notwithstanding.

II. And, in view of the fact that irreparable loss and damage will result to the defendant Manhattan Railway Company unless a temporary restraining order is granted herein, for a temporary restraining order against the said defendants and their successors, and each of them, and their respective privies, and each of their officers, agents, servants and employes, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions or tariff schedules, or either of them,

or of any other provision of law, until the hearing and determination of the application for an interlocutory injunction herein, from doing all or any of the acts hereinabove described.

III. And for such other and further relief as to the Court shall seem just and proper in the premises.

The defendant Manhattan Railway Company also prays that the Judge to whom this application may be presented call to his assistance to hear and determine this application two other Judges or Justices, in accordance with the provision of Section 380 of the Judicial Code of the Code of Laws of the United States (formerly Section 266 of the Judicial Code, as amended), and expedite the hearing of this application, and set the same for hearing simultaneously with the hearing upon the application of the plaintiff herein for an interlocutory injunction; and this defendant prays for [fol. 1249] such other and further relief as to the Court may seem just and proper in the premises; for all of which no previous application has been made to any other Court or Judge.

New York City, March 8, 1928.

Manhattan Railway Company, by James F. Hughes, Vice-President. Murray, Aldrich & Roberts, Solicitors for Defendant Manhattan Railway Company, No. 37 Wall Street, Borough of Manhattan, City of New York. William Roberts, of Counsel.

[fol. 1250] *Duly sworn to by James F. Hughes. Jurat omitted in printing.*

[fol. 1251] AFFIDAVIT IN BEHALF OF MANHATTAN RAILWAY COMPANY JOINING IN MOTION FOR INJUNCTION PENDENTE LITE

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

WILLIAM ROBERTS, being duly sworn, deposes and says:

1. I am a member of the firm of Murray, Aldrich & Roberts, solicitors for the defendant Manhattan Railway Com-

pany, and am in charge of this litigation in behalf of that defendant.

2. On February 29, 1928, the defendant Manhattan Railway Company caused to be filed its answer and cross-petition in this action, verified February 29, 1928, with the Clerk of the United States District Court for the Southern District of New York, and on the same day caused to be served upon the plaintiff, and each of the other defendants parties to this action a copy of such answer and cross-petition.

[fol. 1252] 3. The answer and cross-petition of the defendant Manhattan Railway Company shows the various statutory provisions which limit the rate of fare chargeable on the elevated railroad lines of the Manhattan Railway Company, comprised within the Manhattan Division of the rapid transit railroads operated by the plaintiff; the interest of the plaintiff in the earnings from the operation of the elevated railroads, by virtue of the lease arrangement between this defendant and the plaintiff, the fiscal results of the operation by the plaintiff of such elevated lines at a fare of five cents per passenger, and the confiscatory effect of the present rate limitations upon the property rights of this defendant.

The answer and cross-petition of this defendant prays for judgment that the five-cent fare limitation, and the various legislative acts, orders, regulations and tariff schedules which impose, or operate to impose, such fare limitation, be declared illegal and void because in contravention of the guarantees of the Federal and State Constitutions, and that their enforcement be accordingly enjoined.

For a more particular statement of the facts, I respectfully refer to the verified answer and cross-petition of the defendant Manhattan Railway Company and to the bill of complaint, and the amended and supplemental bill of complaint, and the affidavits submitted in behalf of the plaintiff in support of the pending motion, as well as to the annexed affidavit of James F. Hughes, vice-president of the Manhattan Railway Company.

4. The defendant Manhattan Railway Company, respectfully joins in the application of the plaintiff for an inter-

locutory injunction, and prays that such injunction be also granted in favor of the defendant Manhattan Railway Company pendente lite, applicable to the Manhattan Division (elevated lines) operated by the plaintiff and devoted to the public service.

No previous application for the annexed proposed order upon such application by this defendant has been made to any other Court or Judge.

William Roberts.

Sworn to before me this 8th day of March, 1928.
Elita M. Hyde, Notary Public, New York County
No. 535. Commission expires March 30, 1929.

[fol. 1253] Affidavit in Behalf of Defendant Manhattan Railway Company Joining in Motion for Injunction Pendente Lite

James F. Hughes, being duly sworn, deposes and says:

1. I am the vice-president of the Manhattan Railway Company, one of the defendants in this action.

I am familiar with the matters set forth in the verified bill of complaint herein, the verified amended and supplemental bill of complaint, the verified answer and cross-petition of the defendant Manhattan Railway Company, and the affidavits mentioned in and annexed to the plaintiff's verified application for an interlocutory injunction dated February 25, 1928, in so far as such matters pertain to or affect the elevated railroad properties owned by the Manhattan Railway Company and leased by it to the Interborough Rapid Transit Company, and the operation and use of such properties by the plaintiff for the [fol. 1254] service of the public in the transportation of passengers upon the rapid transit railroads described in the pleadings and affidavits just referred to. The elevated railroad properties of the Manhattan Railway Company are comprised within the Manhattan Division operated by the plaintiff.

2. As shown by the answer and cross-petition of this defendant, out of the properties of the Manhattan Division

of the plaintiff, having a present value, in 1927, of at least $208,873,038, the property provided by this defendant represents a value of at least $142,894,000. (Answer and Cross-petition, Manhattan Railway Company, par. XXIV, fols. 77-78.)

The facts as to the corporate history and present capital structure of this defendant are set forth in paragraph marked "VI" of its answer and cross-petition.

The facts as to the interest of this defendant in this action arising from the lease of the elevated railroads to the plaintiff are set forth in paragraphs marked "VII," "VIII" and "IX" of its answer and cross-petition.

The various statutory provisions applicable or pertinent to the fare upon the elevated railroads owned by this defendant and leased to the plaintiff, and particularly Chapter 743 of the Laws of 1894 of the State of New York prescribing a maximum five cent fare for the elevated railroad lines, are set forth in the paragraphs marked "X" to "XV," both inclusive, of its answer and cross-petition.

The conditions which render the five cent fare inadequate, unreasonable, confiscatory and invalid as to the elevated lines owned by this defendant and operated by the plaintiff, are set forth in the paragraphs marked "XXI" to "XXV," both inclusive, of its answer and cross-petition.

The facts as to the orders of the regulatory commissions operating to impose a five cent fare upon the elevated railroad lines, and the proceedings heretofore taken before such commissions, in 1920, 1922 and 1928, to secure a compensatory fare upon the elevated railroad lines and to protect from confiscation the property interests of this defendant therein, are set forth in the paragraphs marked "XVI" and "XXVI" to "XXX," both inclusive, and "XXXVIII" of its answer and cross-petition.

The facts as to the further acts of the defendant public authorities calculated and intended to prevent the securing of a compensatory rate of fare upon the elevated lines owned by this defendant and operated by the plaintiff and so to impair and destroy the property rights of this de- [fol. 1255] fendant therein, are set forth in the paragraphs marked "XXXI" to "XXXVII," both inclusive, of its answer and cross-petition.

The further facts as to the threatened injury to this defendant by reason of the enforcement of the five cent fare limitation and of interference with the charging of a fare of seven cents or other fare in excess of five cents, are set forth in the paragraphs marked "XXXIX" to "XLII," both inclusive, of its answer and cross-petition.

3. The defendant Manhattan Railway Company has not entered into any contract stipulating a fare of five cents per passenger on the elevated lines owned by it.

On the contrary, various State statutes, from 1867 to 1881, authorized and provided for maximum rates upon elevated lines now owned by the plaintiff in excess of five cents per passenger, and Chapter 855 of the laws of 1868 provided that the performance of the acts therein required by this defendant's predecessor "shall constitute an agreement in the nature of a contract between said City and Constructing Company [the grantee], entitling the latter or its successors to the privileges and rates of fare heretofore or herein legalized, which shall not be changed without the mutual consent of the parties thereto as aforesaid" (Answer and cross-petition of defendant Manhattan Railway Company, Par. X, fol. 23).

Notwithstanding the previous statutory authorizations for the charging of rates in excess of five cents per passenger upon elevated lines now owned by the plaintiff, the Legislature of the State of New York, by Chapter 743 of the Laws of 1894, entitled "An Act to facilitate travel upon elevated railroads in the City of New York," prescribed a five-cent maximum rate of fare upon the elevated railroad lines of this defendant.

4. The answer and cross-petition of this defendant sets forth the lease arrangement between the plaintiff and the defendant and the obligation resting upon the defendant The City of New York in respect of the elevated railroad properties constituting part of the rapid transit railroad system (Par. VIII), and then shows (Par. IX):

"IX. The fulfillment by the plaintiff Interborough Rapid Transit Company, of its obligation arising under the lease referred to in paragraph VII of this answer, to make to the defendant Manhattan Railway Company the sub-

stantial payments specified in paragraph VIII of this answer, is dependent upon and, under the Interborough-Man-
[fol. 1256] hattan Readjustment Plan of 1922, referred to above, such payments are in part measured by, and the amount of the net earnings to be applied to the dividend rental are limited by the ability of said plaintiff Interborough Rapid Transit Company to earn a reasonable return from the operations of the elevated lines so leased by the defendant Manhattan Railway Company to the plaintiff Interborough Rapid Transit Company, and upon other rapid transit lines now operated by the plaintiff Interborough Rapid Transit Company. The defendant Manhattan Railway Company has other claims against the plaintiff Interborough Rapid Transit Company, arising by reason of certain reversionary interests vested in it, in the subject matter of the lease referred to in paragraph VII of this answer. The defendant Manhattan Railway Company is informed and believes that by reason of the facts and conditions hereinafter and in the bill of complaint in this cause alleged and set forth, the plaintiff Interborough Rapid Transit Company has been injured and impaired in its rights and properties and in its operation of its properties, including the elevated lines so leased by the defendant Manhattan Railway Company to the plaintiff Interborough Rapid Transit Company, and that by reason of said facts, conditions, injuries and impairments, the plaintiff Interborough Rapid Transit Company has been, is, and will be hindered and prevented from fully and faithfully discharging its financial and other obligations to the defendant Manhattan Railway Company, arising under and by virtue of said lease referred to in paragraph VII of this answer. That by reason of said facts, conditions, injuries and impairments, the plaintiff Interborough Rapid Transit Company has defaulted, from time to time, in the payments of large sums of money due to the defendant Manhattan Railway Company under and by reason of said lease, and that the rights and interests of the defendant Manhattan Railway Company in and to the property which is the subject matter of the lease referred to in paragraph VII of this answer, and in and to the rentals, net earnings, rights and other payments to accrue under said lease, have been, are and will continue to be imperiled and placed in

jeopardy by said facts, conditions, injuries and impairments, and that the defendant, Manhattan Railway Company, has been caused to suffer, still suffers and will continue to suffer large losses and damages thereby, for which [fol. 1257] it has or can have no adequate remedy or relief in any action or proceeding at law."

5. The prayer for judgment of the defendant Manhattan Railway Company, as set forth in its answer and cross-petition, is as follows:

"1. That it be adjudged and decreed that a maximum rate of five cents per passenger upon the Manhattan Division of the rapid transit railroad lines operated by the plaintiff, is illegal and void, because in contravention of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article 1 of the Constitution of the State of New York; and that the provisions of the said Chapter 743 of the Laws of 1894 of the State of New York, of the said Public Service Commission Law, of the said Railroad Law, of the said Rapid Transit Act, of the said other acts of the Legislature of the State of New York, of the said orders and directions of the said Public Service Commission, and the said tariff schedule published by the plaintiff prior to February 1, 1928, in so far as they prohibit, or operate to prohibit, the plaintiff or this defendant from charging or receiving for transportation of passengers a rate of fare in excess of five cents per passenger upon the said Manhattan Division of rapid transit railroad lines, or in so far as they require or compel, or operate to require or compel, the plaintiff or this defendant to charge such five-cent rate of fare, or in so far as the said Transit Commission or the said Public Service Commission have construed them so to prohibit, require or compel the plaintiff or this defendant, are each likewise illegal and void.

"2. That it be adjudged and decreed that the Public Service Commission Law, as amended and supplemented, or any other provision of law, or any regulation prescribed under any such law, or any order or direction made by the Transit Commission, or any tariff schedules published prior to February 1, 1928, in so far as they, or any of them,

prohibit the plaintiff or this defendant from putting into effect forthwith a rate of fare upon the said Manhattan Division of the said rapid transit railroads such as will afford just compensation therefor, or in so far as they, or any of them, compel the plaintiff or the defendant to observe a rate of fare of not more than five cents per passenger is likewise illegal and void.

[fol. 1258] "3. That it be adjudged and decreed that your defendant has no adequate remedy at law for the injury which will result from the enforcement of said acts, orders, directions, regulations and tariff schedules, and that such injury will be irreparable.

"4. That it be adjudged and decreed that your defendant be granted injunctions, both temporary and permanent, against the other defendants constituting the said Transit Commission, and The City of New York, and their successors, restraining them and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts, orders, directions, regulations or tariff schedules, or of either of them, or of any other provision of any law:

(1) From in any way enforcing, or attempting to enforce, against the plaintiff or this defendant a rate of fare for the transportation of passengers upon the Manhattan Division of the said rapid transit railroad lines of not more than five cents per passenger, under the provisions of said acts, orders, directions, or tariff schedules, or otherwise;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, or tariff schedules, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff or this defendant from charging for the transporation of passengers on its rapid transit railroad lines, or upon the said Manhattan Division, a fare per passenger in excess of five cents;

(3) From bringing and or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under

the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, against the plaintiff or this defendant; or by mandamus, injunctions, summary proceeding, or otherwise to compel compliance by the plaintiff or this defendant with the provisions of the said acts, orders, regulations or tariff schedules, or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger, or prohibit the charging of a rate of fare of seven cents per passenger, upon the [fol. 1259] said Manhattan Division of the said rapid transit railroads

(4) From doing any act or thing interfering with the right or authority of the plaintiff or this defendant forthwith to charge or receive for the transportation of passengers upon the said Manhattan Division of the said rapid transit railroad lines, any rate which the plaintiff or this defendant may lawfully charge or receive; any provisions of said acts, orders, regulations or tariff schedules, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

"5. That the rights of the parties hereto in the premises be declared and adjudged by appropriate decree.

"6. That your defendant may have such other, further or different relief as to the Court may seem meet and the nature of the case may require."

6. In view of the facts shown in the verified pleadings and the affidavits above referred to, the defendant Manhattan Railway Company respectfully joins in the application of the plaintiff to the extent of asking this Court to grant relief to the defendant Manhattan Railway Company, as well as to the plaintiff, by way of an interlocutory injunction, pendente lite, and a temporary restraining order, as prayed for in the defendant Manhattan Railway Company's answer and cross petition.

James F. Hughes.

Sworn to before me this 8th day of March, 1928. Elita M. Hyde, Notary Public, New York County, Certificate No. 535. Commission expires March 30, 1929.

[fol. 1260] In United States District Court

(Title omitted)

Affidavits on Behalf of Defendants City of New York and Transit Commission in Opposition to Motion of Defendant Manhattan Railway Company Before Statutory Court for Interlocutory Injunction

[fol. 1261] State of New York,
County of New York,
Southern District of New York, ss:

George P. Nicholson, being duly sworn, deposes and says:

I am Corporation Counsel of the City of New York, one of the defendants in the above entitled action. I have read the Answer and Cross-Petition of the defendant, Manhattan Railway Company verified February 29th, 1928, the petition verified March 8th, 1928, and the affidavits of William Roberts and James F. Hughes, both sworn to on March 8th, 1928, in support of the application and motion herein. The City of New York appears specially on this [fol. 1262] application and motion to challenge the jurisdiction of the Court with respect to the subject matter of this action.

The grounds of such challenge are the same as those alleged with respect to the application for injunction and stay by the plaintiff Interborough Rapid Transit Company. They may be summarized as follows:

1. That the said answer and cross-petition upon which this application and motion are based does not set forth a good cause of action within the scope of Article XIV of the United States Constitution.

2. That the Supreme Court of the State of New York has acquired prior jurisdiction over the subject matter of this action in two actions and a proceeding instituted in that Court by the defendant, City of New York and Transit Commission on February 14, 1928.

3. That the provisions of Section 380 of the United States Code (Section 266, Judicial Code) prohibit the

grant of a stay or injunction in any Court of the United States to restrain the execution of a statute or an order where a suit shall have been brought in a Court of the State having jurisdiction thereon to enforce said statute or order in which suit in the State Court a stay has been granted pending the determination of such suit by that Court.

4. That the beginning and pendency of the actions and special proceeding in the State Court automatically stays this action.

Before discussing the matters above set forth, I would call the attention of the Court to the situation of the defendant Manhattan Railway Company in this action.

The defendant Manhattan Railway Company has no right or standing in this Court to apply for an interlocutory injunction.
[fol. 1263] I urge that whatever the fare chargeable by plaintiff and however it may have been fixed, the defendant Manhattan Railway Company has no right or standing in this court to challenge the validity of that fare for the reason:

(1) That the said defendant is not an operating railroad company.

(2) That it divested itself for a period of 999 years of the control, management and operation of its railroad lines, by a voluntary agreement or lease made between it and the plaintiff in 1903 in consideration of the payment to said defendant of certain rentals.

(3) That in and by virtue of the covenants of said lease, the plaintiff agreed to deposit with the Guaranty Trust Company of New York, as Trustee, the sum of four million dollars as a guarantee for the performance by it of each and every covenant and agreement contained in the lease.

(4) That if the said plaintiff as lessee defaults in the payment of any rental reserved in the lease, or in making any payment on its part agreed or required to be made, the lessor has the right upon making a request, in writing,

to the trustee, to have recourse to the said deposit of four million dollars and the said trustee is bound to make good any default in payments.

(5) That the lease further provides, in case said rentals or any part thereof shall remain unpaid for the space of ninety days after they become due and payable, or if the lessee shall be in default in the performance of any of the other covenants or agreements in the lease contained, and such default shall continue for the period of ninety days after notice by the lessee, the term of the lease shall, at the option of the lessor, expire, cease and determine and the lessor shall have the right to enter upon and take possession of all the property covered by the lease, or without [fol. 1264] such entry may recover possession thereof in the manner provided by statute, by summary proceedings.

By reason of the provisions of said lease the defendant Manhattan Railway Company could not be damaged either in law or in fact because of the inadequacy of the fare chargeable by the plaintiff, assuming, without admitting, that such fare is inadequate. I respectfully urge that the said defendant has no right to come into a court of equity and ask for any injunctive relief where its remedies at law are so entirely adequate in the event of a default in the payment of its reserved rentals.

Even if such five-cent fare were not entirely adequate to pay such rentals, this defendant would still have no standing in a court of equity to question the validity of it or to seek to set it aside as in violation of its rights or property under Article XIV, U. S. Constitution.

The said defendant has no such interest, legal or otherwise, in the rate of fare chargeable by the plaintiff company as would justify it in seeking the relief which it prays for in its Answer and Cross Petition.

In that pleading the defendant prays that it be adjudged and decreed:

1. That the five-cent fare on the Manhattan Division operated by plaintiff is illegal and void because in contravention of the Fourteenth Amendment, U. S. Constitution, and Section 6, Article I, of the State Constitution.

2. That the provisions of Chapter 743, Laws 1894, various other statutes, "said orders and directions of the said Public Service Commission and the said tariff schedule published by the plaintiff prior to February 1, 1928, in so far as they fix a five-cent fare or prohibit the plaintiff or [fol. 1265] this defendant from charging more than five cents, or in so far as they compel the plaintiff or this defendant to charge a five-cent fare are illegal and void.

3. That the Public Service Commission Law or any other law, or any regulation prescribed by law or any order or direction of the Transit Commission or any tariff schedules published prior to February 1, 1928, in so far as they prohibit the plaintiff or this defendant from putting into effect a compensatory rate or compel the plaintiff or defendant to charge a fare not in excess of five cents are illegal and void.

4. That the defendant has no adequate remedy at law for the irreparable injury which would result from the enforcement of said acts, directions, regulations and tariff schedules.

5. That the defendant be granted injunctions both temporary and permanent restraining the City and the Transit Commission

(a) From enforcing the five-cent fare *fare* against the plaintiff and this defendant;

(b) From enforcing against the plaintiff the provisions of said acts, orders, etc., in so far as they prohibit the plaintiff and this defendant from charging more than five cents.

(c) From bringing or prosecuting any actions for penalties or forfeitures against the plaintiff or this defendant or any proceedings to compel the plaintiff or this defendant to comply with said acts, orders, etc., in so far as they impose a five-cent fare or prohibit a seven-cent fare on the Manhattan Division.

(d) From doing any act or thing interfering with the right or authority of the plaintiff or this defendant to charge any lawful rate, anything in said acts, orders, etc., to the contrary notwithstanding.

And in the motion made herein the defendant further joins in the application of the plaintiff for an interlocutory [fol. 1266] injunction and temporary restraining order.

The relief demanded by the defendant Manhattan Railway Company is so inconsistent with its own situation and with the law and the rules governing the granting of equitable relief as to be almost absurd.

1. The said defendant is not an operating company.

2. It is not charging or collecting any fare, the limitation of which in any manner, whether by statute, order, tariff schedule, contract or otherwise, would operate in contravention of its rights under the constitutions of either the State or the United States.

3. It does not allege that it ever filed or now has on file any tariff schedule fixing or prescribing a five-cent fare or any other fare.

4. It does not allege that the revenue from any fare charged or chargeable by it, is insufficient to pay an adequate return upon the value of its properties used in the public service.

5. It does not allege that it has ever applied to any regulatory body of the State for an increase of fare or that any increase has ever been denied to it.

It would seem unnecessary to pursue the subject further in order to show that the motion of defendant Manhattan Railway Company should be summarily denied. Nevertheless in order to show the absolute lack of merit in said defendant's contentions, I will undertake to answer the cross petition herein as well as the defendant's petition and affidavits on this motion, so far as they purport to allege any facts.

[fol. 1267] As to the First Preliminary Objection that the Answer and Cross-petition Does Not Allege a Cause of Action

For the purpose of opposing this application and motion, I will attempt to do nothing more than point out the most obvious defects appearing on the face of the answer and cross-petition in order to show the Court that it does not

allege a cause of action and answer two affidavits attached to the petition herein in so far as they purport to allege facts. No attempt has been made to deal with the many conclusions of law which constitute so large a part of the moving papers:

The Answer and Cross-petition

Paragraphs V to VII inclusive, X to XXVIII inclusive, and XXXVIII to XLIII inclusive, appear to have been culled verbatim from the original complaint filed by the plaintiff herein. In so far as these paragraphs purport to contain statements of fact which can be answered they have already been answered in my affidavit and that of John Bauer in reply to the said original complaint and the allegations of said affidavits are realleged herein with the same force and effect as though set forth at length.

In Paragraph VIII (pages 4 to 6) the defendant, Manhattan Railroad Company repeats allegations contained in the original complaint with respect to the rental payable to the said defendant by the Interborough Railway Company under its lease of the elevated lines. On page 6, however, the said defendant has added a subdivision to that paragraph setting forth conclusions and arguments with respect to the nature and relationship which the City holds as to the subway and elevated systems, and also with re- [fol. 1268] spect to the sufficiency of the five-cent fare on the new subways, to be constructed by the City itself. In reply I say that these statements are mere conclusions and arguments on the part of the defendant, but even if facts they would have no relevancy, force or effect in the instant case which involves a five-cent fare fixed by contract between the plaintiff and the City.

In Paragraph IX the said defendant sets forth various allegations with respect to the inability of the plaintiff to make payments required to be paid to the said defendant under the lease of its properties heretofore made. In reply to this I repeat that the lease of the elevated railroads by the plaintiff herein was brought about through the agreement between the plaintiff and the said defendant, the terms and conditions of which were wholly within the control of the said parties to the lease and that neither the

City nor any regulatory body of the State ever consented to or approved such agreement.

In paragraph XXIX it is alleged that on February 8, 1928, the plaintiff filed a request in writing with the Transit Commission for a hearing in respect to its application for the approval of the tariff schedule sheets setting forth the increase in rates and for the granting of the special commission prayed for by the plaintiff. In this paragraph there is also set out at length the letter addressed to the Transit Commission by General Counsel for the plaintiff under date of February 8, 1928. I repeat my denial (contained in answering affidavit on motion of plaintiff) that the plaintiff ever applied for a hearing with respect to the said tariff schedule and I further repeat that the letter of February 8, 1928, did not constitute an application to the Commission for a hearing under Section 49 of the Public Service Commission.

[fol. 1269] In Paragraph XXX to XXVII, inclusive, the defendant Manhattan Railway Company alleges certain new matter which was not alleged in the original complaint herein. These allegations have to do with the order of the Transit Commission of February 14, 1928, rejecting the tariff sheets filed on February 1, 1928, and the resolution directing the Commission's counsel to institute a proceeding under section 57 of the Public Service Commission Law. Further allegations are made with respect to the institution by the defendant Transit Commission and City of New York of certain actions and the said proceedings (under Sec. 57, P. S. C. Law) in the Supreme Court of New York State the purpose of which was to restrain the plaintiff herein from collecting or charging the 7-cent fare as in violation of its contract with the City. I respectfully call the attention of the Court to the fact that all of these acts on the part of the Commission and the City took place after the institution of the action in this Court and that none of them are alleged or contained in the complaint in the action in this Court. It is obvious that having taken place after said action was commenced these various acts now alleged in this defendant's petition could not have been inserted in the original complaint. The purpose of this defendant, therefore, is to amend and supplement that complaint in violation of the rules of this Court which provide that a supplemental complaint may not be filed in this

Court except by permission and order of this Court. The plaintiff herein on the 3rd day of March, 1928, served upon the defendants, City of New York and Transit Commission, a so-called "amended and supplemental complaint" which alleged the very matter which is now inserted in this cross-petition. This amended and supplemental complaint was on the same day duly returned to the plaintiff and a motion [fol. 1270] is now pending before this Court to strike said amended and supplemental complaint from the files of this Court. I respectfully submit that the efforts of this defendant to supplement the original complaint in this indirect and surreptitious manner is reprehensible and should not be countenanced by this Court. The allegations made in this cross-petition with respect to this new matter are made for the same purpose as the said amended and supplemental complaint returned as above, to wit, to attempt to cure the obvious defects in the original complaint in this action which have been pointed out in my answering affidavit in opposition to the motion made herein by the plaintiff, which allegation I repeat with the same force and effect as though set forth at length. Among the objections made to that complaint were that the action had been prematurely brought and that the complaint did not state a cause of action. It was prematurely brought for the reason that it was instituted by the plaintiff before any order had ever been made by the Commission rejecting the tariff schedules which the plaintiff filed with the Commission on February 1, 1928, and before any cause of action accrued, if any could be said to have accrued, which I deny. By reason of the fact that this action was prematurely brought and did not state a cause of action, the defendant City of New York and Transit Commission contended on the motion before Judge Bondy and now contend on the application of the plaintiff to this Court that this Court has no jurisdiction over the subject-matter of this action. I repeat therefore that this attempt on the part of the Manhattan Railway Company to supplement the original complaint in this manner and without leave of this Court should be censured. [fol. 1271] The cross-petition sets forth no cause of action within the cognizance of a Federal Court.

The other preliminary objections to the cross-petition involve mainly questions of law which will be discussed in the brief

Affidavit of William Roberts

The affidavit of William Roberts of counsel for the defendant Manhattan Railway Company sets forth the filing of the answer and cross-petition on February 29, 1928, and refers to the various allegations contained therein. Mr. Roberts also refers to "the amended and supplemental bill of complaint" submitted on behalf of the plaintiff in support of its pending motion. As I point out above this "amended and supplemental bill of complaint" was duly returned to the plaintiff on March 3, 1928, for the reason that the same was filed without leave of this Court and a motion to strike the same from the files of this Court is now pending before this Court.

I urge that under the circumstances the affiant Roberts had no right to refer to the same on this motion and that such reference should be disregarded by the Court.

Affidavit of James F. Hughes

The affidavit of James F. Hughes, Vice-President of the defendant Manhattan Railway Company, in Paragraph 11 thereof, realleges certain paragraphs of the answer and cross-petition which I have already answered above.

In paragraph 2 of said affidavit certain statements are made with respect to the value of the properties of the Manhattan Division which are answered at length in the [fol. 1272] annexed affidavit of John Bauer.

Paragraph 3 of said affidavit alleges that the defendant Manhattan Railway Company has not entered into any contract stipulating a fare of five cents a passenger on the elevated lines owned by it, but that on the contrary

(1) By statutes enacted between 1876 and 1881 it has been authorized to charge a fare in excess of five cents.

(2) By Chapter 743 of the Laws of 1894 it has been authorized to charge a five cent fare.

I admit the allegation of affiant Hughes to the effect that said defendant has not entered into any contract with the City stipulating the five cent fare.

I call the attention of the Court to the fact:

(1) That the said defendant is not an operated railroad company and has not operated any railroad since 1903

when it leased all its railroad lines to the plaintiff for a period of 999 years from and after the year 1875.

(2) That the plaintiff, however, as lessee and operator of the said railroad lines of defendant, contracted with the City under and by virtue of the provisions of the Elevated Extension Certificate granted by the Public Service Commission on March 19, 1913, to carry passengers for a fare of five cents, and

(3) That the fare chargeable on such railroad lines having — fixed by contract between the plaintiff and the City of New York, such fare cannot be increased without the consent of the City of New York under and pursuant to the terms and conditions of said Elevated Extension Certificate. (A copy of said certificate is submitted in answer to the motion of the plaintiff herein.)

[fol. 1273] (4) That whatever rate of fare the defendant Manhattan Railway Company had the right to charge prior to the lease of its lines to the plaintiff whether fixed by statute, tariff schedule or otherwise has been superseded by the provisions of said Elevated Extension Certificate and so long as said certificate exists such fare cannot be increased without the consent of the City of New York.

I further call the attention of the Court to the fact that the allegation of the said affiant Hughes (paragraph 3) to the effect that Chapter 743 of the Laws of 1894 prescribed a maximum five-cent fare "upon the elevated railroad lines of this defendant," is misleading. Said Act only fixed a five-cent fare on certain east side lines of the elevated railway and not on the entire elevated railroad system existing at that time.

The purpose of the affiant Hughes in alleging the statutes named in paragraph 3 of his affidavit is to have it appear to the court that the fare chargeable by the plaintiff was fixed by statute in order to bring this action within the scope of Article XIV of the United States Constitution. I urge my previous objection, that the fare so chargeable is not fixed by statute but by contract duly made and voluntarily entered into between the plaintiff and the City of New York.

I deny the allegations of paragraph 4 of the Hughes affidavit which realleges portions of paragraphs VIII and IX

of the answer and cross-petition and refer the court to the statements in my affidavit hereinabove set forth with respect to said paragraph.

With respect to the statements in paragraph 4 of the Hughes affidavit with respect to the lease arrangement between the plaintiff and defendant Manhattan Railway [fol. 1274] Company. I reiterate my previous statement that such original lease was never approved by either the City or any State regulatory body.

I further urge that the rentals payable under said lease were from the inception of said lease, excessive, exorbitant and beyond the earning power of the leased railroads to pay and that this fact was known or should have been known to the plaintiff and to said defendant Manhattan Railway Co. at the time it was made for the reason that such earning for years previous to the lease had not been sufficient to pay the rentals reserved in that lease.

I further say that in view of the fact that the elevated lines were in 1903 about to be brought into competition with the subways then under construction the guaranteed rental of seven per cent. on a total capitalization of sixty million dollars was unreasonable and unwarranted.

I further say that the inability of the plaintiff to pay the exorbitant rental guaranteed to the stockholders of the Manhattan Railway Co. became so apparent and acute that in 1922, the plaintiff under the urging of the Transit Commission sought to bring about a reduction of the rental. It obtained the consent of about ninety-four per cent. of the stockholders of the Manhattan Railway Co. to the reduction of the rentals so that but three per cent. should be paid in 1923, four per cent in 1924 and five per cent. in 1925 and thereafter.

I am informed and believe that neither the plaintiff or the Manhattan Railroad Co. ever applied to the Transit Commission for its formal approval or consent to the readjustment plan, although such plan had the tacit approval of the Commission as is evident from the opinion of the Commission in Case No. 2662, a copy of which is [fol. 1275] annexed hereto (Schedule A). It may be noted, however, that in such opinion, the Commission laid stress upon the fact "that the plan did not contemplate any increase in fare beyond five cents or any reduction of the

service for the five-cent fare now given on the Interborough and Manhattan lines."

Regardless of the fact that the rental payable under the Manhattan lease was exorbitant and excessive, I am informed and believe that out of the surplus earnings of the Subway System the rental payments have been substantially met and that such subway earnings are ample to pay such rentals.

With respect to this matter, I respectfully refer the Court to the annexed affidavit of John Bauer wherein the lease and its provisions are treated at length.

The Motion for Injunction Pendente Lite and Stay Should Be Denied

For the foregoing reasons I respectfully urge that the motion made by the defendant Manhattan Railway Company for an interlocutory injunction and temporary stay should be denied.

Geo. P. Nicholson.

Sworn to before me this 14th day of March, 1928. Walter E. Dunn, Notary Public, Kings Co., No. 16, Reg. No. 8014; New York Co. Clerk's No. 8; New York Co. Register's No. 8009; Bronx Co. Clerk's No. 1; Bronx Co. Register's No. 2801; Queens Co. Clerk's No. 97. Certificate filed in Richmond County. Commission expires March 30, 1928.

[fol. 1276] SCHEDULE A

Case No. 2662

Extract from Vol. II, Transit Commission Reports of Decisions, 1922, Pages 204-210

Opinion

"HARKNESS, Commissioner:

Although technically the matters that are before the Commission in the above-entitled proceedings consist of applications for the modification of orders in these out-

standing proceedings and for the approval of the issuance of $10,500,000 new six per cent. notes, the Commission, in pursuance of the policy announced to representatives of the security holders when the Interborough reorganization plan was first broached, has not limited itself to the proceedings technically before it, but has considered the entire plan, believing that a matter of this importance should be disposed of through a broad, comprehensive study of the entire situation and not be limited to certain elements in the plan that, under the statute, require Commission approval.

As a basis for this consideration, it will be helpful briefly to show the situation as it existed about eighteen months ago when the Transit Commission took office, and then state the results to be expected from the plan of reorganization:

In brief, the situation of Interborough Rapid Transit Company early in 1921 was: It was controlled by Interborough-Consolidated Company, a holding corporation which had almost the entire capital stocks of Interborough Rapid Transit Company, and the New York Railways System, the latter comprising most of the surface lines in the Borough of Manhattan. The Interborough-Consolidated Company was capitalized at over $114,000,000 and had in addition $70,000,000 of 4½% bonds outstanding, secured by the pledge of its holdings of Interborough Rapid Transit Company stock. It was largely to financial manoeuvres in and about Interborough-Consolidated Company and speculation in its stock that blame must be laid for the excessive dividends declared by Interborough Rapid Transit Company during and prior to the war that so depleted its cash [fol. 1277] reserves and liquid assets.

The Interborough Rapid Transit Company had outstanding over $160,000,000 of its 50-year 5% bonds issued (with the exception of approximately $50,000,000 for earlier financing) to provide means to carry out its engagements with the City of New York (Contract No. 3 of March 19, 1913) for the construction and equipment of new rapid transit lines. It also had outstanding nearly $60,000,000 of such bonds which were pledged as collateral security for $38,144,400 of three-year 7% notes becoming due on September 1, 1921, which was issued in 1918 when war-time financial conditions precluded the sale of the 5% bonds.

The terms of the lease made in 1903 for the Manhattan Elevated System were, in view of lessened net earning capacity, becoming increasingly burdensome. This lease provided, in addition to paying interest on over $40,000,000 of Manhattan bonds, together with taxes and incidentals, that the Interborough Company should pay as a rental charge, and irrespective of whether or not the amount was earned, 7% per annum on $60,000,000 of Manhattan stock. This dividend rental amounted to $4,200,000 a year.

The annual report of the Interborough Company for the fiscal year ending June 30, 1921, indicated a deficit, after paying the Manhattan rental of $4,464,826.65. In an endeavor to make both ends meet the operating officials had admittedly cut down service, thereby adding to the already intolerable congestion and further bringing the company into sharp collision with the public and increasing the embittered antagonism.

In order temporarily to ease the situation, the Commission authorized the extension of the 7% notes, becoming due on September 1, 1921, for one year on an 8% basis. This by itself, however, merely afforded a year's additional time to prepare to meet this large capital obligation. At about the same time the Commission informally served notice on the representatives of the Interborough Company that the existing depreciated service could not be allowed to continue, and that the company must prepare to meet [fol. 1278] large requirements in the way of additional equipment and increased service. The representatives of the company were also informed that, on a proper reorganization and on a conservative financial basis, the lines could profitably be operated on a five-cent fare and the Commission would not consider any request for increases in rates of fare. The Commission's informal notice that it would require additional equipment and increased service was last spring translated into definite official orders, requiring the provision, at stated periods, of 350 additional cars, with incidental power additions and very materially increased service in non-rush hours.

Because of the financial condition of the company, suits were instituted to throw it into the hands of a receiver, which came before Judge Mayer. Judge Mayer very properly held these applications in abeyance and exercised his influence very effectively upon the various classes of se-

curity holders to induce them to consider a reorganization plan that would lift the company out of its present financial distress and prepare it to meet the needed additions to equipment and service.

In September, 1921, the Commission made public the outlines of its comprehensive plan for the reorganization of all the transit lines in the City. As this plan, in view of its scope and the radical changes it contemplated in existing organization and financing, would require considerable time to work out, it was deemed necessary by those acting for the Interborough and Manhattan security holders to develop a plan of readjustment for the Interborough Company alone that would take care of immediate difficulties and pave the way for its inclusion in the more comprehensive plans of the Commission. One large difficulty in the way of consummating the Commission's plans, or for that matter any plan, was the large number of security holders that had to be dealt with and the inability in the case of the Manhattan Railway Company to deal with any board or committee which could represent the stockholders.

In preliminary informal discussions that the Transit Commissioners had last spring with Judge Mayer and the [fol. 1279] representatives of the various security groups, the Commissioners, without committing themselves in the matter of final judgment, laid down certain fundamental conditions that they would in any event require to be met. These were:

(1) That the plan did not contemplate any increase in fare beyond five cents; or any reduction of the service for the five-cent fare now given on the Interborough and Manhattan Lines.

(2) That it should provide funds for new cars, to develop power service and other equipment to meet the present and future service orders of the Commission.

(3) That it should do away wholly with the Interborough Consolidated Company and its $114,000,000 of securities.

(4) That it should eliminate the fixed 7% return on Manhattan stock paid by the Interborough Company by way of rental for the elevated properties, amounting to $4,200,-

000 a year, and that the rental paid to the Manhattan Company be reduced to a reasonable rate, payable only in years in which it was earned.

(5) That it should limit the possible future dividends of the Interborough Company to 7%, to be payable only if earned.

(6) That no dividends whatever should be paid upon Interborough stock during the next five years; the revenue, within the proposed limitation, to be devoted exclusively to service.

(7) That it should provide for public representation in the new board of directors; and, finally

(8) That it should be considered as a preliminary step in the carrying out of the Commission's broader plan for municipal ownership and unification of all the useful transit properties in the City.

The plan developed from these conferences had upon the date of the applications received the assent of about 90% of the Interborough-Metropolitan 4½% bonds and [fol. 1280] Interborough Rapid Transit stock, about 85% of Manhattan Railway Company stock, about 90% of Interborough notes and the full amount required by the plan in the case of the Interborough 5% bonds.

In general terms the plan provides for:

(1) The elimination of the fixed 7% Manhattan dividend rental and the substitution of a return, if earned. This return, if earned, is fixed at:

For the fiscal year ending July 1, 1923, 3%.
For the fiscal year ending July 1, 1924, 4%.
For the fiscal year ending July 1, 1925, 5%.
For each subsequent year thereafter, 5%.

(2) The foreclosure of the mortgage securing the $70,000,000 4½% Interborough-Metropolitan bonds and the complete divorce of the Interborough Company from Interborough-Consolidated Corporation.

(3) Extension of the outstanding matured 7% notes for ten years from September 1, 1922.

(4) Postponement of sinking fund payments under the mortgage securing the Interborough 5% bonds for a period of five years beginning January 1, 1921.

(5) The authorization of a new issue of $15,000,000 of 10-year 6% notes of which $10,500,000 is presently to be issued. Such new present issue to be absorbed by holders of the Interborough-Metropolitan 4½% bonds.

(6) The members of the board of directors of the Interborough Company to be elected by various group interests as follows: 9 by the Interborough stockholders, 3 by Interborough bondholders, 3 by Manhattan stockholders and 3 by public authority.

(7) The dividend rate on Interborough stock is restricted to a maximum of 7% and no dividends to be declared for the next five years.

[fol. 1281] Outside of earnings, the plan will provide:

(a) By postponement of sinking fund payments on Interborough bonds accruing during the three and a half years from July 1, 1922	$7,612,500
(b) Proceeds of sale of new 6% notes	10,500,000
Or a total of	$18,112,500

In addition, the earnings available for service and proper corporate purposes will largely be increased by the elimination of the present 7% Manhattan Dividend rental. The extension of the Interborough 7% notes for ten years will relieve the company of its present embarrassment of having this heavy matured debt hanging over its head and give time for the resumption of more normal conditions when complete and adequate refinancing may be effected. The Interborough directorate is to contain responsible representation of all the groups (including the City) having large financial interests in the properties operated by the company.

It is by a comparison of these results with the existing conditions of the Interborough Company that the beneficial results of the plan are apparent. Furthermore, the only alternative of the plan would seem to be a receivership which would be the source of incalculable damage to se-

curity holders and the public as well. In the formulation of the plan and the remarkable success in securing the assent of thousands of widely scattered security holders, and thus avoiding receiverships and probable disintegration, Judge Mayer and those associated with him have performed a service not only to the security holders but to the public as well.

Furthermore, all these changes show substantial progress toward the reorganization contemplated in the Commission's comprehensive plan and those changes, together with the ability now to deal with a compact, responsible representation of the several group interests, will greatly facilitate putting the larger plan into effect.

[fol. 1282] The technical applications before the Commission cover the modification of existing orders of the Commission in three old proceedings and the approval of the new 6% note issue in a new proceeding. I recommend the granting of all the applications, and appropriate orders to this effect are now submitted herewith.

There are a few matters connected with the Plan and these applications that require this further brief comment:

It should be understood that the approval of this plan does not involve any approval of the principle of 999-year leases of public utility properties. The Commission is opposed to them, and looks to the adoption of its comprehensive plan to eliminate them from New York City transit once and for all. Nor can the Commission's action in these cases be taken as in any sense fixing or determining valuations of any of the Interborough or Manhattan properties.

In the hearings before the Commission on these applications the Corporation Counsel of the City suggested the incorporation of some provision in the orders with respect to the maintenance of the five-cent fare. As was stated from the bench upon the hearings, the contract between the City and the Interborough Company already provides explicitly for a five-cent fare. Furthermore, the successful reorganization of the transit companies with recovery from war-time inflation has made the question of an increase in fare only of practical importance to politicians who strive to use it for political effect.

It is also suggested by the Corporation Counsel that provision be made for public representation in, or stronger

control over, the voting trustees, who are to elect the directors under the provision for group representation. In the absence of express statutory authority, this voting trust agreement is necessary to accomplish the desired result. By its own terms, however, it indicates that it is a temporary arrangement only, and it contemplates the enactment of legislation authorizing such group representation. It therefore seems to me that this voting trust agreement, in its present form, will take care of the immediate [fol. 1283] situation, and that little difficulty should be experienced in obtaining legislation that will permanently cover the situation.

The Corporation Counsel also suggested the inclusion of a stipulation in the orders similar to that in previous similar orders reserving any rights of the City under Contract No. 3. Proper provisions to this end are incorporated in the orders submitted herewith."

[fol. 1284] State of New York,
City of New York,
County of New York, ss:

John Bauer, being duly sworn, says:

I am an economist and financial analyst. For the past ten years I have been acquainted with the properties of the Manhattan Railway Company included in the Elevated Division operated by the Interborough Rapid Transit Company. I have knowledge of the lease of its properties made by the Manhattan Railway Company to the Interborough in 1903 for a period of 999 years from 1875, and am familiar with the rental provisions of said lease and of the readjustment plan made in 1922. I am acquainted also with the results of operation of the Elevated Division by the Interborough Company and the payments of rentals to the Manhattan Railway Company.

[fol. 1285] At the request of Hon. George P. Nicholson, the Corporation Counsel of the City of New York, I read the "Answer and cross-petition of defendant Manhattan Railway Company" in this action and the petition and affidavits upon which the present motion is based. I have studied the allegations and data presented in said papers in respect to

the alleged confiscatory character of the five-cent fare applicable to the Elevated Division, and say with respect thereto:

1. The principal data presented for the purpose of showing the inadequacy of the five-cent fare as applicable to the Manhattan Division, appears in the computations presented relative to the valuations, return and rate of return for the period 1921 to 1927, set up on two separate bases: (1) "present value," and (2) "minimum present value" (pages 26-27, Answer and Cross-Petition).

These computations are intended to show a low rate of return realized to support the contention that the five-cent fare is inadequate for the operation of the Elevated Division. The figures upon which the rate of return is based are, however, in both computations excessive. The "present value" of the properties for ordinary rate making purposes are much less. No determination of such value has ever been determined either by the Transit Commission or by any other regulatory body.

The amount of "present value" for the year 1927 of all the properties included in the Elevated Division is stated at $208,873,038, and the alleged "minimum present value" at $179,777,038. I believe that these amounts are greatly excessive because of these facts:

(1) They include excessive amounts for labor and materials even on the basis of present day construction costs.

[fol. 1286] (2) They do not provide for the deduction of depreciation to take account of the physical condition, obsolescence, and the unsuitable character of the properties for present transportation needs.

To determine "present value," it is necessary to make deduction for depreciation due to all causes. The only deduction made from the gross figures are the estimated expenditures to place the property in operating condition. This, however, is a small amount and does not constitute the depreciation of the properties; it is merely an additional element to the other factors above recited.

The present extent of the depreciation of the Elevated Division is great, but has never been exactly determined by

the Transit Commission or other public authority. The depreciation is due in part to the ordinary effect of time and use, to the developments in the arts and the changing requirements of transportation.

Most of the cars used are old and are of antiquated type, with relatively low carrying capacity. From the present standpoint they have little or no value for use in transportation.

All the power plant equipment provided by the Manhattan Company itself has become obsolete and little of it is in use at the present time. All other equipment has experienced a large expired life, and is greatly depreciated although the amount has never been determined.

The extent of depreciation of the elevated property, however, must be considered also from the standpoint of the obsolescence of the entire mode of operation.

As the lines were originally leased to the Interborough Company they consisted principally of two-track structures which almost immediately proved to be inadequate for the [fol. 1287] transportation requirements of the City. In 1913 The City of New York granted the so-called Third Tracking Certificate under which the system was somewhat modernized. But even with the third tracking the structures have become increasingly unsuited to the needs of transportation. With the enormous growth of population and traffic in the City of New York, mass transportation has become more and more important. This requires the maximum available carrying capacity, with great speed of operation, and constant express service in both directions of the service.

The Elevated Division, limited to three-track structures, is not suited to the needs of present day mass transportation. Its carrying capacity is greatly limited as compared with the existing four-track subways (or the six-track subways which are being provided in some of the routes now under construction or laid out).

Because of the limited track capacity the express service on the elevated is possible only one way, and is reversed with the movement of traffic. The speed of operation is thus greatly impeded, and constant express service is not available.

Because of these conditions the entire mode of elevated transportation has become obsolete, at least so far as the Borough of Manhattan is concerned. With the enormous growth of traffic that has taken place during recent years, the elevated traffic has remained stationary and in fact has receded, while the subway traffic has increased with leaps and bounds.

For the fiscal year ended June 30, 1920, the transportation revenues on the subway at a five-cent fare amounted to $29,299,777, and for the year ending June 30, 1927, they reached the sum of $40,731,330, an increase of about 40%. [fol. 1288] For the first six months of the current fiscal year the subway revenue was $21,432,532, compared with $18,646,630 for the same six months the year before. The growth in subway traffic is thus continuing unimpeded.

On the elevated lines the transportation revenues at a five cent fare in 1920 amounted to $18,449,571, and for the year ended June 30, 1927, $17,950,983. During the first six months of the current fiscal year the revenue was $8,874,474, compared with $9,098,440 for the same six months a year before.

The elevated properties are, as a matter — fact, rapidly on the road to complete obsolescence, and it is all but inconceivable that in Manhattan they can survive more than 10 or 15 years when they will be replaced by modern subways.

The present value of elevated properties must be determined from the standpoint of the conditions just recited. The "present value" or "minimum present value," which disregard the depreciation and the functional obsolescence due to the change in the conditions of transportation, are meaningless figures and serve no use whatever for judging the reasonableness of the five cent fare.

2. The rentals paid by the Interborough Company under the elevated lease are grossly excessive from the standpoint of present day conditions; they were excessive even as of the date when the lease was signed. Prior to the lease the elevated lines had never earned a sufficient net return to justify the rentals agreed to by the Interborough. This is shown by the annual reports of the Manhattan Railway Company to the former Board of Railroad Commissioners of the State of New York. For the six fiscal years ended

[fol. 1289] June 30, preceding the year of the lease, the net annual income above operative expenses, taxes, interest and all fixed charges was as follows:

1897	$1,334,651
1898	1,423,276
1899	1,120,512
1900	2,029,516
1901	2,322,336
1902	3,073,455

These were the annual amounts earned upon the capital stock, which amounted to $30,000,000 prior to 1899, but during that year was increased to $48,000,000. The rate of dividend paid was 4% during the last five years, and 5% during the fiscal year 1897; but the dividends exceeded the net earning by $165,349 in 1897, and by $259,488 in 1899.

In none of the six years was the net income adequate to warrant a 7% dividend rate upon $60,000,000 of capital stock as fixed in the lease. The annual income as shown, moreover, did not provide for depreciation of the equipment and the structures. The lines had been operated by steam, and their electrification had taken place mainly just prior to the lease. No provision for the needed reconstruction had been made out of earnings. The real net income earned upon the capital stock was, therefore, less than the amounts above presented.

During the latter years of the above period, there was an increase in net income. This was due to the improvements, especially the changing from steam to electric operation.

At the time of the lease, in 1903, there was in immediate prospect the placing in operation of the subway then under construction. Operation actually was begun in October, 1904, which caused a decrease in elevated traffic. This is [fol. 1290] shown by the number of passengers carried during the fiscal year ended June 30 prior to the opening of the subway, compared with two fiscal years following (according to the annual reports to said Board of Railroad Commissioners):

1904	286,634,195
1905	266,381,930
1906	257,796,754

That the opening of the subway would take traffic from the elevated should have been foreseen by the Interborough. It should have had regard for the ultimate competitive influence of the new mode of transportation upon the entire elevated system. It should have realized just as the electrification of the surface lines during the 1890's had reduced the elevated traffic, which was regained by elevated electrification, that successful subway operation would cut into the traffic and affect the earning power of the elevated. In fact, the great success of the subway has rendered the elevated system obsolete for future mass transportation.

3. In paragraph VIII. of the "Answer and Cross-Petition of Defendant Manhattan Railway Company," there is presented a summary of the plan of revised dividend rentals paid according to an agreement in 1922 between the Interborough and about 94% of the Manhattan Company stockholders. According to this agreement the 7% annual dividend was reduced to 5% applicable to the fiscal year ended June 30, 1925, and thereafter, to the extent as earned during each year by the Interborough on all its properties or by the Manhattan leased lines, whichever amount may be the larger.

In Paragraph IX of said answer and cross-petition, it is alleged that the Interborough has defaulted from time to [fol. 1291] time in the payment of large sums of money due to the defendant Manhattan Company under said lease, and that further defaults will cause losses to the defendant Manhattan Company, unless a seven cent fare is charged.

During the two fiscal years ended June 30, 1926 and 1927, the net earnings of the entire Interborough properties, which earnings are available for such rental payments to the Manhattan, exceeded substantially the dividend accruals under said plan of readjustment. For the year ended June 30, 1926, the net earnings above all such accruals and all other expenses and fixed charges of the Interborough amounted to $3,425,040 as reported to the Transit Commission (or to $2,443,695 after actual maintenance without depreciation adjustments). For the fiscal year ended June 30, 1927, such excess amounted to $2,950,709 (or to $1,470,888 on the basis of actual maintenance). For the six months ended December 31, 1927, the excess was $1,944,109 (of $896,859 after actual maintenance).

The actual earnings of the Interborough have thus been ample, with large surplus margin, for the past two and one-half fiscal years, and, it is estimated herein, that they will be adequate in the future, so far as prediction may be made, to meet the annual rental payments.

While certain quarterly earnings were not sufficient to meet the rental accruals for the particular quarters, the annual earnings have been much more than adequate to cover the yearly accruals; the postponement of payment was thus a matter of financial arrangement between the companies, and not one of inadequate annual earning power of the properties.

4. The losses incurred by the Interborough on the Elevated Division have not been due to any inadequacy of the {fol. 1292} five-cent fare, but to the excessive and unwarranted rentals paid to the Manhattan Company, and to the obsolete character of the system of transportation. If the rentals were adjusted in accordance with present day conditions of the property, there would be no deficits accrued to the Interborough.

I have presented a more detailed analysis of the elevated properties and their relation to the Interborough's finances, in a separate affidavit prepared in connection with the Interborough's "application for interlocutory injunction and temporary restraining order." Reference is hereby made to said affidavit for a more complete analysis of the elevated properties, operations, and return, including valuations and investment, Section 7, pp. 95-97; excessive capitalization and fixed charges, Section 8, pp. 97-98; the elevated lease in relation to the City of New York, Section 16, pp. 103-104; the operating results and excessive rentals, Sections 17 and 18, pp. 104-105; obsolescence of the property, Section 19, pp. 106-108.

John Bauer.

Sworn to before me this 14th day of March, 1928. Walter E. Dunn, Notary Public, Kings Co. No. 16, Reg. No. 8014, New York Co. Clerk's No. 8; New York Co. Register's No. 8009; Bronx Co. Clerk's No. 1; Bronx Co. Register's No. 2801; Queens Co. Clerk's No. 97. Certificate filed in Richmond County. Commission expires March 30, 1928.

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[fol. 1295] IN UNITED STATES DISTRICT COURT

(Title omitted)

REPLY AFFIDAVIT IN BEHALF OF DEFENDANT MANHATTAN RAILWAY COMPANY

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

JAMES F. HUGHES, being duly sworn, deposes and says:

I am vice-president and the auditor of the Manhattan Railway Company, one of the defendants in this action,

and am, and have been for over ten years, familiar with its affairs. I have read the affidavit of George P. Nicholson, Corporation Counsel of the State of New York, and [fol. 1296] the affidavit of John Bauer, both sworn to March 14, 1928, in opposition to the application of the defendant Manhattan Railway Company for an interloctory injunction.

Direct Interest of the Defendant Manhattan Railway Company in the Return Earned from the Operation of the Manhattan (Elevated) Division

The Corporation Counsel for the defendant The City of New York, in his affidavit opposing the motion of this defendant for an interlocutory injunction, alleges that this defendant has no "right or standing in this Court to challenge the validity" of the present rate of fare, and urges (1) that this defendant is not an operating company, and (2) that this defendant has divested itself by the lease of 1903 for a period of 999 years of the control of its railway lines (Nicholson answering affidavit, pages 2-3, fols. 7-9).

As to the first ground, it may first be pointed out that, under this defendant's existing profit-sharing readjustment agreements with the plaintiff, the directors of the Interborough Company constitute, as provided in the readjustment agreements, a jointly-created operating board. Three directors are nominated by this defendant, three by the bondholders and three by the defendant Transit Commission. Only one-half are elected by the plaintiff's stockholders.

As to the second ground, it may be pointed out that this defendant has rights of immediate re-entry under default clauses of the lease, and, as stated in the agreement of readjustment, the plaintiff was, as of April 15, 1922, in default in the sum of $4,853,000, and that, in view of the [fol. 1297] present inability of the Interborough Company to make any present return upon the stock of this defendant other than $764,000 which represents a fixed liability, the claim of the defendant Transit Commission, that the plaintiff was heavily indebted to the City, and the confiscatory policy of the City emphasized by the threats of special counsel for the defendant Transit Commission that the

plaintiff will be thrown into bankruptcy by the acts of the City in pursuance of that policy, this defendant has a most immediate and vital interest in the maintenance and rehabilitation of its property and in the grant of the compensatory rate which is necessary to insure its protection in that regard.

There is no $4,000,000 Guarantee Fund, Referred to in Mr. Nicholson's Affidavit

No sum of $4,000,000, referred to in the affidavit of Mr. Nicholson (page 3, fol. 10), nor any other sum, is deposited in the Guaranty Trust Company of New York or elsewhere to protect this defendant against the defaults of the plaintiff. In this, as in other respects, his affidavit contains no revelation of the fact in regard to the subject matter of this cause. Under the express terms of the lease, the temporary guarantee deposit has long ago been returned to the plaintiff.

The Direct and Distinct Interest of the Defendant Manhattan Railway Company in This Litigation Shown in Detail

The Manhattan Railway Company and its stockholders not only have a direct interest in the return which is received from the operation of both the subways and the [fol. 1298] elevated railways constituting the Interborough system, but the only right which the holders of 95 per cent. of the stock of the Manhattan Company have to any return at all on their stock is entirely dependent upon the net earnings from the elevated railroads owned by the Manhattan Company and constituting part of the Interborough system, and also the net earnings of the Interborough subways, if any.

Under the lease by the Manhattan Company to the Interborough Company made in 1903, the rental to be paid for the elevated railways thus leased included 7 per cent. per annum on the shares of the stock of the Manhattan Company outstanding. In 1922, the high cost of materials and labor had made it impossible for the Interborough Company under the five-cent fare to pay its obligations as they became due. The Interborough Company had failed to pay

the dividend rental on the stock of the Manhattan Company and had failed to pay substantial amounts of taxes on the properties of the Manhattan Company which under the terms of the lease the Interborough Company was required to pay. In these circumstances, either the creditors of the Interborough Company, including the Manhattan Company and its stockholders, must voluntarily reduce the amounts of their obligations or a receiver must be appointed for the Interborough Company.

A voluntary plan of readjustment was made in 1922, to relieve the Interborough Company temporarily from the financial embarrassment caused by the high costs and the five-cent fare, in which the holders of approximately 95 per cent. of the stock of the Manhattan Company assented to a reduction of the dividend rental on the stock from 7 per cent. provided for in the lease to 3 per cent. for the year ending June 30, 1923, 4 per cent for the year ending June 30, 1925, and 5 per cent. thereafter; in addition, it was pro- [fol. 1299] vided in the plan that the net earnings from the properties must be cumulatively applied to the assenting Manhattan stock until all deficits thereon are paid, but that the Interborough Company would not be in default as to the dividend rental on the assenting stock so long as the net earnings are so applied. The Interborough Company guarantees the application of these net earnings to the assenting stock and the assenting Manhattan stockholders have a direct right, not a derivative right, against the Interborough Company to have these earnings so applied.

The Transit Commission's Interdiction Against the Application of the Earnings from the Subway Division to the Payment of the Manhattan Dividend Rental

As the result of a demand dated December 10, 1927, from the Transit Commission to the Interborough Company, no net earnings from the Interborough subways can be applied to the dividend rental on the assenting Manhattan stock. The aforesaid demand, the purpose of which was to prevent such application of subway earnings to Manhattan stock, is in part as follows:

"According to the filed statements of your company the accrued deficits on preferentials claimed to be due the I. R. T. under Contract No. 3 as of October 31, 1927, amount to $4,818,045. According to the report herewith transmitted our accountants claim there should be credited back or put in suspense account until final determination by arbitration and/or court decision a sum including interest of approximately $7,000,000 which is in excess of the amount of accrued preferential your company claims to [fol. 1300] be due.

"Our accountants also claim that there should be credited back or put in suspense account until final determination by arbitration and/or court decision a sum exclusive of interest of $1,645,423.54, which is in excess of the amount of accrued preferential your company claims to be due under the Extension Certificate.

"The Commission is not unmindful of the fact that your company contests some of the items and that they are or may become the subject matter of arbitration or litigation under the terms of the contract, but the Commission regards it as highly improper that your company should have paid itself or should be permitted to further pay itself on account of its accrued preferential claims pending the determination of such controversies.

"If the reports of our accountants are sustained, the time has arrived when the City of New York is entitled to have the net earnings over fixed charges and current preferentials applied toward the payment of its accrued deductions from revenue which as of October 31, 1926, amounted to $79,000,000.

"We now, therefore, ask that your company definitely commit itself in writing to the Commission to credit back the items agreed upon and to put in a suspense account as provided in the contract the disputed items and to make no further withdrawals on account of alleged accrued preferentials. We request that you be good enough to indicate to the Commission in writing not later than December 15, whether you will comply with this demand."

The Interborough Company is now complying with the aforesaid demand.

The whole of the current preferential referred to in the letter of the Transit Commission is required to pay the

[fol. 1301] interest and sinking fund on the Interborough bonds issued under Contracts Nos. 1 and 2 and on the Interborough bonds and notes issued to construct the third track, elevated extensions and power house improvements. No part of such current preferential could ever have been applied to payment on the Manhattan stock, even before the aforesaid notice was given. The only amounts from subway earnings which could at any time have been applied to the payment of the dividend rental on the assenting Manhattan stock was measured by the accrued deficits to the current preferentials or the amounts by which the earnings from the subways had been insufficient to pay the current preferentials during the war period and under the high costs. This amount, as shown by the Interborough Company's books, as of December 31, 1927, was $4,400,000, but the Transit Commission in its aforesaid notice has taken the position that there are no accrued deficits whatever to the current preferentials and that, therefore, no part of the subway earnings can be applied to the Manhattan dividend rental.

Under the notice from the Transit Commission, the purpose of which was to prevent the application of subway earnings to the payment of the Manhattan dividend rental, and as a direct result of such notice, no part of the earnings from the Interborough subways will be applied by the Interborough Company to the payment of the dividend rental until the controversy concerning the accrued deficits has been determined, and the assenting stockholders must rely for payment upon their stock solely upon the earnings from the elevated properties.

[fol. 1302] Under the Five-cent Fare the Plaintiff has no Net Earnings for the Quarter Ended March 31, 1928, Which are Required to be Applied to the Dividend Rental Payable to the Manhattan Company

The engineer for the Manhattan Company, Mr. George W. Burpee, estimates quarterly the net earnings for the fiscal year which under the plan of readjustment are to be applied as dividend rental on the stock of the Manhattan Company. In his quarterly report to the Manhattan Company, dated March 13, 1928, the engineer estimates that the net earnings which must be applied to the dividend

rental on the assenting stock for the fiscal year ending June 30, 1928, is $764,000, being the net earnings of the elevated lines, as no net earnings from the subways will be applicable. At its last meeting on March 13, 1928, the board of directors of the Interborough Company determined that there were no earnings under the plan of readjustment, either from the elevated lines or from the subway lines, which are required to be applied to the dividend rental on the assenting Manhattan stock for the quarter ending March 31, 1928, and that no payment would be made on such stock on April 1, 1928. There is outstanding $60,000,000 par value of Manhattan stock; to pay the dividend rental on the assenting stock at the rate of 5 per cent. prescribed in the plan and on the non-assenting stock at 7 per cent. as provided in the lease would require $3,088,000. The result is that there will be paid on the Manhattan stock in the present fiscal year less than 25 per cent. of the amount necessary to pay dividend rental in full. The only securities of the Manhattan Company outstanding, other than the $60,000,000 of Manhattan stock, are $40,683,000 [fol. 1303] of Consolidated Bonds bearing 4 per cent. without sinking fund and $4,523,000 of Second Mortgage Bonds bearing 4 per cent. without sinking fund, so that the total annual interest charge on the entire outstanding bonds of the Manhattan Company is $1,808,240.

The 1922 Readjustment Plan was in Fact Approved by the Transit Commission

Mr. Nicholson also states, in his affidavit (page 14, fol. 55), that neither the Interborough Company nor the Manhattan Company ever applied to the Transit Commission for its formal approval and consent to the readjustment plan, although such plan had the tacit approval of the Commission. It is, however, undeniable that the Transit Commission approved the issue of $10,500,000 of unsecured ten-year notes which represented the contribution of the stockholders of the Interborough Company to the plan of readjustment and without which the plan of readjustment could not have become effective, and also approved the expenditure of the proceeds for the purposes named in the plan.

The opinion of the Transit Commission, per Harkness,

T. C., as shown by the excerpt attached to Mr. Nicholson's affidavit (page 22, fols. 84-85), states:

"I recommend *the granting of all the applications*, and appropriate orders to this effect are now submitted herewith.

"There are a few matters connected with the Plan and these applications that require this further brief comment:

[fol. 1304] "It should be understood that *the approval of this plan* does not involve any approval of the principle of 999-year leases of public utility properties." (Italics mine.)

Therefore, when the Transit Commission granted "all the applications" and described the action taken by it as "the approval of this plan," the Commission did approve the plan of financial readjustment.

The Present Unprofitableness of Operation of the Manhattan Division is Due Solely to Increased Operating Costs and the Inadequate Rate of Fare

The earnings from the elevated railroads owned by the Manhattan Company and leased to the Interborough Company and now constituting part of the Interborough system, prior to the time when the high costs created the financial difficulty for transit properties in this city and elsewhere, are shown by the certificate granted by the Public Service Commission, with the approval of the Board of Estimate and Apportionment, to the Interborough Company in 1913, authorizing the construction of the elevated extensions. Under this certificate the Interborough Company and the City share equally the excess net profits from the elevated railroads constituting part of the Interborough system. In determining the amount of the excess net profits, it is prescribed in the certificate that certain deductions from the gross income shall be made, including not only the rental payable by the Interborough Company for the elevated railroad under the Manhattan lease, but, in addition, an amount equal to the average net profits of the [fol. 1305] Interborough Company from the elevated railroads over and above such rental. The provision for those deductions is as follows (page 27):

"(6) An amount to be retained by the Interborough Company equal to one-quarter (¼) of One Million Five Hundred and Eighty-nine Thousand Three Hundred and Forty-eight Dollars ($1,589,348) as representing the average net profits of the existing Manhattan Railroad for the two years, one ending June 30, 1910, and the other June 30, 1911, provided, however, that if it should hereafter be decided that either the Manhattan Railway Company or the Interborough Company is liable for the payment of the Federal corporation tax upon the sum distributable to the stockholders of the Manhattan Railway Company as a dividend, the aforesaid amount shall be reduced to the sum of One Million Five Hundred and Forty-seven Thousand Three Hundred and Fifty-one Dollars ($1,547,351)."

There is similar recognition in the certificate to the Manhattan Company authorizing the construction of the third track (page 16) of the existence of the profit which the Interborough Company realized from the elevated railroads over and above the full rental.

Since 1912 a substantial change in the earnings of the elevated has been brought about, so that from a profit of $1,547,351 over and above the full rental, including 7 per cent. on the $60,000,000 of Manhattan stock, a point has been reached where for the fiscal year ending June 30, 1928, the amount which will be earned on the elevated railroad, over and above the interest charges of $1,808,240 on the $45,206,000 of Manhattan bonds outstanding and excluding all interest charges and sinking fund on the Interborough [fol. 1396] bonds and notes amounting to $47,330,574 issued to construct the third track, elevated extensions and the power house improvements, will be $764,000. The increased costs of operation causing this change in the earnings are a matter of common knowledge and are explicitly recognized in a written report from the Board of Transportation of this City to the Board of Estimate and Apportionment, dated May 26, 1925, hereinafter referred to.

Not only was the certificate by the Public Service Commission to the Interborough Company authorizing the elevated extensions granted on the theory that the elevated railways of the Manhattan Company were highly profitable, but the actual earnings between the time of the making of the lease in 1903 and the time when the certificate

was given in 1913 demonstrated clearly that these properties were profitable. The net earnings in this period, over and above the full rental under the lease including the 7 per cent. on the Manhattan stock, which net earnings represent the profit to the Interborough Company from the elevated properties, are as follows:

1903	$547,322 14
1904	1,925,726 13
1905	1,089,392 67
1906	689,759 99
1907	1,511,030 01
1908	649,886 62
1909	579,537 92
1910	1,441,187 90
1911	1,479,837 68
1912	1,601,035 76
1913	1,528,389 96
1914	1,705,899 07
1915	1,416,565 79
1916	1,393,229 89
1917	1,146,179 93

[fol. 1307] Thus, in 1914, the operating profit of this property permitted the payment of the full annual dividend rental payment of $4,200,000, and left an excess of $1,705,899, giving for that year a total operating profit of $5,905,899, while in 1927, the operating profit was only $1,395,130. The number of passengers carried in 1914 was 311,473,568, and in 1927 the number of passengers carried was 359,019,660.

The defendant Manhattan Railway Company is engaged in the operation of the lines which are the subject of this action, under certain profit-sharing agreements readjusting the relation of the plaintiff to this defendant and its stockholders heretofore referred to and attached hereto, pursuant to which three members of the board of directors of the plaintiff controlling such operation are nominated by the said Manhattan Railway Company. The dividend returns of 94 per cent. of the stockholders of this defendant irrevocably participating in said agreements are made solely dependent upon the net profits of the said system or of the said Manhattan Railway lines, whichever may be the

greater, and all dividend payments to the stockholders of the Manhattan Railway Company are a charge upon the net earnings of the Interborough system prior to any payment upon the equity therein of the plaintiff.

The Economic Efficiency of the Elevated Railroads as Compared with the Subway Lines

The value of said Interborough's system, based upon the defendant Transit Commission's engineer's reproduction cost figures, is at least $831,553,648, and, upon the plain-
[fol. 1308] tiff's estimate of present value, at least $898,-793,648. Upon the Interborough system of over 388 miles of single track, there were transported during the fiscal year ending June 30, 1927, 1,173,626,256 passengers, of which 359,019,660 passengers were carried upon the Manhattan (or elevated) Division, the present value of which is at least $208,873,038, as estimated by the plaintiff. The capital requirement to carry a passenger upon the elevated lines is thus only approximately 58 cents, while over 84 cents upon the Subway Division constituting the balance of the system. The economic efficiency of the Manhattan Elevated Railway lines thus not only exceeds that of existing subway lines, but it will be vastly greater than that of the new subways now approaching completion by the City, which cost at least twice as much to construct and would require a fare exceeding eight cents to permit of compensatory operation, even upon the City's own estimates. I am informed and believe that in no possible manner can traffic relief be advanced with greater economy, speed and resulting advantage to the public than by an increase in the facilities of the elevated railway now and for many years past rendered impossible by a confiscatory rate of fare.

The elevated division is subjected to the full incidents of taxation, while the competing City-owned lines are exempt from taxation as private property and are the recipients of enormous subsidies arising out of the failure of the existing non-compensatory five-cent rate of fare to carry the greater portion of the City's investment, the deficits being thrown upon the taxpayers.

The elevated railways thus contribute to support of the City, while the City supports the subways.

The entire net earnings of the system, if any, will as aforesaid be exhausted under existing conditions in making [fol. 1309] meagre and intermittent payments to defendant's stockholders of a small fraction of a just return upon their property, if any at all, leaving nothing whatever to nourish the developing capital necessities of the greatest transit system in the world, and there is now being paid upon the entire investment represented by the property of this defendant nothing whatever except the annual sum of $50,000 for the expenses of its corporate administration, $1,808,240, representing 4 per cent. on its mortgage indebtedness, and $764,000, or less than 1.03 per cent. upon said present value. In contrast to the financial structure of the plaintiff, the capital stock of the Manhattan Railway Company represents a major element of the investment in its property and the stockholders of this defendant by reason of the said priority over the equity of the plaintiff represent the interest most primarily and immediately concerned in the establishment of a compensatory rate alike upon the same system as a whole as upon its lines of elevated railway.

The earnings of the new and old subways constituting part of the Interborough system were combined under Contract No. 3 at the opening of these subways in 1919. Out of the combined gross revenue of the new and old subways, after paying the operating expenses and the average profit of the Interborough Company on the old subways, there was next to be paid out of the earnings the interest and sinking fund on the Interborough Company's investment; after this was paid in full, the return to the City on its investment at the rate of 8.76 per cent. per annum was to be paid out of the remaining earnings.

No payment has ever been made on the City's investment in the new (Contract No. 3) subways, as the earnings [fol. 1310] have been insufficient. The high cost had become effective at the time that those subways were opened. The amount of the City's investment in the said new subways was $113,095,955 as of June 30, 1927. The annual return on that City's investment at 8.76 per cent, is $9,899,322. The total unpaid return on the City's investment with interest is $83,271,200 as of December 31, 1927. If the annual rate of return were 6 per cent. instead of 8.76 per

cent., the amount of the annual return to be paid on the City's investment out of earnings would now be about $6,800,000 and the total unpaid return would now be approximately $57,000,000.

In the fiscal year ending June 30, 1927, the Interborough Company earned on the subways over and above the City rental under Contracts Nos. 1 and 2 and interest and sinking fund on the company's bonds and notes issued for subway purposes $6,380,017. On the elevated in the same year the Interborough Company earned over and above the interest on the Manhattan Company's bonds but excluding the interest and sinking fund on the Interborough Company's bonds, the proceeds of which were used to construct the elevated third track, the elevated extensions and the power house improvements $1,395,130. If there is put back into the earnings of the elevated the amount of the State Franchise Tax, as there is no similar tax on the subways, the net earnings of the elevated over and above the interest charges named above would then be $2,618,543. Although the third track, the extensions and the power house improvements were made by the Interborough Company at its own expense and the proceeds were secured from Interborough securities sold to the public, if the interest and sinking fund on these securities is deducted from the elevated earnings, the result would be a deficit of $4,989,129.

[fol. 1311] In making such calculations, it is also necessary to keep in mind not only that the subways have the more modern cars, but that 76 per cent. of the subway cars are equipped with multiple unit control doors and only 21 per cent. of the elevated cars are so equipped; the expense for guards on elevated cars is one of the most substantial items in operating expenses of the elevated.

This favorable comparison between subway and elevated earnings, even after making the various charges which under the present arrangement could not be made against the elevated earnings, results from the fact that it costs less to construct a given unit of elevated structure than a similar unit of subway and that the easements of light, air and access which constitute the property interest in the bed of the street which the Manhattan Company had to acquire in order to complete its right to have its railroad

in the street cost, when acquired many years ago, the sum of $23,000,000. These easements have had the same increase in value as the properties abutting on the street from which they were acquired and were paid for on the basis of the amount by which their taking decreased the market value of the abutting properties. The easements to-day could not be acquired from the abutters if they owned them for the $105,000,000 representing the total face value of all outstanding bonds and stock of the Manhattan Company.

[fol. 1312] The Rental Payable under the Manhattan Lease is not Now and has not Been in the Past, Excessive

Mr. Nicholson, in his affidavit (page 14, fol. 52), asserts, without a vestige of support in fact, "that the rentals payable under said Lease were from the inception of said Lease excessive, exorbitant and beyond the earning power of the leased railroads to pay and that this fact was known or should have been known to the plaintiff and the said defendant Manhattan Railway Company." It is known to no one, for the contrary is true. Appended hereto is a complete statement of the earnings of this defendant "from the inception of said lease," showing not only that the earnings in each and every year thereafter up to the period of increased costs in 1918, due to war conditions, were in excess of the rental, but so greatly in excess as to have reached an aggregate excess of approximately $18,704,941.46 in 1917.

The Corporation Counsel further says that, in view of the fact that the elevated lines were in 1903 about to be brought into competition with the subways, a guaranteed rental of 7 per cent. was unreasonable and unwarranted. He is apparently ignorant of the fact that the Manhattan earnings prior to the subway construction were far less than they were after it was opened for operation, namely, $1,120,512 in 1899, and $5,709,726.13 in 1904, and also of the fact that the reason for this increase was that a compensatory rate of fare at that time rendered it possible to make improvements in the equipment of the lines, developing an increase of traffic (55 per cent. in four years), just as the absence of a compensatory rate at the present time together with the confiscatory policy of the City has utterly de-

[fol. 1313] stroyed the credit based upon which similar improvements could be made in equipment at the present time to the great relief of the public. The history of transportation in this City has shown that on any line of rapid transit the traffic growth is limited only temporarily by competition, and is more permanently and effectively conditioned by the degree to which its equipment and facilities are adapted to contemporary requirements.

Appended to this affidavit is also a statement of the number of passengers carried upon the Interborough "L" lines covering the entire period of subway competition.

The Manhattan Elevated System is Neither Obsolete nor Inherently a Losing Venture; It is Vitally Indispensable for the Public Accommodation

Dr. John Bauer, the economist employed by The City of New York, seeks to depreciate the value of the property of this defendant (Affidavit, pages 26-27, fols. 100-107), upon the alleged ground of an obsolescence of its equipment which, if existent, the non-compensatory rate of fare deprives the plaintiff and this defendant of power to rectify, notwithstanding this defendant's great monetary sacrifices incident to the readjustment of 1922. It is to be understood, however, that the obsolescence here considered does not imply any lack of efficiency or safety in an operation which, throughout its history, has sustained an unparalleled record of safety. The alleged obsolescence resides rather in the fact that cars more commodious and more easily accessible might attract a larger share of the traveling public to the elevated lines.

[fol. 1314] The report of C. E. Smith, who is an engineer of recognized authority in transportation and who was engaged as a traffic expert by The City of New York, to the Comptroller of the City, dated September 30, 1927, states (page 32):

"The Manhattan Elevated system is not obsolete nor inherently a losing venture. Passengers last year increased 12,815,086 over the preceding year and about equalled the busiest year in the company's history. The trouble with the property is solely due to the competition

of the City subsidized subways. The elevated lines do not have five-cent fare restrictions either in the franchises or third track certificates.

"The trouble here is the same as would be the trouble with real estate if the City should condemn land and build homes and apartments and office buildings and contract with companies to equip and operate them at less than cost at a fixed pre-war rent that would not pay taxes and interest and sinking fund payments on the cost of the land and buildings. Owners of other homes, apartments and office buildings would be in a bad fix because they would have to pay taxes and interest on their investments.

"Such a City policy would bankrupt such owners and stagnate the development of other homes, apartments and office buildings to the great detriment of the City. The City can break any other line of industry by subsidizing competition with it. It approaches confiscation."

He also said (page 33):

"It is just as unfair, in the light of changed conditions, for the City to ruin these companies by subsidized competition as it would be to ruin any other industry.

"Contrary to general impressions, business is not leav- [fol. 1315] ing the elevated railways in favor of the subways. The rate of increase on the elevated has not been so fast as the subway traffic, but it must be remembered that the elevated lines were thought to be saturated with traffic when the subways were built and it has only been by improvements in operating facilities and methods that the elevated has increased its traffic. Interesting figures on the increase in passengers handled by the elevated lines during the last twenty-five years, in which all the subways were built, are as follows:

1902	215,259,345 Passengers
1907	282,924,273 Passengers
1912	304,270,841 Passengers
1917	349,380,093 Passengers
1921 (Peak) .	374,293,051 Passengers
1922	348,517,216 Passengers
1927	359,019,660 Passengers

"This is still considerable of a going concern. Its service can be improved and capacity further enlarged by modern commodious cars. To strengthen it and operate slightly heavier cars is not a serious matter, but it cannot be done at a five-cent fare. This company is not under contract to charge a five-cent fare, and if necessary can give a superior class of service, such as a seat for every passenger except during short rush periods, at a fare that would yield a reasonable return on the fair value of the property.

"In the 1925 report of the Board of Transportation in considering the effect of the new City subways in deflecting passengers from the elevated lines, the Board gave the following figures:

	Manhattan Elevated	Brooklyn Elevated	Total
1924	359,000,000	239,000,000	598,000,000
1931	328,000,000	331,000,000	659,000,000
1940	443,000,000	447,000,000	890,000,000

[fol. 1316] "*After a falling off at the opening of the new City subways in* 1931 *the estimate shows a* 35% *increase in the next* 10 *years to an amount nearly* 25% *in excess of the present Manhattan elevated and nearly double on the Brooklyn elevated. The latter would be reduced somewhat if the Fulton St. subway be built.*

"*The Board also estimated* $582,780,000 *in* 1925 *as the cost of the new City subway system to carry* 856,000,000 *passengers in* 1940, *less than the two elevated systems are estimated to carry. Contracts already let indicate that the cost will far exceed the estimate. This gives a good idea, by comparison, of the value and continuing necessity of the elevated railways, estimated to carry more passengers than the expensive City system.*

"As the cost of the City system will be about $1.00 per passenger, a subway system that would carry the 890,000,000 passengers of the old elevated railways in 1940 might cost, on the same basis, $800,000,000. Adding to this the cost of acquiring and taking down the elevated railways, the total would amount to about $1,000,000,000. This does not including many miles of elevated extensions of subway

lines in upper Manhattan, Bronx, Queens and South Brooklyn, which, if included, would increase the cost far beyond a billion dollars.

"Until another billion dollars is available the old Brooklyn and Manhattan elevated lines must be tolerated. Until still more money is available the newer elevated extensions of the subways must be tolerated. In the meantime such fares should be paid as will enable more modern cars to be operated, full equipment for unquestionably safe operation, a better degree of maintenance to improve their appearance; and it is to be hoped that a more prosperous company will devise some means to decrease the noise." (Italics mine.)

[fol. 1317] In a report made by the Board of Transportation of the City, of which Mr. Delaney is head, to the Board of Estimate and Apportionment, dated May 26, 1925, Mr. Delaney contrasts the present cost of building a subway with the cost which prevailed at the time the Interborough subways were constructed as follows (page 21):

"The policy of financing the construction and equipment of the existing rapid transit systems by the issuance of fifty-year bonds was based upon estimates of cost of construction, equipment and operation made in 1912, which indicated that the interst and amortization of these fifty-year bonds could be supported from the earnings produced by a five-cent fare. Experience has proved that those estimates were accurate, but the tremendous increase in the cost of labor and material since 1912 has produced an entirely different condition in respect to cost of construction, equipment and operation.

"The present estimated cost of subway construction and equipment is about 150 per centum higher than similar costs prior to 1904, when the first subways were put into operation, and about 125 per centum higher than the cost which prevailed when contracts for construction were let in 1914 and 1915 for the dual system of subways."

Not merely is the cost of the new subways from 125 per cent to 150 per cent more than that of the old, but the elevated railways cost still less.

Thus, the elevated lines are not only now the most economically efficient, but they tend steadily to become more and more so. Dr. Bauer imagines that it is "inconceivable" that they can survive more than 10 or 15 years." Mr. Delaney, the responsible and experienced transit expert, upon the basis of whose estimates the City subways are being constructed, predicts, as heretofore stated, an [fol. 1318] increase of more than 100,000,000 passengers in the same period.

Illustrative of the extremity of contention of Dr. Bauer relative to the elevated railroads of this defendant, was the claim, based largely upon the testimony of the said Bauer, interposed by the City against the recovery by this defendant of any amount whatever in the condemnation of a portion of its railway in 42nd Street, said defense being chiefly based upon an inability (alleged by Dr. Bauer) to earn anything upon a five-cent fare. The serious present and irremediable damage inflicted by the absence of a compensatory rate is evidenced by the fact that the Court, apparently giving weight to this contention, has awarded this defendant only $750,000 for real property acquired by this defendant as part of its right of way and having an uncontested and undisputable value for other than railway purposes of over $3,000,000. The affiant, Dr. Bauer, totally ignores the fact that, owing to the approaching exhaustion of the plaintiff's accrued preferential which as aforesaid the City claims is already overdrawn, there will in the future be available little, if any, net income to the plaintiff other than the preferential which must be practically all devoted to inescapable fixed charges leaving, as contended by senior counsel for the Commission and the City, practically nothing in the future applicable to the equity of the stockholders of this defendant.

The affidavit of Dr. Bauer merely emphasizes the fact that, due to the confiscatory rate of fare to which the said system is now limited, there is not now and for many years has not been any adequate source from which capital requirements for necessary improvements and developments of the said Manhattan lines can be drawn and that the impossibility of adapting the equipment and service of the [fol. 1319] Manhattan Railway Company to the requirements of an adequate and profitable operation has been

ruinous alike to the property of the said defendant and to the public interest.

The necessity of the improvement and modernization of the equipment of the defendant in order to preserve and develop its traffic has been demonstrated by its experience and is common to all transit lines engaged in meeting the inevitable developments and necessities of such service.

The improvements of 1900-1904, followed a decade in which traffic was diminishing owing to the lack of proper adaptation. There followed immediately not only an increase of total traffic reaching over 55 per cent by 1904 as aforesaid, when the net revenue was $5,799,726.13, but also an increase to $6,142,374 in 1917, the last year before the World War conditions became effective in increasing costs.

Following the War and in consequence of the economic conditions resulting therefrom, the five-cent rate of fare became wholly inadequate to meet dividend requirements resulting in a readjustment agreement by virtue of which 94 per cent of said stockholders waived their right vested in them as individual stockholders to the said fixed dividend rate and became dependent solely upon the earnings of the Interborough system and or the Manhattan Elevated Railways, whichever should be the greater, for any return whatever upon their investment. But the rights of all the Manhattan stockholders to participate in the earnings of the system under the said readjustment agreement, as well as under said lease, are still vested in them individually as said stockholders.

[fol. 1320] The Threatened Destruction of a "Partnership"

The present policy of confiscation pursued by the City is substantially that enunciated by the former Mayor of said City, John F. Hylan, in the plan of rapid transit submitted by him to the Board of Estimate of said City, September 6, 1922, in which it was said that the City, "will entertain no partnership in the operation of any of these lines * * * the City intends to discontinue its present partnership arrangements with the Interborough." As far as the elevated lines of this defendant are concerned, this result was then intended and is now being vigorously pursued in the manner then announced by the said Mayor of the defendant City as follows:

"One of the important effects of the construction of new rapid transit lines will be that existing privately owned elevated structures in the built up sections of Manhattan, Bronx and Booklyn will ultimately be removed, *because their continued operation by private owners will be unprofitable, then elevated structures will disappear after the first period of new City construction.*" (Italics supplied.)

Far from the new subways eliminating the elevated railways of the "partner" by fair competition, defendant's elevated lines possess a tremendous economic advantage owing to their low capitalization and cheapness of construction. The report of the chairman of the Board of Transportation, an appointee of the Mayor of the said City, to the said Board of Estimate March 26, 1925, estimated that the traffic on the elevated lines of the plaintiff would increase from 328,000,000 passengers in 1931 to 443,000,000 [fol. 1321] in 1940, and that the ratio of elevated to Interborough subway traffic would rise (from the present 30.6 per cent to 37 per cent of the total traffic of the Interborough system). The capital investment in the new subway he estimated at $587,780,000 in 1931, or $1.45 to each passenger carried, as against the aforesaid 58 cents capital value per passenger on the elevated division at present based on a value thereof of $208,873,638.

James F. Hughes.

Sworn to before me this 20th day of March, 1928. Elita M. Hyde, Notary Public, New York County. N. Y. Co. Cl'k's No. 535, Reg. No. 9675. Commission expires March 30, 1929.

[fol. 1322] Interborough Rapid Transit Company

Statement Showing Number of Passengers Carried by Years on the Elevated Lines from 1877 to 1927, Inclusive

1877	3,011,862
1878	9,291,319
1879	46,045,181
1880	60,831,757
1881	75,585,778
1882	86,361,029
1883	92,124,943
1884	96,702,620
1885	103,354,729
1886	115,109,591
1887	158,963,232
1888	171,529,789
1889	179,497,433
1890	185,833,632
1891	196,714,199
1892	213,692,570
1893	221,407,197
1894	202,751,532
1895	187,614,985
1896	184,703,036
1897	182,904,851
1898	183,390,846
1899	174,324,575
1900	184,164,110
1901	180,045,741
1902	215,259,345*
1903	246,587,022
1904	286,534,195†
1905	266,381,930‡
1906	257,796,754‡
1907	282,924,273§
1908	282,845,864
1909	276,250,196
1910	293,826,280
1911	301,449,292
1912	304,270,841
1913	306,845,000
1914	311,473,568
1915	301,702,517
1916	312,246,796
1917	349,390,093
1918	352,660,669
1919	348,188,000
1920	369,034,477
1921	374,283,051
1922	348,517,216
1923	348,524,700
1924	359,410,056
1925	352,723,553
1926	340,204,574
1927	359,019,660

* First year electrical operation.
† First subway contract No. 1.
‡ First subway contract No. 2.
§ Contract No. 3 subways opened.
Years 1877 to 1889, inclusive, are for the year ended September 30th; all other years are for the year ended June 30th.

[fol. 1323] Interborough Rapid Transit Company

Statement Showing the Net Income and Dividend Rental of the Manhattan Division for the Years Ended June 30, 1904 to 1917, Inclusive

Year	Net income before deducting Manhattan dividend rental	Dividend rental	Net income
1904	$5,789,726.13	$3,864,000.00	$1,925,726.13
1905	4,953,392.67	3,864,000.00	1,089,392.67
1906	4,553,759.99	3,864,000.00	689,759.99
1907	5,627,030.01	4,116,000.00	1,511,030.01
1908	4,849,886.62	4,200,000.00	649,886.62
1909	4,779,537.92	4,200,000.00	579,537.92
1910	5,641,187.90	4,200,000.00	1,441,187.90
1911	5,679,837.68	4,200,000.00	1,479,837.68
1912	5,801,035.76	4,200,000.00	1,601,035.76
1913	5,728,389.96	4,200,000.00	1,528,389.96
1914	5,905,899.07	4,200,000.00	1,705,899.07
1915	5,616,565.79	4,200,000.00	1,416,565.79
1916	5,593,229.89	4,200,000.00	1,393,229.89
1917	5,346,179.93	4,200,000.00	1,146,179.93
Totals	$75,865,659.32	$57,708,000.00	$18,157,659.32

[fol. 1324] In United States District Court, Southern District of New York

E 44-229

Interborough Rapid Transit Company, Plaintiff,

against

John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; the Manhattan Railway Company, and the City of New York, Defendants

(Ancillary Action)

Ancillary Complaint

The plaintiff, a railroad corporation organized and existing under the laws of the State of New York and a citizen of the State of New York, brings this ancillary bill in the nature of an original bill against John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit

Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; the Manhattan Railway Company, a railroad corporation organized and [fol. 1325] existing under the laws of the State of New York; and The City of New York, a municipal corporation created and existing under the laws of the State of New York, defendants, citizens of the State of New York, and at least one of whom resides within the Southern District of New York;

And for a cause of action alleges, upon information and belief:

I. By a bill of complaint in equity, duly filed with the Clerk of the United States District Court for the Southern District of New York at 9:20 o'clock in the forenoon of the 14th day of February, 1928, an action was commenced by the Interborough Rapid Transit Company, the plaintiff herein, against John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York; William A. Prendergast, as Chairman of the Department of Public Service of the State of New York; Manhattan Railway Company, and the City of New York, defendants. A copy of said bill of complaint, marked "Exhibit A," is hereto annexed and made a part hereof.

II. Pursuant to the prayer contained in the said bill of complaint, a writ of subpoena ad respondendum was thereupon forthwith issued out of and under the seal of this Honorable Court, directed to the said defendants named in said bill of complaint, commanding them and each of them on a certain day and under a certain penalty to appear before this Honorable Court and then and there make answer to the said bill of complaint.

III. The said subpoena ad respondendum, issued as aforesaid, was thereupon forthwith duly entered in the office of the United States Marshal in and for the Southern District of New York, in the forenoon of the 14th day of February, 1928.

[fol. 1326] IV. The said subpoena was thereafter and in the forenoon of the 14th day of February, 1928, duly per-

sonally served by Henry V. Becher, a Deputy United States Marshal, upon each of the said defendants, within the Southern District of New York.

V. In and by the said bill of complaint in the original action herein, the plaintiff set forth and alleged five separate causes of action covering the following subject-matters in brief summarization, viz:

First Cause of Action.—As to limitations imposed by legislation or acts legislative in character of the State of New York (particularly Chapter 743 of the Laws of 1894 of the State of New York) on rates of fare chargeable by the plaintiff on certain elevated railroad lines (the so-called "Manhattan Division") of the rapid transit railroads operated by the plaintiff, the greater part of which is owned by the defendant Manhattan Railway Company and leased to the plaintiff and the other part of which is owned by the plaintiff.

Second Cause of Action.—As to not only the subject-matter of the first cause of action, but, also, as to the rate provision in a certain Elevated Railroad Extension Certificate of March 19, 1913, granted by the Public Service Commission of the State of New York for the First District, acting in behalf of the defendant The City of New York, to the plaintiff, and the steps taken by the plaintiff, in conformity with and in pursuance of the Public Service Commission Law and of the powers conferred upon and delegated to it by the Legislature (including the plaintiff's tariff schedules), to establish an increase in the fare chargeable by the plaintiff on the said elevated lines (Manhattan Division) operated by it.

Third Cause of Action.—As to the limitations imposed [fol. 1327] by legislation or acts legislative in character of the State of New York, including the plaintiff's tariff schedules, on the rates of fare chargeable on the Subway Division of the rapid transit railroads operated by the plaintiff, part of which is owned by the plaintiff and part of which is owned by the defendant The City of New York, and, also, the rate provisions in a certain Contract No. 3 of March 19, 1913, made between the plaintiff and the Public Service Commission of the State of New York for the First District, acting in behalf of the defendant The

City of New York, for rapid transit railroad extensions within the City of New York, and the steps taken by the plaintiff, in conformity with and in pursuance of the provisions of the Public Service Commission Law and the power and authority conferred upon and delegated to it by the Legislature, to establish an increase in the fare chargeable on the said Subway Division.

Fourth Cause of Action.—As to not only the subject-matters of the first three causes of action, but, also, as to the fare chargeable on the subject-matters of the first three causes of *of* the rapid transit railroads operated by the plaintiff, considered as a unified operation, both under the said legislation or acts legislative in character and under the said Elevated Extension certificate and the said Contract No. 3 for rapid transit railroad extensions, of March 19, 1913.

Fifth Cause of Action.—As to not only the matters alleged in the first four causes of action, but, also, as to various acts and threatened action of the defendant Transit Commission and the defendant The City of New York to enforce the continuance of a confiscatory five-cent fare and to prevent the plaintiff from resorting to Court to obtain an adjudication of its rights and to test the validity of any limitation to the five-cent fare.

The said complaint also set forth and showed the various acts and proceedings of the said Transit Commission which [fol. 1328] contemplated the expenditure by the plaintiff, for capital purposes, of approximately $40,000,000, for or in connection with the extension of subway station platforms and the providing of 432 or other substantial number of additional subway cars, and the facts as to the fiscal and operating conditions of the plaintiff as well as to the force of the legislative acts, orders, regulations, leases, contracts and certificates in anywise affecting the validity and enforceability of rate limitations on either or both the Manhattan Division (elevated lines) and the Subway Division of the rapid transit railroad lines operated by the plaintiff.

VI. In and by the said bill of complaint in the original action, the plaintiff herein prayed this Honorable Court to grant relief not only as to all matters in controversy

between the parties, but as to all matters of right or interest of the parties in the premises which could be declared by judgment, and contained the following prayer for relief:

"Prayer for Judgment

"To the end that the plaintiff may have that relief which it can only obtain in a court of equity and that the defendants may each answer the premises, but not only oath or affirmation, the benefit whereof hereby is expressly waived by the plaintiff, it hereby prays:

1. That it be adjudged and decreed that a maximum rate of five cents per passenger upon the rapid transit railroad lines operated by the plaintiff, or upon each the said Manhattan Division or the said Subway Division thereof, is illegal and void, because in contravention of the Fourteenth Amendment of the Constitution of the United States and of Section 6 of Article I of the Constitution of the State of New York; and that the provisions of the said Chapter 743 [fol. 1329] of the Laws of 1894 of the State of New York, of the said Public Service Commission Law, of the said Railroad Law, of the said Rapid Transit Act, of the said other acts of the Legislature of the State of New York, of the said orders and directions of the said Public Service Commission, the said tariff schedule published by the plaintiff prior to February 1, 1928, of the said Contracts Nos. 1, 2 and 3, and of the related certificates for elevated extensions and improvements, in so far as they prohibit, or operate to prohibit, the plaintiff from charging or receiving for transportation of passengers a rate of fare in excess of five cents per passenger upon the said rapid transit railroad lines or upon the Manhattan Division or upon the said Subway Division, or in so far they require or compel, or operate to require or compel, the plaintiff to charge such five-cent rate of fare, or in so far as the said Transit Commission or the said Public Service Commission have construed them so to prohibit, require or compel the plaintiff, are each likewise illegal and void.

"2. That it be adjudged and decreed that the said orders and decisions of the said Transit Commission, requiring the plaintiff to construct and provide, at its own expense,

extensions to the platforms of the subway stations, as aforesaid, are each likewise illegal and void.

"3. That it be adjudged and decreed that the making of an order, determination or decision by the said Transit Commission, requiring the plaintiff to provide, at its own expense, 432 or other substantial number of additional cars for operation on the subway lines, as threatened by the said Transit Commission to be made, would likewise be illegal and void.

"4. That it be adjudged and decreed that the said order of the said Transit Commission or any order or direction by it or by the defendant The City of New York preventing or tending to prevent the plaintiff from resorting freely to test the validity of the said rates or fares, are likewise illegal and void

[fol. 1330] "5. That it be adjudged and decreed that the Public Service Commission Law, as amended and supplemented, or any other provision of law, or any regulation prescribed under any such law, or any order or direction made by the Transit Commission, or any tariff schedules published prior to February 1, 1928, in so far as they, or any of them, prohibit the plaintiff from putting into effect forthwith a rate of fare upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division which will afford to it just compensation therefor, or in so far as they, or any of them, compel the plaintiff to observe a rate of fare of not more than five cents per passenger, is likewise illegal and void.

"6. That it be adjudged and decreed that the plaintiff has no adequate remedy at law for the injury which will result from the enforcement of said acts, contracts, orders and decisions and that such injury will be irreparable.

"7. That it be adjudged and decreed that the plaintiff be granted injunctions, both temporary and permanent, against the defendants constituting the said Transit Commission, and The City of New York, and their successors, restraining them and each of them, and their respective privies, and each of their officers, agents, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the said acts,

orders, directions, or tariff schedules, contracts or related certificates, or of either of them, or of any other provision of law:

"(1) From in any way enforcing, or attempting to enforce, against the plaintiff a rate of fare for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each of Manhattan Division and the Subway Division of not more than five cents per passenger, under the provisions of said acts, orders, directions, tariff schedules, contracts or certificates, or otherwise;

[fol. 1331] "(2) From in any way enforcing, or attempting to enforce, against the plaintiff the provisions of the said acts, orders, directions, tariff schedules or certificates, in so far as they prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, a fare per passenger in excess of five cents;

"(3) From in any way enforcing, or attempting to enforce, against the plaintiff the said order relating to the construction of subway platform extensions;

"(4) From in any way enforcing the said order or direction of the said Transit Commission, or any other order or direction by it or by the defendant The City of New York, or bringing or prosecuting any action or proceeding to seize or take possession of the properties used or operated by the plaintiff in or in connection with said rapid transit railroads, or to take over the operation of the same, or to prevent the application of the revenues therefrom, or otherwise preventing or deterring the plaintiff from testing the validity of said rates or fares and the acts, orders, regulations and provisions relative thereto;

"(5) From making or in any way enforcing, or attempting to enforce, against the plaintiff any order requiring the plaintiff to provide 432 or other substantial number of additional cars for operation on the *the* said subway lines;

"(6) From bringing and or prosecuting any suit, action or proceeding to enforce any penalties and forfeitures, under the said Public Service Commission Law, the said

Railroad Law, the said Rapid Transit Act, or any other law, the said orders or directions, or the said Contracts Nos. 1, 2 and 3 and related certificates, against the plain- [fol. 1332] tiff; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts or certificates or any of them, in so far as they, or any of them, impose a maximum rate of fare of five cents per passenger or prohibit the plaintiff from charging a rate of fare of seven cents per passenger upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division;

"(7) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, any rate which it may lawfully charge or receive; any provisions of said acts, orders, regulations, contracts or certificates or any regulations prescribed thereunder, relative to the rate to be charged and received by the plaintiff, to the contrary notwithstanding.

"7. That the rights of the parties hereto in the premises be declared and adjudged by appropriate decree.

"8. That the plaintiff may have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

"That Your Honors grant unto the plaintiff a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to said defendants, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to appear before Your Honors in this Honorable Court and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to Your Honors may seem meet."

[fol. 1333] VII. After the original action herein had been commenced by the plaintiff and this Court had acquired jurisdiction of the subject-matter therein, as aforesaid, and after

the service of the subpoena ad respondendum upon the defendants as aforesaid, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service, and the defendant The City of New York, contemporaneously undertook to bring two civil actions and a special summary civil proceeding, in the Supreme Court of the State of New York, respectively entitled as follows:

Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant;

The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant;

The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant.

VIII. Copies of the petition in the said summary proceeding brought in the New York State Supreme Court by the defendants constituting the Transit Commission, entitled "Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant," the orders therein made, and the affidavits referred to in the said orders, are hereto annexed and made part hereof, and marked "Exhibit B."

Copies of the complaint in the said action brought in the New York State Supreme Court by the defendants, consti- [fol. 1334] tuting the Transit Commission, entitled "The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant," the order therein made and the affidavits referred to in the order, are hereto annexed and made part hereof, and marked "Exhibit C."

Copies of the complaint in the action brought in the New York State Court by the defendant The City of New York, entitled "The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant," the order therein made, and the affidavit referred to in the order, are

hereto annexed and made part hereof, and marked "Exhibit D."

IX. In and by the Civil Practice Act of the State of New York it is provided, in Section 218, that a civil action is commenced by the service of a summons, which is a mandate of the Court, and it has been judicially held and determined by the Courts of the State of New York that the action is commenced at the time of the service of the summons, and that an action is not begun until the summons has been served upon the defendant or the defendant has voluntarily appeared in the action.

X. The said summary proceeding and two actions brought by the defendants as aforesaid were not commenced until after the commencement of the original action herein by the filing of the bill of complaint with this Court, and were not commenced until 1.55 o'clock in the afternoon of the 14th day of February, 1928, when copies of the petition in the summary proceeding and of the summons and complaint in the two actions, in the New York State Court, were served upon the plaintiff by the delivery of copies [fol. 1335] thereof to assistant counsel for the plaintiff.

XI. The subject-matter of each the said summary proceeding and the said two actions, brought in the New York State Court by the said defendants, is comprised within the bill of complaint filed by the plaintiff in the original action in this Court, now pending before this Court undetermined, and no other matter is alleged in either of the pleadings in the said summary proceeding or the said two actions in the New York State Court.

XII. Each of the matters alleged or set forth in the said petition and the said two complaints in the New York State Court is comprised in the complaint filed by the plaintiff in the original action in this Court, either by affirmation or by negation.

XIII. The identity of the limited issues in the New York State suits and part of the issues comprised in the plaintiff's original suit in this Court is shown also from the prayers for relief set forth in the pleadings in the State suits. The prayer for relief in the petition by the defend-

ants constituting the said Transit Commission, in the special summary proceeding, reads as follows:

"Wherefore your petitioner prays that this Court will by order specify the time, not exceeding twenty days after service of a copy of this petition, within which defendant must answer this petition and further provide that this Court will inquire into the facts and circumstances as provided in Section 57 of the Public Service Commission Law; that a mandamus order be made and entered commanding and directing defendant to charge the five (5) cent fare in the tariff schedules on file and in effect or that an injunction be issued to restrain defendant from charging a seven (7) cent fare; and that your petitioner may have such other or further relief as to this Court may seem proper."

[fol. 1336] The prayer for relief in the complaint in the said action brought by the defendants constituting the Transit Commission reads as follows:

"Wherefore the plaintiff demands judgment against the defendant as follows:

"(1) Compelling by mandamus or injunction the defendant, its agents, officers, servants and employess to specifically perform and continue in the performance of the aforesaid agreements as represented by Contract No. 3 and the aforesaid Certificate, by transporting and continuing to transport for a continuous ride over its lines all such passengers and persons as desire that privilege and present themselves on the payment of a fare of five (5) cents and no more.

"(2) Enjoining the defendant, its agents, officers, servants and employees from increasing its fare from five (5) cents to seven (7) cents on the subway and elevated railroads or any part thereof operated by the defendant, or from carrying out its threats so to increase said fare, or from charging or collecting a fare in excess of five (5) cents on said railroads for a continuous ride in one direction, or from in any way violating or ignoring the provisions fixing a five (5) cent fare contained in said Contract No. 3 and in said Certificate, and also for an injunction restraining the defendant, its agents, officers, servants and employees during the pendency of this action from charg-

ing or collecting any such fare, and for such other and further relief as to the Court may seem just and proper, together with the costs of this action."

The prayer for relief in the complaint in the action brought by the defendant The City of New York reads as follows:

"Wherefore the plaintiff demands judgment enjoining and restraining the defendant, its officers, agents and employees from carrying out its said threat to increase the fare from five (5) cents to seven (7) cents, and from tak- [fol. 1337] ing any steps tending to, or looking towards the enforcement of said increased fare on the subway and elevated railroads operated by it, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from, in any way, violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said subway and elevated railroads, operated by it, and further prays that an injunction be granted restraining the defendant, its officers, agents, and employees, during the pendency of this action, from carrying out its said threat to increase the fare on its said subway and elevated railroads from five (5) cents to seven (7) cents, and from taking any steps tending to, or looking towards the enforcement of said increased fare on said railroads, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from in any way violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said railroads, and for such other and further relief as to the Court may seem just and proper, together with the costs of this action."

XIV. (a) The direction, as alleged, in paragraph 11 of the petition in the said summary proceeding, brought by the defendants constituting the Transit Commission in the New York State Court, to have been given by the said Transit Commission to its counsel to commence an action or proceeding in the Supreme Court of the State of New York, was not given until after the bill of complaint in the

original action had been filed in this Court and the jurisdiction of this Court had attached to the cause therein, and until after each of the defendants constituting the said Transit Commission and the defendant The City of New York had been served with the said subpoena ad respondendum.

[fol. 1338] (b) After the filing of the bill of complaint in this Court and the attaching of the jurisdiction of this Court to the cause therein, and the service of the subpoena as aforesaid, the defendants constituting the Transit Commission convened at a special meeting and adopted a purported resolution directing its counsel to commence the said summary proceeding, and also made a purported order rejecting the tariff sheets referred to in the complaint and duly published, posted and filed by the plaintiff in accordance with the provision of the Public Service Commission Law, for the purpose of establishing a rate of seven cents per passenger on and after March 3, 1928, subject, however, to such regulatory authority as was vested in the said Transit Commission.

Such action was taken by the said Transit Commission notwithstanding that the said tariff sheets had actually been accepted by the said Commission and had been filed by it, and been kept on its files, since February 1, 1928, notwithstanding that the Public Service Commission Law of the State of New York, Section 16, provides that all documents and records in the possession of the said Transit Commission shall be public records. Such purported resolution and purported order were adopted and made by the said Transit Commission ex parte and without any prior notice to this plaintiff, and without giving the plaintiff any opportunity to be heard in respect thereto, and were wholly unauthorized, and a denial by a State agency of legislative or administrative relief, and thereby said Transit Commission has so misconstrued and misapplied the laws as to compel observance of the five-cent rate of fare and to prevent permanently a compensatory rate herein, from which there is no relief except by resort to this Honorable Court; that said order is in conflict with the laws and Con-[fol. 1339] stitution of the State of New York and with the guaranties of the Constitution of the United States; and

the said proceeding so brought by the Transit Commission is wholly lacking in merit.

XV. The actions brought in behalf of The City of New York in the New York State Court, as aforesaid, were brought without any authorization by the Board of Estimate and Apportionment of The City of New York or by the legislative body of The City of New York to the Transit Commission or the Corporation Counsel, and were and are wholly unauthorized by any provision of law, and are wholly lacking in merit.

XVI. After the commencement of the original action in this Court, the filing of the bill of complaint, the attaching of the jurisdiction of this Court over the cause therein, and the service of the subpœna, as aforesaid, the defendants constituting the said Transit Commission and The City of New York, acting by their respective attorneys, counsel, agents, or representatives, applied to one of the Justices of the Supreme Court of the State of New York, ex parte and without any notice to the plaintiff, for, and secured, orders to show cause for preliminary injunctions, which orders contained temporary restraining orders (copies of which form parts of "Exhibit B," "Exhibit C" and "Exhibit D," respectively, annexed to this complaint).

In and by one order in the said summary proceeding brought by the defendants constituting the said Transit Commission, the plaintiff herein is directed to make answer to the petition and serve a copy of its answer upon the petitioner's attorney not later than February 17, 1928 (or not more than three days from the bringing of the said pro-[fol. 1340] ceeding), and to proceed with a summary hearing to final judgment in the said proceeding on February 20, 1928, at Special Term, Part I, of the Supreme Court in and for the County of New York.

By another order in the said special summary proceeding, the plaintiff herein is directed to show cause before the said New York State Court on February 20, 1928, why an interlocutory injunction should not be granted, and the plaintiff herein is temporarily restrained pending the determination of the proceeding.

The said summary proceeding brought by the Commission is alleged to be brought under Section 57 of the Pub-

lic Service Commission Law, which is a purely statutory proceeding, and restricted in scope, and there is no provision of law authorizing the granting of a preliminary injunction of a restraining order in, or in aid of, such special summary proceeding.

The orders to show cause granted in the said two actions brought by the defendants in the New York State Court, as aforesaid, are likewise returnable before the said State Court on February 20, 1928; likewise require this plaintiff to show cause why an injunction pendente lite to the same effect should not be granted, and contain similar temporary restraining orders.

XVII. The plaintiffs in the said actions in the Courts of the State of New York, to wit, the defendants in this action, constituting the Transit Commission and The City of New York, are wrongfully interfering with the exclusive jurisdiction and possession of this Court over the subject matter of the said original action pending undetermined in this Court, and are unlawfully seeking to deprive this Court of its exclusive jurisdiction over the subject matter of the said original action in this Court and over the individual de-[fol. 1341] fendants in said original action, and are seeking to frustrate and deprive the plaintiff herein of its constitutional right to resort to this Court for the relief contained in the complaint in the original action herein.

XVIII. The suits instituted in the New York State Court by the said plaintiffs therein, who are defendants in this action, will result in a multiplicity of suits and a conflict between the jurisdiction of the Courts of the State of New York and this Honorable Court, and will necessarily involve the expenditure of large sums of money on the part of the plaintiff herein in order to contest said suits in the said New York State Court.

XIX. The effect of the further prosecution of the actions and summary proceeding brought by the defendants members of the Transit Commission and The City of New York, in the New York State Supreme Court, concerning the fare chargeable by this plaintiff, will be to defeat or impair the jurisdiction of this Federal Court already attached, since this Court had first acquired jurisdiction in the said original action in this Court, over the subject-matter of the

rates chargeable by the plaintiff Interborough Rapid Transit Company under and by virtue of the New York State statutes, orders and regulations of the State Commissions, the tariff schedules filed by the plaintiff, the leases, Contract No. 3 and Elevated extension certificate relating to the rapid transit railroads operated by this plaintiff, and over the other matters and controversies relating to the enforcement of orders, regulations or directions of the said Transit Commission as to the construction of station platforms, the providing of 432 additional subway cars, the application of the plaintiff's revenues to the necessary expenses of judicially testing the validity of the fare limitations, and the alleged intimidation of the plaintiff by the Special Coun-
[fol. 1342] sel of the said Transit Commission.

The said New York State Court actions tend to obstruct and impair the administration and jurisdiction of this Federal Court in the suit so commenced by the plaintiff in this Federal Court, and to interfere with *res* brought into this Federal Court.

The plaintiff is continuing to be subjected to a multiplicity of actions and proceedings brought by the said Transit Commission and the said The City of New York in the State Court, involving the same subject matter of the fare chargeable by the plaintiff.

The plaintiff herein is oppressively required to serve not later than February 17, 1928, an answer to the petition in the summary proceeding brought by the Transit Commission and served upon the plaintiff herein in the afternoon of February 14, 1928; and is oppressively required to go to trial in the said summary proceeding in the State Court on February 20, 1928, upon issues upon which its future financial stability may depend.

The plaintiff herein has been subjected to three restraining orders, issued ex parte upon the application of the said Transit Commission and the said The City of New York, enjoining it from charging a rate of seven cents, although such rate was not to become effective under the tariff schedules filed by it with the said Commission before March 3, 1928, and although the Public Service Commission Law imposes upon the plaintiff herein severe penalties for charging any rate other than that set forth in the tariff

schedules published, posted and filed with the said Transit Commission.

The plaintiff herein will be compelled to incur large expense and will be subjected to great labor in defending the three *suits* brought in the State Courts by the said Transit [fol. 1343] Commission and the said The City of New York, especially as the orders to show cause why the restraining orders should not be continued pendente lite are returnable before the State Court on February 20, 1928.

If the said motions by the Transit Commission and The City of New York should not be determined before March 3, 1928, the plaintiff herein will be subjected to the continuing force of the said three restraining orders. If the plaintiff herein should be forced to proceed to trial in the said summary proceeding on February 20, 1928, or in the other two State Court actions, the issues therein may be so limited as to prevent a determination therein of all of the issues which may be raised in this action, especially as the said summary proceeding is purely statutory, but the judgment may later be urged in the action originally brought in this Federal Court to operate to debar the plaintiff herein from later having all of the issues herein adjudicated by this Court. The further prosecution of the said three State Court actions and proceeding interferes with the plaintiff's right to secure a complete and full adjudication of its constitutional, legal and equitable claims as to the operation of the various statutes, orders, regulations, tariff schedules, contracts and certificates as limitations upon the fare chargeable by the plaintiff.

Wherefore the plaintiff, having no adequate remedy at law for the wrong done and threatened to be done by the said defendants and because the injury inflicted by the defendants will be irreparable, to the end that it may obtain the relief to which it is entitled in the premises, prays:

(1) That the defendants may each answer the premises but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff;

[fol. 1344] (2) That it be adjudged and decreed that the plaintiff be granted injunctions, both temporary and permanent, against the defendants John F. Gilchrist, Leon G.

Godley and Charles C. Lockwood, constituting the said Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, and the defendant The City of New York, and their respective successors and privies, and each of their officers, agents, servants, employees and attorneys, or those in active concert or participating with them, and any and every person acting or attempting to act under and by virtue of their authorization, enjoining and restraining them from further prosecuting, or causing, procuring, or suffering to be prosecuted, in any respect, the actions and proceeding or the causes, in the Supreme Court of the State of New York, New York County, to wit:

Transit Commission, being the Metropolitan Division of the Department of Public Service, Petitioner, against Interborough Rapid Transit Company, Defendant;

The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant, and

The City of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant;

from bringing or prosecuting, or causing, procuring, or suffering to be prosecuted, any similar action, proceeding or any other suit involving the subject matter of the original action commenced by the plaintiff herein on February 14, 1928; from taking any action or proceeding under or by virtue or in pursuance of the said orders to show cause and the said temporary restraining orders granted in the [fol. 1345] said actions and summary proceeding; from in any wise interfering with the prosecution of the original action herein; or from obstructing or impairing the administration and jurisdiction of this Federal Court in the original action herein, or from interfering with res brought into this Court.

(3) That it be adjudged and decreed that the plaintiff has no adequate remedy at law for the injury which will

result from the acts or threatened acts herein complained of and that such injury will be irreparable.

(4) That it be adjudged and decreed that the plaintiff may have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

(5) That Your Honors grant unto the plaintiff an ancillary writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to said defendants, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to appear before Your Honors in this Honorable Court and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to Your Honors may seem meet.

Interborough Rapid Transit Company, by Earl E. Starbard, Vice-President. James L. Quackenbush, Solicitor for Plaintiff, No. 165 Broadway, Borough of Manhattan, New York City. William L. Ransom, Jacob H. Goetz, of Counsel.

[fol. 1346] *Duly sworn to by Earl E. Starbard.* ***Jurat*** *omitted in printing.*

[fol. 1347] Exhibit A to Ancillary Complaint

[fol. 1348] Supreme Court, New York County

1928-6190

Transit Commission, Being the Metropolitan Division of the Department of Public Service, Petitioner,

against

Interborough Rapid Transit Company, Defendant

Order to Show Cause With Stay

Upon the annexed petition, verified the 14th day of February, 1928, and upon the annexed affidavits of John F.

Gilchrist, verified the 14th day of February, 1928, and of Edward D. Hutchinson, verified the 14th day of February, 1928, and on motion of Clarence M. Lewis, Counsel to the Transit Commission, it is

Ordered that the Interborough Rapid Transit Company, defendant herein, show cause at a Special Term of this court, Part I thereof, to be held in and for the County of New York in the court house in the Borough of Manhattan, City of New York, on the 20th day of February, 1928, at 10 A. M. or as soon thereafter as counsel can be heard, why an order should not be made pending the trial and determination of this proceeding restraining the said defendant, its agents, officers and employees, from carrying out the threat to increase its fare from five (5) cents to seven (7) cents on the subway and elevated railroads operated by it, [fol. 1349] from charging or collecting a fare in excess of five (5) cents on said railroads, and from in any way violating or ignoring the provision fixing a five (5) cent fare, contained in Contract No. 3 and in the Certificate referred to in said petition, and why petitioner herein should not have such other and further relief as to the court may seem just.

And it appearing to my satisfaction by the said petition and annexed affidavits that petitioner prays for and is entitled to an injunction against the defendant, restraining the acts herein sought to be enjoined and that the commission of said acts during the pendency of this proceeding would produce irreparable injury to the citizens of The City of New York and would render any order in this proceeding ineffectual and that said defendant is about to do the acts herein complained of in violation of the contract rights of The City of New York and of the rights of the citizens of The City of New York arising out of said contract thereby tending to render the final order herein ineffectual.

Now therefore, it is ordered that pending the determination of this proceeding the defendant, Interborough Rapid Transit Company, its officers, agents and employees and each of them are herein enjoined and restrained from charging or attempting to charge any fare on the subway and elevated lines referred to in the annexed petition in excess of the fare of five (5) cents and from in any way forcing,

compelling or attempting to compel the payment of any fare in excess of said five (5) cents; and it is further

Ordered that a copy of the petition herein and of the aforesaid affidavits, together with a copy of this order be served upon the Interborough Rapid Transit Company, defendant herein, not later than the 14th day of February, [fol. 1350] 1928, and that such service shall be sufficient.

Dated February 14, 1928.

Edward J. Glennon, Justice of the Supreme Court of the State of New York.

[fol. 1351] Supreme Court, New York County

Present: Hon. ——— ———, Justice.

Transit Commission, Being the Metropolitan Division of the Department of Public Service, Petitioner,

against

Interborough Rapid Transit Company, Defendant

Upon the annexed petition of the Transit Commission, verified the 14th day of February, 1928, by John F. Gilchrist, and it appearing therefrom that the defendant threatens and is about to charge, demand, collect and receive, on and after March 3, 1928, for the transportation of passengers on the said railroads operated by it a fare of seven (7) cents, instead of a fare of five (5) cents and that said threatened act of the defendant in charging, demanding, collecting or receiving a greater compensation for transportation of persons than the five (5) cents rate applicable to such transportation as filed and in effect on March 3, 1928, will result in a charge in excess of the rate allowed by law and will be contrary to law and in violation of law, and on motion of Clarence M. Lewis, attorney for the petitioner, it is hereby

Ordered:

1. That said petition and this order shall be served on said defendant in the manner required by the Civil Practice [fol. 1352] Act for the service of a summons in the Su-

preme Court on or before February 14, 1928, which service shall be sufficient.

2. That the defendant Interborough Rapid Transit Company answer said petition and serve a copy of its answer upon the petitioner's attorney not later than February 17, 1928.

3. That after answer or in case of default in answer, this court will on the 20th day of February, 1928, at Special Term, Part I, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, inquire into the facts and circumstances in such manner as to the court may seem just without other or formal pleadings and without respect to any technical requirement, to the end that final judgment may be rendered herein, directing that a mandamus order or injunction or both issue, that a mandamus order be made and entered commanding and directing defendant to charge the five (5) cent fare in the tariff schedules on file and in effect or that an injunction be issued to restrain defendant from charging a seven (7) cent fare; or that the petitioner have such other or further relief by way of mandamus or injunction or in such other or modified form as the court may determine will afford appropriate relief, as provided by Section 57 of the Public Service Commission Law of the State of New York, and that your petitioner may have such other or further relief as to this court may seem proper.

Dated Feby. 14, 1928.

Edward J. Glennon, J. S. C.

[fol. 1353] Supreme Court, New York County

Transit Commission, Being the Metropolitan Division of the Department of Public Service, Petitioner,

against

Interborough Rapid Transit Company, Defendant

Petition

The petition of the Transit Commission, being the Metropolitan Division of the Department of Public Service, sets forth and respectfully shows to this court:

1. That your petitioner was created by the Public Service Commission Law as amended by Chapters 134 and 335 of the Laws of 1921 and is now functioning pursuant thereto; and that John F. Gilchrist, Chairman, Leon G. Godley and Charles C. Lockwood are the duly appointed and qualified commissioners constituting said Transit Commission.

2. That defendant is a railroad corporation organized and existing under the laws of the State of New York, and is managing and operating certain lines of rapid transit street railroads forming a system known and referred to as the "Subway Division" and certain other lines of rapid transit street railroads forming a system known and referred to as the "Manhattan Division," all of which railroads are within The City of New York.

3. That under a contract, known as Contract No. 3, made and entered into on March 19, 1913, by defendant and The [fol. 1354] City of New York, defendant is entitled to charge for a single fare upon the street railroads constituting the "Subway Division" the sum of five (5) cents but not more.

4. That under a contract made and arrived at on March 19, 1913, through the grant and acceptance of a certain certificate for the construction and operation of certain extensions to the elevated street railroads owned by the Manhattan Railway Company and leased by it to defendant, which extension certificate was granted to defendant by the Public Service Commission for the First District and was accepted by defendant, defendant is entitled to charge for a single fare for each passenger in the same general direction over the elevated street railroads comprising the "Manhattan Division" the sum of five (5) cents but not more.

5. That defendant is now operating under and pursuant to the said contracts referred to in paragraphs 3 and 4 hereof; that said contracts are in full force and effect; and that the rate provisions of said contracts have never been modified by agreement of the parties or otherwise and are in full force and effect.

6. That during the period of operation by it under said contracts, defendant has filed and kept on file with the Pub-

lic Service Commission for the First District or with the Transit Commission, and now has on file with the Transit Commission, printed schedules showing, as the charge for transportation of passengers upon the rapid transit railroads operated by it as aforesaid, the rate of five (5) cents for a single fare.

7. That on February 1, 1928, defendant filed with the Transit Commission certain revised sheets purporting to amend certain existing sheets of the said schedules already on file with the Transit Commission, which revised sheets [fol. 1355] contain the words "effective March 3, 1928," and show as the charge for transportation of passengers upon the said railroads comprising the "Subway Division" and the "Manhattan Division," respectively, the rate of seven (7) cents for a single fare.

8. That the Transit Commission has rejected said revised tariff sheets as unlawful; and that said revised sheets are ineffective to increase a rate of fare fixed by contract and will not be in effect on and after March 3, 1928.

9. That defendant threatens and is about to charge, demand, collect and receive, on and after March 3, 1928, for the transportation of passengers on the said railroads operated by it a fare of seven (7) cents, instead of a fare of five (5) cents.

10. That said threatened act of the defendant in charging, demanding, collecting or receiving a greater compensation for transportation of persons than the five (5) cent fare applicable to such transportation as filed and in effect on March 3, 1928, will result in a charge in excess of the rate allowed by law and will be contrary to law and in violation of law.

11. That the Transit Commission being of the opinion that said threatened act of the defendant in failing to charge only a five (5) cent fare and in charging a seven (7) cent fare will be contrary to law and in violation of law, has directed Counsel to the Commission to commence an action or proceeding in the Supreme Court of the State of New York for the purpose of having such threatened violations stopped and prevented either by mandamus or injunction.

[fol. 1356] Wherefore your petitioner prays that this Court will by order specify the time, not exceeding twenty days after service of a copy of this petition, within which defendant must answer this petition and further provide that this Court will inquire into the facts and circumstances as provided in Section 57 of the Public Service Commission Law; that a mandamus order be made and entered commanding and directing defendant to charge the five (5) cent fare in the tariff schedules on file and in effect or that an injunction be issued to restrain defendant from charging a seven (7) cent fare; and that your petitioner may have such other or further relief as to this Court may seem proper.

No previous application has been made for any order herein to any court or judge.

Dated New York, February 14, 1928.

Transit Commission, by John F. Gilchrist, Chairman.

[fol. 1357] State of New York,
County of New York, ss:

John F. Gilchrist, being duly sworn, deposes and says that he is the Chairman and one of the Commissioners of the Transit Commission, the petitioner in this proceeding; that the foregoing petition is true to deponent's knowledge, except as to matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true.

Deponent further says that the sources of his information and the grounds of his belief as to all matters not stated to be alleged on his own knowledge are documents and papers on file with said Commission and statements made and information furnished to deponent by persons acquainted with the facts; and that the reason why this verification is made by deponent and not by petitioner is that petitioner is a public body created by and pursuant to the Public Service Commission Law.

John F. Gilchrist.

Sworn to before me this 14th day of February, 1928.
Nathan L. Elgovstein, Notary Public, Bronx Co.
No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No.

116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375. Also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 1358] EXHIBIT B (TO ANCILLARY COMPLAINT)

[fol. 1359] SUPREME COURT, NEW YORK COUNTY

1928-6191

THE CITY OF NEW YORK, ACTING BY THE TRANSIT COMMISSION, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant

Order to Show Cause with Stay

Upon the annexed summons, the complaint, verified February 14, 1928, and upon the annexed affidavits of John F. Gilchrist, verified February 14, 1928, and of Edward D. Hutchinson, verified February 14, 1928, and on motion of Clarence M. Lewis, Counsel to the Transit Commission, it is

Ordered that the Interborough Rapid Transit Company, defendant herein, show cause at a Special Term of this court, Part I thereof, to be held in and for the County of New York in the court house in the Borough of Manhattan, City of New York, on the 20th day of February, 1928, at 10 A. M. or as soon thereafter as counsel can be heard, why an order should not be made pending the trial and determination of this action, restraining the said defendant, its agents, officers and employees, from carrying out the threat to increase its fare from five (5) cents to seven (7) cents [fol. 1360] on the subway and elevated railroads operated by it, from charging or collecting a fare in excess of five (5) cents on said railroads, and from in any way violating or ignoring the provision fixing a five (5) cent fare, contained in Contract No. 3 and in the Certificate referred to in said complaint, and why The City of New York, plaintiff herein, should not have such other and further relief as to the court may seem just.

And it appearing to my satisfaction by the said complaint and annexed affidavits that plaintiff prays for and is entitled to judgment against the defendant, restraining the acts herein sought to be enjoined and that the commission of said acts during the pendency of this action would produce irreparable injury to the plaintiff and to the citizens of The City of New York and would render any judgment in this action ineffectual and that said defendant is about to do the acts herein complained of in violation of the contract rights of the plaintiff and of the rights of the citizens of The City of New York arising out of said contract thereby tending to render judgment herein ineffectual.

Now therefore, it is ordered that pending the determination of this motion the defendant, Interborough Rapid Transit Company, its officers, agents and employees and each of them are herein enjoined and restrained from charging or attempting to charge any fare on the subway and elevated lines referred to in the annexed complaint in excess of the fare of five (5) cents and from in any way forcing, compelling or attempting to compel the payment of any fare in excess of said five (5) cents; and it is further

Ordered that a copy of the summons and complaint herein and of the aforesaid affidavits, together with a copy of this order be served upon the Interborough Rapid Transit [fol. 1361] Company, defendant herein, not later than the 14th day of February, 1928, and that such service shall be sufficient.

Dated February 14, 1928. Edward J. Glennon, Justice of the Supreme Court of the State of New York.

[fol. 1362] Supreme Court, County of New York

The City of New York, Acting by The Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, February 14, 1928.

Clarence M. Lewis, Counsel to the Transit Commission, Department of Public Service, Metropolitan Division. Office and Post Office address: No. 270 Madison Avenue, Borough of Manhattan, New York City.

[fol. 1363] Supreme Court, County of New York

The City of New York, Acting by The Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Complaint

The Plaintiff, by Clarence M. Lewis, Counsel for the Transit Commission, complaining of the Defendant, alleges as follows:

1. The City of New York (herinafter referred to as the "City") is a domestic municipal corporation created by and existing under the laws of the State of New York and is the successor of certain domestic municipal corporations formerly existing under and pursuant to ancient charters and acts of the Legislature.

2. The Transit Commission, being the Metropolitan Division of the Department of Public Service of the State of New York, which brings this action in the name and on behalf of the City of New York, is a public body or commission created by and existing under the laws of the State of New York. It is the successor of the Public Service Commission for the First District hereinafter mentioned, and as such Commission is authorized to institute this action in the name of and on behalf of the City of New York pursuant

[fol. 1364] to Section 9, Chapter 4 of the Laws of 1891 as amended from time to time.

3. On March 19, 1913, the City of New York, by the Public Service Commission for the First District with the consent and approval of the Board of Estimate and Apportionment of the City of New York, entered into a contract known as Contract No. 3 with defendant, therein described as Lessee, a copy of which contract is annexed hereto and marked Exhibit A and made part hereof.

4. By said contract the City of New York agreed to construct certain lines of rapid transit railroads defined in said contract as the "Railroad" and to lease said Railroad to defendant and defendant agreed to contribute toward the cost of construction of said Railroad, to equip it and to maintain and operate it in conjunction with certain existing rapid transit railroads referred to in said contract as "Existing Railroads," theretofore constructed at the expense of the City of New York, for a single fare, in accordance with said Contract No. 3.

5. Said Railroad and Existing Railroads, as defined and described in said Contract No. 3, are being operated by defendant under said Contract No. 3 and comprise the said system of railroads known as the "Subway Division."

6. Said Contract No. 3 provides:

"The Lessee shall during the term of said contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents, but no more."

7. Said Contract No. 3 provides:

"No correction or change in this contract shall be made except by written instrument duly authorized by the Commission and approved by the Board of Estimate and consented to by the Lessee and by the sureties upon its bond."

[fol. 1365] 8. In reliance upon said covenants the City of New York contributed many millions of dollars toward the construction of the Railroad which still remains invested therein and on which it has as yet received no return by way of interest or sinking-fund on its investment.

9. No change in any of the fare provisions of said Contract No. 3 has ever been made by any written instrument or otherwise authorized by the Transit Commission or its predecessors or approved by the Board of Estimate and Apportionment of the City of New York, or consented to by the Lessee (defendant herein) or by the sureties upon the bond of said Lessee or otherwise. Said Contract has been ever since the making thereof and is now in full force and effect.

10. On March 19, 1913, the Public Service Commission for the First District, with the consent and approval of the Board of Estimate and Apportionment and the Mayor of the City of New York, granted to Defendant a Certificate, a copy of which is annexed hereto and marked Exhibit "B" and is hereby embodied in this Complaint as part thereof.

11. Said Certificate granted to defendant the right to construct, maintain and operate certain extensions to the then existing lines of the Manhattan Railway Company, referred to in said Certificate as the "Railroads," under the terms and conditions set forth in said Certificate, and the defendant accepted said Certificate.

12. Said Certificate provides:

"Article VI. The Interborough Rapid Transit Company shall be entitled to charge for a single fare for each passenger of one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Rapid Transit Company is provided with trackage rights as in this certificate [fol. 1366] provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad Company the sum of five (5) cents, but no more."

The provisions of said Certificate have ever since the making thereof and are still in full force and effect.

13. The said Railroads which constitute the extensions referred to in paragraph 11 hereof are being operated by defendant under said Certificate in conjunction with the lines of said Manhattan Railway Company provided with

the additional tracks, all of which comprise the said system of railroads known as the Subway Division.

14. No change in said fare provision of said Certificate has ever been made by any modification of the Certificate delivered by plaintiff or its predecessors and accepted and consented to by defendant.

15. Upon information and belief the City of New York has duly performed all the conditions of said Contract No. 3 and of said Certificate on its part to be performed.

16. During the entire period since March 19, 1913, defendant has in compliance with the provisions of said Contract kept on file with the plaintiff and its predecessors schedules as required by law, which set forth and showed for the subway and elevated routes leased, operated and controlled by defendant the full fare of five (5) cents fixed and provided in said Contract No. 3 and said Certificate respectively.

17. On February 1, 1928, defendant filed with plaintiff certain revised tariff sheets of said schedules.

[fol. 1367] 18. Said revised sheets set forth the purpose and intention of defendant on and after March 3, 1928, to put into effect, charge and collect a fare of seven (7) cents on the subway and elevated lines operated by defendant instead of the five (5) cent fare now being charged and collected as fixed and provided in said Contract No. 3 and in said Certificate in violation and disregard of the agreements between the City and the Company as defined by said Contract and Certificate.

19. Upon information and belief the defendant has filed with its agents at the stations on its subway and elevated railroads copies of said revised sheets heretofore filed with plaintiff on February 1, 1928, and since said date has posted and displayed at such stations printed notices to the effect that the schedules showing the rates, fares and charges are on file with said agents and are open to inspection by any person.

20. Upon information and belief, defendant intends to and will on March 3, 1928, charge and collect upon the subway and elevated railroads operated by it the fare of seven

(7) cents in place of the fare of five (5) cents fixed and provided in said Contract No. 3 and in said Certificate unless restrained or prevented by injunction or directed by mandamus to perform its said Contract by exacting and collecting no more than five (5) cents for a ride.

21. Said proposed increase in fare from five (5) cents to seven (7) cents will be in violation of law and in violation of the fare provisions of Contract No. 3 and of said Certificate.

22. The plaintiff has directed its Counsel to commence this action in the name of the City of New York for the purpose of enforcing the specific performance of said Con- [fol. 1368] tracts and of having such threatened violations enjoined.

Wherefore the plaintiff demands judgment against the defendant as follows:

(1) Compelling by mandamus or injunction the defendant, its agents, officers, servants and employees to specifically perform and continue in the performance of the aforesaid agreements as represented by Contract No. 3 and the aforesaid Certificate, by transporting and continuing to transport for a continuous ride over its lines all such passengers and persons as desire that privilege and present themselves on the payment of a fare of five (5) cents and no more.

(2) Enjoining the defendant, its agents, officers, servants and employees from increasing its fare from five (5) cents to seven (7) cents on the subway and elevated railroads or any part thereof operated by the defendant, or from carrying out its threats so to increase said fare, or from charging or collecting a fare in excess of five (5) cents on said railroads for a continuous ride in one direction, or from in any way violating or ignoring the provisions fixing a five (5) cent fare contained in said Contract No. 3 and in said Certificate, and also for an injunction restraining the defendant, its agents, officers, servants and employees during the pendency of this action from charging or collecting any such fare, and for such other and further relief as to the

Court may seem just and proper, together with the costs of this action.

Clarence M. Lewis, Counsel for Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, 270 Madison Avenue, New York City.

[fol. 1369] State of New York,
County of New York, ss:

John F. Gilchrist, being duly sworn, deposes and says that he is the Chairman and one of the Commissioners of the Transit Commission, the petitioner in this proceeding; that the foregoing petition is true to deponent's knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

Deponent further says that the sources of his information and the grounds of his belief as to all matters not stated to be alleged on his own knowledge are documents and papers on file with said Commission and statements made and information furnished to deponent by persons acquainted with the facts, and that the reason why this verification is made by deponent and not by the petitioner is that it is a public body created by and pursuant to the Public Service Commission Law.

John F. Gilchrist.

Sworn to before me this 14th day of February, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375. Also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 1370] Supreme Court, County of New York

The City of New York, Acting by The Transit Commission, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Affidavit

State of New York,
County of New York, ss:

John F. Gilchrist, being duly sworn, deposes and says:

1. That he is the Chairman of the Transit Commission, being the Metropolitan Division of the Department of Public Service of the State of New York.

2. That the City of New York, plaintiff herein, is a municipal corporation created by and existing under the laws of the State of New York.

3. That said Transit Commission is a public body created by and existing under the laws of the State of New York and is the successor to the Public Service Commission for the First District, and as such is authorized by law to sue in the name and on behalf of the City of New York, plaintiff herein, in matters connected with contracts for the construction, maintenance or operation of rapid transit railroads entered into under the provisions of the Rapid Transit Act (Chapter 4, Laws of 1891 as amended and supplemented).

[fol. 1371] 4. That the defendant, Interborough Rapid Transit Company, is a domestic railroad corporation, organized and existing under the laws of the State of New York, operating and managing certain rapid transit railroads, parts of which are owned and leased to it by plaintiff, other parts of which are owned and leased to it by the Manhattan Railway Company, and still other parts of which are owned by defendant.

5. That on March 19, 1913, the City of New York by the Public Service Commission for the First District, with the consent and approval of the Board of Estimate and Apportionment of said City of New York, entered into a contract with defendants, known as Contract No. 3, a copy of which is attached to and made part of the annexed conrplaint as Exhibit "A" thereof, wherein and whereby the City agreed to construct certain lines of rapid transit railroad, referred to in said contract as the Railroad, and to lease said Railroad to the defendant, and the defendant agreed to contribute toward the cost of construction of said Railroad, to equip it, and to maintain and operate it in conjunction with certain existing rapid transit railroads, referred to in said contract as Existing Railroads, theretofore constructed at the expense of said City of New York, for a single fare, in accordance with said contract.

6. That said Contract No. 3 provides in part as follows:

"Article LXII. The Lessee shall, during the term of the contract, be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but no more.

• • • • • • •

"Article XXXI. No correction or change in this contract shall be made except by written instrument duly authorized by the Commission and approved by Board of [fol. 1372] Estimate and consented to by the Lessee and by the sureties on its bond."

7. That no change in the rate of fare prescribed in and by said Contract No. 3 has ever been made by any written instrument authorized by the Public Service Commission for the First District or by its successors in authority under said contract, or approved by the Board of Estimate and Apportionment of the City of New York and consented to by the Lessee, defendant herein, and by the sureties upon the bond of said Lessee, or otherwise.

8. On March 19, 1913, the Public Service Commission for the First District, with the consent and approval of the Board of Estimate and Apportionment and of the Mayor of the City of New York, granted to defendant a

Certificate, a copy of which is attached to and made part of the annexed complaint as Exhibit B thereof; that said Certificate granted to defendant the right to construct, maintain and operate certain extensions to the then existing lines of the Manhattan Railway Company, under the terms and conditions set forth in said Certificate, and that defendant accepted said Certificate.

9. Said Certificate, granted as above, provides in part as follows:

"Article VI. The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided), and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but no more."

[fol. 1373] 10. That no change in said fare provision of said Certificate has ever been made by any modification certificate, prepared and delivered by the Transit Commission or its predecessors and accepted or consented to by the defendant, or otherwise.

11. That during the entire period in which defendant has been operating said railroads under Contract No. 3 and under said Certificate, defendant filed and kept on file with the Transit Commission and its predecessors, and now has on file with the Transit Commission, schedules which set forth and show for the subway and elevated railroads leased, operated or controlled by it the fare of five (5) cents as fixed and provided in said Contract No. 3 and in said Certificate.

12. That on February 1, 1928, defendant filed with the Transit Commission certain revised sheets to said schedules, which said revised sheets set forth the purpose and intention of the defendant, on and after March 3, 1928, to put into effect, charge and collect a fare of seven (7) cents on all the said subway and elevated railroads by it, instead

of the five (5) cent fare now being charged and collected as fixed and provided in said Contract No. 3 and said Certificate.

13. That the defendant, as more fully set forth in the affidavit of Edward D. Hutchinson, hereto annexed, has filed with its agents at various stations of its subway and elevated railroads, copies of said revised sheets heretofore filed with the Transit Commission on February 1, 1928, and has posted and displayed at said stations printed notices to the effect that schedules showing the rates, fares and charges are on file with the said agents and are open to inspection by any person.

14. That your deponent is informed and believes that defendant intends to and will, on and after March 3, 1928, charge and collect upon the subway and elevated railroads [fol. 1374] operated by it the fare of seven (7) cents in place of the five (5) cent fare fixed and provided in said Contract No. 3 and in said Certificate, unless restrained or prevented by injunction or by order of this Court.

15. That your deponent is advised and believes that said proposed increase in fare from five (5) cents to seven (7) cents would be in violation of the fare provisions of said Contract No. 3 and of said Certificate.

16. That deponent is informed and believes that approximately four million persons use the subway and elevated railroads operated by defendant each and every week day; that such large numbers of persons depend daily upon said subway and elevated railroads as their means of transportation in the area in which defendant operates; that such threatened increase in fare, if enforced by the defendant, would cause irreparable injury and damage to the plaintiff and to the residents and citizens of the City of New York, and that such loss and damage could not be adequately remedied by actions at law for damages, and that there is no adequate remedy at law for the injury and damage which would be caused to the plaintiff.

17. That the deponent is further informed and believes that the increase in fare from five (5) cents to seven (7) cents, if enforced by defendant, will result in controversies,

confusion, public disturbances and multiplicity of actions, to the further loss, damage and detriment of the plaintiff herein, for which injury, damage and detriment plaintiff has no adequate — at law.

18. That the reason why an order to show cause is asked for and the usual notice of motion not given is that a stay is desired; that the matters herein involved are of the utmost public importance and directly affect a very large number of persons in their daily transportation [fol. 1375] between their homes and their place of employment or business; that it is possible, because of the importance of the matters involved, that a decision may not be had in the premises nor an injunction or order granted therein, until after the date fixed by the defendant for putting into effect the seven (7) cent fare; that said defendant, if not in the meantime restrained, will actually enforce its threat and demand for such increased fare; that in the event of such happening, public confusion, disorder, inconvenience and damage would result and for these reasons a stay is desired pending the hearing and determination of the within motion.

19. That no previous application has been made to any Court or Judge for the relief herein prayed for.

Wherefore deponent respectfully prays than an injunction be granted during the pendency of the above entitled action of the same force and effect as that requested in the complaint herein, and that pending the determination of this motion the defendant be likewise stayed from enforcing or putting into effect the proposed increase in fare from five (5) cents to seven (7) cents.

John F. Gilchrist.

Sworn to before me this 14th day of February, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert. filed in Queens Co. No. 375. Also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 1376] SUPREME COURT, COUNTY OF NEW YORK

THE CITY OF NEW YORK, acting by THE TRANSIT COMMISSION, Metropolitan Division, Department of Public Service of the State of New York, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant

Affidavit

STATE OF NEW YORK,
County of New York, ss:

Edward D. Hutchinson, being duly sworn, deposes and says that he is Chief of the Tariff Bureau of the Transit Commission and has charge of the tariff schedules filed with said Commission by railroad corporations and common carriers; that the Interborough Rapid Transit Company filed with the predecessor of the Transit Commission and now has and for a long time past has had on file with the Transit Commission certain tariff schedules showing the rates, fares and charges in effect upon the subway and elevated railroads operated, controlled and managed by it; that said schedules show and have shown a rate of fare of five (5) cents as the rate to be charged upon the railroads so operated by said Company.

Deponent further says that on February 1, 1928, said Interborough Rapid Transit Company filed with the Transit Commission certain revised sheets marked to become effective March 3, 1928, which said sheets purported to amend certain sheets of said existing tariff schedules now on file with the Transit Commission; and that among said [fol. 1377] revised sheets were sheets showing a rate of fare of seven (7) cents proposed to be charged by said Interborough Rapid Transit Company on and after March 3, 1928, on the said railroads operated and controlled by it.

Deponent further says that on February 6 and February 7, 1928, he visited twelve ticket offices on the stations of the subway railroads operated by the Interborough Rapid Transit Company and known as the "Subway Division," and twelve ticket offices on the stations of the elevated railroads operated by the Interborough Rapid Transit Com-

pany and known as the "Manhattan (or elevated) Division;" and that the ticket offices so visited, the station, division and line on which they were located, and the dates on which deponent visited them were as follows:

Monday evening, Feb. 6th, 1928, Subway Division

Ticket booths on the south side of Madison Avenue on the 42nd Street Shuttle Line.

Two booths at northwest end of the Times Square Station.

Ticket booths at the entrance from the Long Island concourse of the Pennsylvania Station.

Ticket booth at the Chambers Street Station.

Ticket booth at the Cortlandt Street Station, south end of southbound side.

Tuesday, February 7, 1928, Subway Division

Cortlandt Street Station, south end of northbound side.

Times Square Station, ticket booth at south end of station at 40th Street.

[fol. 1378] Times Square Station, ticket booth near foot of stairway leading from the west side of Broadway.

Times Square Station, ticket booth at entrance from B. M. T. concourse.

Grand Central Station, in 42nd Street Shuttle, west side of Madison Avenue.

14th Street Station, Lexington Avenue Subway, northbound side, south end of station.

Southbound side, south end of station.

Tuesday, February 7, 1928, Elevated Division

Third avenue Elevated Line:

42nd Street Station, southbound side.
34th Street Station, southbound side.
28th Street Station, southbound side.
23rd Street Station, southbound side.
18th Street Station, southbound side.
14th Street Station, southbound side.
14th Street Station, northbound side.

Sixth Avenue Elevated Line:

14th Street Station, southbound side.
14th Street Station, northbound side.
23rd Street Station, northbound side.
34th Street Station, northbound side.
42nd Street Station, northbound side.

Deponent further says that at each and all of the stations so visited by him there was posted a notice, a true copy of which is hereto annexed, marked Schedule A and made a part hereof; and that at each and all of said stations deponent examined the tariff schedule there on file and found that all of said tariff schedules contained copies of the new revised tariff sheets filed with the Transit Commission by the Interborough Rapid Transit Company on [fol. 1379] February 1, 1928, and marked to become effective March 3, 1928, and that among said sheets so examined there were at all stations visited sheets showing a seven (7) cent fare for the railroads of the "Subway Division" and the "Manhattan (or Elevated) Division," respectively.

Edward D. Hutchinson.

Sworn to before me this 14th day of February, 1928. Nathan L. Elgovstein, Notary Public, Bronx Co. No. 33, Reg. No. 2824; Cert. filed in N. Y. Co. No. 116, Reg. No. 8088; Cert. filed in Kings Co. No. 47, Reg. No. 8048; Cert filed in Queens Co. No. 375. Also filed in Richmond and Westchester Counties. Commission expires March 30, 1928.

[fol. 1380] Schedule "A"—Notice

Schedules showing the rates, fares, and charges and the rules or regulations for the transportation of passengers and property upon the routes of the Interborough Rapid Transit Company, including those leased, operated or controlled by the Company, are on file with the Agent at this station or office, and are open to inspection by any person, and the Agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force.

Interborough Rapid Transit Company, by Frank Hedley, President and General Manager.

[fol. 1381] EXHIBIT C TO ANCILLARY COMPLAINT

SUPREME COURT, NEW YORK COUNTY

THE CITY OF NEW YORK, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant

Order to Show Cause in Action Entitled "The City of New York against Interborough Rapid Transit Company, New York State Supreme Court," Read in Opposition to Motion

Upon the annexed summons and complaint verified the 11th day of February, 1928, and upon the annexed affidavits of George P. Nicholson, verified the 11th day of February, 1928, and Joseph A. Devery, verified the 11th day of February, 1928, and on motion of George P. Nicholson, Corporation Counsel of The City of New York,

It is hereby ordered that the defendant, Interborough Rapid Transit Company, show cause at a Special Term of this Court, Part I thereof, to be held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 20th day of February, 1928, at 10 a. m., or as soon thereafter as counsel can be heard why an order should not be made pending the trial and determination of this action restraining defendant, its officers, agents and employees from carrying out its threat to increase its fare from five (5) cents to seven (7) cents and from taking any steps tending or looking toward said [fol. 1382] increase of fares on the subway and elevated railroads operated by it; from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads and from in any way violating or ignoring the provisions fixing a five (5) cent fare contained in a certain contract known as Contract No. 3, dated March 19, 1913, between the plaintiff and defendant and in a certain Certificate dated March 19, 1913, made by the Public Service Commission for the First District, granting to defendant the right to construct, maintain and operate extensions to the railroads of the Manhattan Railway Company and why The City of New York, plaintiff herein, should not have such other and further relief as to the Court may seem just;

And it appearing to my satisfaction by the said complaint

and annexed affidavits that plaintiff prays for and is entitled to judgment against the defendant restraining the acts hereinafter enjoined and that the commission of said acts during the pendency of this action would produce irreparable injury to the plaintiff and would render any judgment in this action ineffectual and that the said defendant is about to do the acts hereinafter mentioned in violation of the rights of said plaintiff thereby tending to render judgment herein ineffectual;

Now, therefore, it is ordered that pending the determination of this motion, the defendant, its officers, agents and employees are restrained and enjoined from carrying out its threat to increase its fare from five (5) cents to seven (7) cents and from taking any steps tending or looking toward said increase of fares on the subway and elevated railroads and from in any way violating or ignoring the provisions fixing a five (5) cent fare contained in said Contract No. 3 and in said Certificate.

[fol. 1383] Ordered that a copy of the summons and complaint and of the aforesaid affidavits together with a copy of this order be served upon the defendant not later than the 15th day of February, 1928, and that such service shall be sufficient.

Dated February 14, 1928.

Edward J. Glennon, Justice of the Supreme Court of the State of New York.

[fol. 1384] Supreme Court, New York County

The City of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Affidavit of George P. Nicholson in Action Entitled "The City of New York Against Interborough Rapid Transit Company, New York State Supreme Court," Read in Opposition to Motion

State of New York,
County of New York, ss:

George P. Nicholson, being duly sworn, deposes and says:

1. That he is the Corporation Counsel of The City of New York and familiar with the above entitled action.

2. That on March 19th, 1913, The City of New York by the Public Service Commission for the First District, acting under powers vested in it by the Rapid Transit Act, Chapter 4, Laws of 1891, as amended and supplemented, and by Chapter 429, Laws of 1907, with the consent and approval of the Board of Estimate and Apportionment of The City of New York, entered into a contract known as Contract No. 3, with the defendant, therein described as the Lessee, a copy of which contract as entered into March 19th, 1913, is attached to and made part of the annexed complaint, as Exhibit A thereof, wherein and whereby the [fol. 1385] plaintiff agreed to construct certain lines of rapid transit railroads defined in said contract as the Railroad and to lease said Railroad to the defendant, and the defendant agreed to contribute toward the cost and construction of said Railroad, to equip it, and to maintain and operate it in connection with certain existing rapid transit railroads referred to in said contract as Existing Railroads theretofore constructed at the expense of the plaintiff, for a single fare in accordance with the provisions of said Contract No. 3.

3. Deponent is informed and believes that defendant Lessee took possession of and operated the Railroad described in said Contract No. 3 and operated the same in connection with the Existing Railroads described in said Contract under and in pursuance of the provisions of said Contract and that said Railroad and Existing Railroads are now being operated by the said defendant under and in pursuance of the provisions of said Contract No. 3 and comprise a system of Rapid Transit Railroads known as the Subway Division.

4. That said Contract No. 3 provides in part as follows:

"Article LXII. The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but not more.

. . . . . .

"Article LIX. The Lessee shall operate the Railroad and the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as

shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the [fol. 1386] Commission under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) of (1) any part or parts of the Railroad, (2) any part or parts of the Existing Railroads and (3) between any part or parts of the Railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare.

* * * * * * *

"Article XXXI. No correction or change in this contract shall be made except by written instrument duly authorized by the Commission, and approved by the Board of Estimate and consented to by the Lessee and by the sureties upon its bond."

5. That on March 19, 1913, the said Public Service Commission for the First District, acting under powers vested in it by the Rapid Transit Act, Chapter 4, Laws of 1891, as amended and supplemented, and by Chapter 429, Laws of 1907, with the consent and approval of the Board of Estimate and Apportionment and of the Mayor of The City of New York granted to defendant a certain Certificate, a copy of which is attached to the annexed complaint as Exhibit B thereof, which said Certificate granted to defendant the right to construct, maintain and operate certain rapid transit railroads or portions of railroads as extensions to the then existing system of elevated railroads of the Manhattan Railway Company.

6. Deponent is informed and believes that said defendant accepted said Certificate authorizing extensions so granted to it on March 19, 1913, and all the terms and conditions [fol. 1387] set forth and contained therein.

7. Deponent is informed and believes that the defendant constructed the extensions granted or authorized by the said Certificate dated March 19, 1913, and defined in said Certificate as the Railroads and is now operating the same under and pursuant to the provisions of said Certificate in connection with all the other lines of the said Manhattan

Railway Company, including certain additional tracks, the right to construct which was granted to the said Manhattan Railway Company by another certificate dated March 19, 1913, which system of railroads of defendant and lines and additional tracks of Manhattan Railway Company comprise a system of rapid transit railroads known as the Manhattan Division.

8. That said Certificate authorizing said extensions dated March 19, 1913, provides, in part, as follows:

"Article VI. The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date hereof) and the Manhattan Railroad the sum of five (5) cents but not more."

9. That under and pursuant to the provisions of Chapter 134 of the Laws of 1921 the Transit Commission was created and succeeded to all the powers of the said Public [fol. 1388] Service Commission for the First District under the provisions of the said Rapid Transit Act and is now vested with all of such powers, except certain powers to construct rapid transit railroads or additions or extensions thereto which were transferred to and are now vested in the Board of Transportation in The City of New York under and pursuant to the provisions of Chapter 573 of the Laws of 1924.

10. Deponent is informed and believes that no written instrument authorizing or providing for any change, correction or modification of the said provisions as to fare contained in said Contract No. 3 has ever been made, entered into or authorized by the Public Service Commission for the First District or by its said successor in authority, the Transit Commission, and that no such written instrument has ever been approved by the Board of Estimate and Apportionment of The City of New York or consented to

by the defendant as Lessee or by the sureties upon the bond of said Lessee.

11. Deponent is informed and believes that no modification certificate changing, altering or modifying the provisions as to fare contained in said Certificate for extensions granted to defendant on March 19, 1913, has ever been made or prepared by the said Public Service Commission for the First District or its successor in authority, the said Transit Commission, and that no such modification certificate has ever been delivered to defendant and accepted and consented to by it.

12. Deponent is informed and believes that in compliance with the provisions of said Contract No. 3 entered into on March 19, 1913, and of said Certificate granted to defendant on March 19, 1913, the said defendant from and after the respective dates of said Contract No. 3 and said Certificate has charged and collected the single fare of five (5) cents [fol. 1389] on said Subway Division and said Manhattan Division as fixed and provided in said Contract and in said Certificate and that the defendant from and after said respective dates has filed and kept on file with the Public Service Commission for the First District and its successor in authority, the said Transit Commission, schedules of fares and charges fixing and providing for said single fare of five (5) cents in accordance with the provisions of said Contract No. 3 and of said Certificate.

13. Deponent is informed and believes, and as more fully set forth in the affidavit of Joseph A. Devery, hereto annexed, that notwithstanding and contrary to the provisions as to fare fixed and contained in said Contract No. 3 and in said Certificate dated March 19, 1913, and in violation of said provisions the defendant on February 1, 1928, filed with the Transit Commission certain schedules or revised sheets of schedules, wherein and whereby the defendant set forth its purpose and intention to put into effect, demand, charge and collect, on and after March 3, 1928, the fare of seven (7) cents on all the subway and elevated lines operated by it, comprising the Subway Division and Manhattan Division, instead of the fare of five (5) cents now being charged and collected pursuant to the provisions of said Contract No. 3 and of said Certificate.

14. Deponent is informed and believes as more fully set forth in the affidavit of Joseph A. Devery, hereto annexed, that copies of said revised sheets or schedules setting forth the purpose and intention of the defendant on and after March 3, 1928, to charge, collect and demand such increased fare of seven (7) cents on the said Subway Division and the said Manhattan Division, have been filed and are now on file with the agents of defendant at each and all of the [fol. 1390] subway stations on said Subway Division, and on said Manhattan Division, and that a printed notice has been posted at each of said stations setting forth that such schedules or revised sheets are on file with said agents and are open to inspection by any person.

15. Deponent is informed and believes that the defendant has threatened and that it intends to and will on and after March 3, 1928, charge, demand and collect on the said Subway Division and on said Manhattan Division operated by it the fare of seven (7) cents in place of the fare of five (5) cents now charged by it as fixed and provided in said Contract No. 3, and in said Certificate, unless restrained or prevented by injunction or by order of this Court.

16. That the said proposed increase in fare by defendant from five (5) cents to seven (7) cents on the lines of its said Subway Division and said Manhattan Division, if enforced and put into effect, would be in violation of the provisions with respect to fare fixed and contained in said Contract No. 3 and in said Certificate dated March 19, 1913.

17. That according to the Annual Report filed by the defendant with the Transit Commission for the year ending June 30, 1927, there were carried on the said Subway Division of the defendant 814,626,596 passengers and on the Manhattan Division 359,019,660 passengers, a total on both divisions of 1,173,646,256 passengers carried on the subway and elevated railroads operated by defendant; deponent is informed and believes that such large number of persons carried annually depend upon such subway and elevated railroads as their means of transportation between points within the City of New York and that an increase in the fare of said large number of passengers from five (5) cents to seven (7) cents would work and cause irreparable

loss, injury and damage to the plaintiff and to said persons, [fol. 1391] which loss, injury and damage could not be compensated for or adequately remedied by actions at law and that the plaintiff has no adequate remedy at law for the loss, injury and damage which would be thus caused.

17. Deponent is informed and believes that the enforcement of such threatened increase in fare from five (5) cents to seven (7) cents would cause public confusion, disorder, disturbance and controversy and would result in a multiplicity of actions all of which would be to the injury, damage and detriment of the plaintiff for which it would have no adequate remedy at law.

18. That the reason why an order to show cause is asked for, and the usual notice of motion not given is that a stay is desired; that the matters herein involved are of the utmost public importance and directly affect a very large number of persons in their daily transportation between their homes and their places of employment or business and that it is possible because of the importance of the matters involved that a decision may not be had in the premises nor an injunction or restraining order granted herein, until after the date fixed by the defendant for putting into effect the seven (7) cent fare, i. e., March 3, 1928; that said defendant if not in the meantime restrained will actually enforce its threat and demand for such increased fare; that in the event of such happening, public confusion, disorder, inconvenience and damage would result and for these reasons a stay is desired pending the hearing and determination of the within motion.

19. That no previous application has been made to any court or judge for the relief herein prayed for.

Wherefore deponent respectfully prays that an injunction be granted during the pendency of the above entitled [fol. 1392] action of the same force and effect as that prayed for in the complaint herein, and that pending the determination of this motion, the defendant, its officers, agents and employees, be likewise stayed and restrained from enforcing its said threat to increase the fare on the railroads operated by it from five (5) cents to seven (7) cents and from taking any steps tending to or looking

towards the enforcement of said increased fare on the said subway and elevated railroads operated by it and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads and from in any way violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said subway and elevated railroads.

Geo. P. Nicholson.

Sworn to before me this 11th day of February, 1928.
G. H. Cowie, Commissioner of Deeds (270), N. Y. City.

[fol. 1393] Supreme Court, New York County

The City of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Affidavit of Joseph A. Devery in Action Entitled "The City of New York against Interborough Rapid Transit Company, New York State Supreme Court," Read in Opposition to Motion

Joseph A. Devery, being duly sworn, deposes and says:

I. That he is an Assistant Corporation Counsel in the Law Department of The City of New York.

II. That on Wednesday, February 1, 1928, he called at the office of the Secretary of the Transit Commission, No. 270 Madison Avenue, Borough of Manhattan, City of New York, and requested to be informed whether revised schedules had been filed by the Interborough Rapid Transit Company setting forth increased fares on the subway and elevated railroads operated by it. He was informed by Mr. James B. Walker, Secretary of said Commission, that on February 1, 1928, the Interborough Rapid Transit Company had filed with the Commission certain revised sheets or schedules, which were exhibited, and which included two

sheets, one of which is headed I. R. T. Co. No. 2, Original Sheet 2A, which sets forth the following:

[fol. 1394] "Standard Rates, Terms and Conditions of Service

(1) Rates of Fare
On routes of subway division 7 cents. Between any two stations of the same division or between a station of one division and a station of the other as provided in the 'transfer points.'
Issued February 1, 1928. To take effect March 3, 1928."

The other of which sheets is entitled I. R. T. Co. No. 2, Original Sheet 2B, which sets forth the following:

"Standard Rates, Terms and Conditions of Service

(1) Rates of Fare (Continued)
On routes of Manhattan Division 7 cents. Between any two stations of the same division or between a station of one division and a station of the other division as provided in the 'transfer points.'
Issued February 1, 1928. To take effect March 3, 1928."

III. Deponent further says that on Friday, February 10, 1928, he called at the following stations of the subway and elevated railroads operated by the Interborough Rapid Transit Company:

On the Jerome Avenue Subway Line, Bronx—183d Street Station.

On the East Side Subway Line, Manhattan—Brooklyn Bridge Station.

On the West Side Subway Line, Manhattan—Chambers Street Station.

On the 3d Avenue Elevated Line, Manhattan—City Hall Station.

On the 6th Avenue Elevated Line, Manhattan—Chambers Street Station.

[fol. 1395] On the 9th Avenue Elevated Line, Manhattan—Warren Street Station.

IV. That at each of said stations deponent found printed notices posted in conspicuous places setting forth the following:

"Schedules showing the rates, fares and charges and the rules or regulations for the transportation of passengers and property upon the routes of the Interborough Rapid Transit Company, including those leased, operated or controlled by the Company are on file with the agent at this station or office, and are open to inspection by any person and the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force.

Interborough Rapid Transit Company, by Frank Hedley, President and General Manager."

V. At each of said stations deponent requested the agent of the Company in the change booth or office to show him the schedules showing the rates, fares and charges of the Company and in each case the agent at said stations exhibited to deponent copies of the two sheets referred to above as having been filed with the Transit Commission on February 1, 1928, which show that on and after March 3, 1928, a seven (7) cent fare will be charged on the Subway Division and on the Manhattan Division of the Interborough Rapid Transit Company.

Joseph A. Devery.

Sworn to before me this 11th day of February, 1928. G. H. Cowie, Commissioner of Deeds (270), N. Y. City.

[fol. 1396] New York Supreme Court

The City of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Trial Desired in New York County

Summons in Action Entitled "The City of New York against Interborough Rapid Transit Company," New York State Supreme Court, Read in Opposition to Motion

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service.

In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, February 11, 1928.

George P. Nicholson, Corporation Counsel, Plaintiff's Attorney. Office and Post-Office Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 1397] SUPREME COURT, NEW YORK COUNTY

THE CITY OF NEW YORK, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant

COMPLAINT IN ACTION ENTITLED "THE CITY OF NEW YORK AGAINST INTERBOROUGH RAPID TRANSIT COMPANY," NEW YORK STATE SUPREME COURT, READ IN OPPOSITION TO MOTION

The plaintiff, by George P. Nicholson, its Corporation Counsel, complaining against the defendant, alleges upon information and belief:

I. That plaintiff is a domestic municipal corporation organized and existing under and by virtue of the Laws of the State of New York and its ancient charters, especially under and by virtue of Chapter 378 of the Laws of 1897 as amended by Chapter 466 of the Laws of 1901 by which act it duly succeeded to all the rights and obligations of the Mayor, Aldermen and Commonalty of The City of New York.

II. That defendant is a domestic corporation, organized and existing under the Laws of the State of New York for the purpose of operating rapid transit railroads under and

in pursuance of the provisions of the Rapid Transit Act, Chapter 4, Laws of 1891, as amended and supplemented.

III. That at the times mentioned herein said defendant was operating, maintaining and managing certain lines [fol. 1398] of rapid transit railroad; that parts of said railroad known as the Subway Division are owned and leased to it by the plaintiff; that part of said railroad known as the Manhattan Division are owned and leased to it by the Manhattan Railway Company, while other parts of said Manhattan Division are owned by the defendant.

IV. That on March 19, 1913, the plaintiff, by the Public Service Commission for the First District, under and pursuant to powers vested in said Commission by the Rapid Transit Act, Chapter 4 of the Laws of 1891 as amended and supplemented, and by Chapter 429 of the Laws of 1907, with the consent and approval of the Board of Estimate and Apportionment of the City of New York, entered into a Contract, known as Contract No. 3, with the defendant, therein described as the Lessee, a copy of which Contract as entered into on said date, is annexed hereto, marked Exhibit "A" and made a part hereof.

V. That under and pursuant to the provisions of said Contract No. 3, the plaintiff agreed to construct what is therein defined as the Railroad and which comprises certain lines of rapid transit railroad; and to lease said lines, known as the Railroad, to the defendant; that the defendant by said contract agreed to contribute towards the construction of these said lines of rapid transit railroad, defined as the Railroad, to equip them and to maintain and operate them in connection with certain other lines of rapid transit railroad previously constructed at the expense of the City, which said previously constructed lines were defined in said Contract as Existing Railroads; that the defendant, defined in said Contract No. 3 as the Lessee, agreed to operate all of said Railroads and Existing Railroads as a single and unified system for a single fare.

[fol. 1399] VI. That said Contract No. 3 provides in part as follows:

"LXII. The Lessee shall during the term of the Contract be entitled to charge for a single fare upon the Rail-

road and the Existing Railroads the sum of five (5) cents but not more."

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"LIX. The Lessee shall operate the Railroad and the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission, under regulations prescribed or approved by it, between all trains operated by the Lessee at common or connecting points (where interchange station facilities are supplied by the Lessee or required by the Commission) of (1) any part or parts of the Railroad, and (2) any part or parts of the Existing Railroads, and (3) between any part or parts of the Railroad and any part or parts of the Existing Railroads, so as to afford a continuous trip in the same general direction for a single fare."

• • • • • • •

"Article XXXI. No correction or change in this Contract shall be made except by written instrument duly authorized by the Commission and approved by the Board of Estimate and consented to by the Lessee and by the sureties upon its bond.'

VII. That on March 19, 1913, the Public Service Commission for the First District, under and pursuant to powers vested in said Commission by the Rapid Transit Act, Chapter 4, of the Laws of 1891, as amended and supplemented, and by Chapter 429 of the Laws of 1907, with the [fol. 1400] consent and approval of the Board of Estimate and Apportionment and of the Mayor of The City of New York, granted to defendant a certain Certificate, a copy of which is annexed hereto marked Exhibit "B" and made a part hereof, which said Certificate granted to defendant the right to construct, maintain and operate certain rapid transit railroads or portions of railroads as extensions to the then existing system of elevated railroads of the Manhattan Railway Company; that said extensions so authorized are referred to in the said Certificate as the Rail-

roads; that said extensions were so granted and authorized under and pursuant to certain terms and conditions set forth and contained in the said Certificate.

VIII. That defendant accepted said Certificate authorizing extensions so granted to it on March 19, 1913, and all the terms and conditions set forth and contained herein.

IX. That said Certificate of March 19, 1913, provides in part as follows:

"Article VI. The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this Certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date hereof) and the Manhattan Railroad a sum of five (5) cents but not more."

X. That the defendant as Lessee took possession of and operated the Railroad described in said Contract No. 3 [fol. 1401] and operated the same in connection with the Existing Railroads described in said Contract under and in pursuance of the provisions of said Contract, and that said Railroad and Existing Railroads are now being operated by the said defendants under and in pursuance of the provisions of said Contract No. 3 and comprise the said system of railroads known as the Subway Division.

XI. That the defendant constructed the extensions granted or authorized by the said Certificate dated March 19, 1913, and defined in said Certificate as the Railroads, and is now operating the same under and pursuant to the provisions of said Certificate in connection with all the other lines of the said Manhattan Railroad Company, including certain additional tracks, the right to construct which was granted to said Manhattan Railway Company by another certificate dated March 19, 1913, which system of Railroads of defendant, and lines and additional tracks of Manhattan Railway Company, comprise the said system of rapid transit railroads known as the Manhattan Division.

XII. That under and pursuant to the provisions of Chapter 134 of the Laws of 1921, the Transit Commission was created and succeeded to all the powers of the said Public Service Commission for the First District under the provisions of the said Rapid Transit Act, and is now vested with all of such powers, except certain powers to construct rapid transit railroads or additions or extensions thereto, which were transferred to and are now vested in the Board of Transportation in the City of New York under and pursuant to the provisions of Chapter 573 of the Laws of 1924.

XIII. That no written instrument authorizing or providing for any change correction or modification of the said [fol. 1402] provisions as to fare contained in Contract No. 3, has ever been made, entered into or authorized by the Public Service Commission for the First District, or by its said successor in authority, the Transit Commission, nor has any such written instrument ever been approved by the Board of Estimate and Apportionment of the City of New York, or consented to by the defendant, as Lessee, or by the sureties upon the bond of said Lessee.

XIV. That no modification certificate changing, altering or modifying the provisions as to fare contained in said Certificate of extensions granted to defendant of March 19, 1913, has ever been made or prepared by the said Public Service Commission for the First District or its successor in authority, the said Transit Commission, nor has any such modification certificate ever been delivered to defendant and accepted and consented to, by it.

XV. That in compliance with the provisions of said Contract No. 3 entered into on March 19, 1913, and of said Certificate granted to defendant on March 19, 1913, and from the respective dates of said Contract No. 3 and said Certificate, the defendant has charged and collected the single fare of five (5) cents on said Subway Division and said Manhattan Division, as fixed and provided in said Contract and in said Certificate, and that the defendant has from and after said respective dates, filed and kept on file with the Public Service Commission for the First District and its successor in authority, the said Transit Commission, schedules of fares and charges providing for

said single fare of five (5) cents in accordance with the provisions of said Contract No. 3 and of said Certificate

XVI. That notwithstanding and contrary to the provision as to fare fixed and contained in said Contract No. 3 and in said Certificate dated March 19, 1913, and in viola- [fol. 1403] tion of said provisions, the defendant on February 1, 1928, filed with the Transit Commission certain schedules or revised sheets of schedules, wherein and whereby the defendant set forth its purpose and intention to put into effect, demand, charge and collect, on and after March 3, 1928, the fare of seven (7) cents on all the subway and elevated lines operated by it, comprising the Subway Division and Manhattan Division, instead of the fare of five (5) cents now being charged and collected, pursuant to the provisions of said Contract No. 3 and of said Certificate.

XVII. That copies of said revised sheets or schedules setting forth the purpose and intention of the defendant, on and after March 3, 1928, to charge, collect and demand such increased fare of seven (7) cents on the said Subway Division and the said Manhattan Division, have been filed and are now on file with the agents of defendant at each and all of the stations on said Subway Division and said Manhattan Division, and that a printed notice has been posted at each of said stations, setting forth that such schedules or revised sheets are on file with said agents and are open to inspection by any person.

XVIII. That said proposed increase in fare by defendant from five (5) cents to seven (7) cents on the lines of its said Subway Division and of said Manhattan Division, if enforced and put into effect would be in violation of the provisions with respect to fare fixed and contained in said Contract No. 3 and in said Certificate dated March 19, 1913.

XIX. That according to the Annual Report filed by the defendant with the Transit Commission for the year ending June 30, 1927, there were carried on the said Subway Division of the defendant 814,626,596 passengers, and on [fol. 1404] the Manhattan Division 359,019,660 passengers, a total on both divisions of 1,173,646,256 passengers car

ried on the subway and elevated railroads operated by defendant; that such large number of persons depend upon said subway and elevated railroads as their means of transportation between points within the City of New York, and that an increase in the fare of said large number of passengers, from five (5) cents to seven (7) cents would work and cause irreparable loss, injury and damage to the plaintiff and to said persons, which loss, injury and damage could not be compensated for or adequately remedied by actions at law, and that the plaintiff has no adequate remedy at law for the loss, injury and damage which would be thus caused.

XX. That the enforcement of such increase in fare from five (5) cents to seven (7) cents would cause public confusion, disorder, disturbance and controversy and would result in a multiplicity of actions, all of which would be to the injury, damage and detriment of the plaintiff, for which it would have no adequate remedy at law.

XXI. That the plaintiff has duly performed all the conditions of said Contract No. 3 and of said Certificate on its part to be performed.

Wherefore the plaintiff demands judgment enjoining and restraining the defendant, its officers, agents and employees from carrying out its said threat to increase the fare from five (5) cents to seven (7) cents, and from taking any steps tending to, or looking towards, the enforcement of said increased fare on the subway and elevated railroads operated by it, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from, in any way, violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) [fol. 1405] cents on said subway and elevated railroad, operated by it, and further prays that an injunction be granted restraining the defendant, its officers, agents and employees, during the pendency of this action, from carrying out its said threat to increase the fare on its said subway and elevated railroads from five (5) cents to seven (7) cents, and from taking any steps tending to, or looking towards the enforcement of said increased fare on said

railroads, and from charging or collecting a fare in excess of five (5) cents on said subway and elevated railroads, and from, in any way, violating the provisions of said Contract No. 3 and of said Certificate dated March 19, 1913, fixing and providing for a fare of five (5) cents on said railroads, and for such other and further relief as to the Court may seem just and proper, together with the costs of this action.

George P. Nicholson, Corporation Counsel, Attorney for Plaintiff. Office and Post Office address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 1406]

New York Supreme Court, County of New York

The City of New York, Plaintiff,

against

Interborough Rapid Transit Company, Defendant

Verification of Complaint by Corporation Counsel

State of New York,
County of New York, ss:

George P. Nicholson, being duly sworn, says that he is Corporation Counsel of The City of New York, and as such that he is an officer of the Plaintiff in the above-entitled action: That the foregoing complaint is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the Plaintiff is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government and from statements made to him by certain officers or agents of the Plaintiff.

Geo. P. Nicholson.

Sworn to before me, this 11th day of February, 1928. G. H. Cowie, Commissioner of Deeds (270), New York City.

[fols. 1407 & 1408] In United States District Court

(Ancillary Action)

Answer of Transit Commission

John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, denying the jurisdiction of this Court and saving and reserving to themselves the benefit of their objections and defenses hereinafter made that the ancillary complaint herein states no cause of action or any cause of action within the jurisdiction of this Court, answering and explaining the ancillary complaint of the Interborough Rapid Transit Company, or such parts thereof as they are advised that it is material to answer, say:

1. They admit that an action was commenced in this Court on February 14, 1928, by plaintiff herein against [fol. 1409] these defendants, and against William A. Prendergast, as Chairman of the Department of Public Service of the State of New York, the Manhattan Railway Company, and The City of New York, defendants; but they have no knowledge as to the other allegations of Article I of the Ancillary Complaint.

2. They admit that a writ of subpoena ad respondendum was issued under the seal of this Honorable Court, directed to the said defendants, commanding them and each of them on a certain day and under a certain penalty to appear before this Honorable Court and then and there make answer to the said bill of complaint; but they have no knowledge of the other allegations of Article II of the Ancillary Complaint.

3. They have no knowledge as to the allegations of Article III of the Ancillary Complaint.

4. They admit that said subpoena was personally served upon these defendants on February 14, 1928, within the Southern District of New York; but they have no knowledge as to the other allegations of Article IV of the Ancillary Complaint.

5. They admit that the said bill of complaint in the original action herein set forth five alleged causes of action, and also set forth certain proceedings of said Transit Commission, in connection with the extension of subway station platforms and looking to the provision of additional subway cars, but they beg leave to refer to the original bill of complaint for a full and accurate description of its contents. They have no knowledge as to the other allegations of Article V of the Ancillary Complaint.

6. They admit the allegations of Article VI of the Ancillary Complaint, believing that the "Prayer for Judg-
[fol. 1410] ment" purported to be set forth therein is in substance correct, although they have not compared it with the original; and for a full and accurate statement of the contents of the said "Prayer for Judgment," they beg leave to refer to the original complaint.

7. They admit that, after the plaintiff herein had sought to commence the original action herein and after the service of a subpoena ad respondendum upon these defendants, these defendants and The City of New York brought the two civil actions and the summary proceeding, referred to in Article VII of the Ancillary Complaint; but they have no knowledge as to the other allegations of said Article VII.

8. They have no knowledge as to the allegations of Article VIII of the Ancillary Complaint.

9. They have no knowledge as to the allegations of Article IX of the Ancillary Complaint; and for a correct and accurate statement thereof, they beg the Court to consult the Civil Practice Act and the judicial decisions of the Courts of the State of New York.

10. They deny the allegations of Article X of the Ancillary Complaint, except that they admit that said summary proceedings and said actions brought by the defendants were commenced on February 14, 1928, after the subpoena

and the original complaint had been served upon these defendants; and they explain and show that copies of the petition in the summary proceeding and of orders therein and copies of the summons and complaint in the action entitled "The City of New York, acting by the Transit Commission —Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant," and of an order to [fol. 1411] show cause therein with stay were served upon plaintiff by delivery of copies thereof to the Secretary and Treasurer of the plaintiff.

11. Upon information and belief, they deny the allegations of Article XI of the Ancillary Complaint.

12. Upon information and belief, they deny the allegations of Article XII of the Ancillary Complaint.

13. Upon information and belief they deny that the identity of the issues in the New York State suits and part of the issues comprised in the plaintiff's original suit in this Court is shown from the prayer for relief set forth in the pleadings in the State suits. They believe that the prayers for relief in the said summary proceeding and in the said action brought by the Transit Commission on behalf of the City, which Article XIII of the Ancillary Complaint purports to set forth are copies of the originals, although they have not compared them and have no direct knowledge; and, for a correct statement of the contents of said prayers for relief they beg leave to refer to the originals. They have no knowledge as to the other matters alleged in said Article XIII.

14. They admit that the direction, as alleged in paragraph 11 of the petition of the said summary proceeding, was not given until after these defendants had been served with the subpœna ad respondendum; but they have no knowledge as to the time of filing in this Court of the original bill of complaint in this action or as to the time of service of The City of New York; and they deny the other allegations of paragraph "(a)" of Article XIV of the Ancillary Complaint.

They admit that after the service of the aforesaid subpœna upon them, these defendants constituting the Transit [fol. 1412] Commission convened at a special meeting and

adopted a resolution directing its counsel to commence the said summary proceeding, and also made an order rejecting the tariff sheets referred to in the complaint and published, posted and filed by plaintiff and purporting to establish a rate of seven cents per passenger on and after March 3, 1928; that such action was taken by the Transit Commission notwithstanding that the said tariff sheets had been filed with it and had been in its files since February 1, 1928, and notwithstanding that Section 16 of the Public Service Commission Law provides that all documents and records in the possession of the Transit Commission shall be public records; and that such resolution and order were adopted and made by the Transit Commission without prior notice from the Transit Commission to the plaintiff and without plaintiff's having been heard in respect thereto. They deny the other allegations of paragraph "(b)" of said Article XIV.

15. They admit that the action brought by the Transit Commission on behalf of The City of New York was brought without any authorization by the Board of Aldermen of the City of New York. They have no knowledge as to what authorization was obtained by the Corporation Counsel from other City authorities. They deny the other allegations of Article XV of the Ancillary Complaint.

16. They admit that, after the service of the said subpœna upon these defendants, the Transit Commission and the City of New York, acting by their respective attorneys, counsel, agents, or representatives, applied to one of the Justices of the Supreme Court of the State of New York without giving any notice to plaintiff, for, and secured, orders to show cause for preliminary injunctions, which orders contained temporary restraining orders; that in and [fol. 1413] by one order in the said summary proceeding, the plaintiff herein is directed to make answer to the petition and serve a copy of its answer upon the petitioner's attorney not latter than February 17, 1928; and that said order provides that after answer or in default of answer the Court will, on February 20, 1928, at Special Term, Part I, inquire into the facts and circumstances, to the end that final judgment may be rendered therein; that, by another order in said special proceeding, the plaintiff is directed to show cause why an interlocutory injunction should not

be granted, and plaintiff is temporarily restrained pending the determination of the proceeding; that said summary proceeding brought by the Commission is alleged to be, and is, brought under Section 57 of the Public Service Commission Law; and that the orders to show cause granted in the two actions brought by the defendants in the New York State Court are returnable before the said State Court on February 20, 1928, and require plaintiff to show cause why an injunction pendente lite to the same effect should not be granted, and contain similar temporary restraining orders. They deny that there is no provision of law authorizing the granting of a preliminary injunction or a restraining order in, or in aid of, such summary proceeding; and they have no knowledge as to the other allegations of Article XVI of the Ancillary Complaint.

17. They deny the allegations of Article XVII of the Ancillary Complaint.

18. They deny the allegations of Article XVII of the Ancillary Complaint.

19. They admit that plaintiff is subject to three restraining orders, issued ex parte upon the application of the Transit Commission and the City of New York, enjoining [fol. 1414] it from charging a rate of seven cents, although plaintiff did not threaten to put said rate into effect before March 3, 1928; and that until said motions by the Transit Commission and the City of New York are determined, the plaintiff will be subject to the continuing force of the said three restraining orders; and they deny the other allegations of Article XIX of the Ancillary Complaint.

20. They deny that any wrong has been done or threatened to be done to plaintiff by said defendants; that any irreparable, or other, injury has been or will be inflicted upon plaintiff by said defendants; that plaintiff is in need of remedy or relief; and that it has no adequate remedy at law.

Wherefore, defendants demand judgment dismissing the complaint herein, together with costs and disbursements.

Clarence M. Lewis, Solicitor for Defendants Constituting the Transit Commission. Office and P. O. address: 270 Madison Ave., Borough of Manhattan, City of New York.

[fol. 1415] *Duly sworn to by Charles C. Lockwood. Jurat omitted in printing.*

[fols. 1416 & 1417] In United States District Court

[Title omitted.]

(Ancillary Action)

Answer of Defendant City of New York

The defendant, The City of New York, by George P. Nicholson, as Corporation Counsel, having appeared herein to challenge the jurisdiction of the Court and saving and reserving to itself the benefit of its objections and defenses hereinafter set forth that the ancillary complaint herein states no cause of action or any cause of action within the jurisdiction of this Court answering and explaining the said complaint or such parts thereof as it is advised, shows:

[fol. 1418] 1. It is without knowledge as to the allegations in "I" except that on February 14, 1928, at or about the time mentioned an action was commenced by the plaintiff herein against the defendants mentioned in said paragraph.

2. It is without knowledge as to the allegations in "II" except that a writ of subpœna ad respondendum was issued out of said Court directed to said defendants commanding them to appear and answer the said bill of complaint.

3. It is without knowledge as to the allegations in "III."

4. It is without knowledge as to the allegations in "IV."

5. Answering "V," it admits that the said bill of complaint set forth five alleged causes of action and also set forth certain alleged acts or proceedings of the Transit Commission, but for a full and accurate statement of the contents of said complaint this defendant refers to the original thereof. It is without knowledge as to the other allegations of said paragraph.

6. Answering "VI," it admits that said bill of complaint in the original action contained a certain prayer for relief,

but for a full and accurate statement of it, this defendant refers to the said bill of complaint.

7. It denies the allegations in "VII" except that on February 14, 1928, the actions and special proceedings therein mentioned were commenced.

8. It is without knowledge as to the allegations in "VIII."

9. It is without knowledge as to the allegation in "IX" and for a full and accurate statement of the provision of Section 218 of the said Civil Practice Act, it refers to said section of said act.

[*fol.* 1419] 10. It denies the allegations in "X" except that the actions and proceeding therein mentioned were commenced at about the time specified.

11. It denies the allegations in "XI" and alleges that the said actions and summary proceeding relate to contract obligations of the plaintiff.

12. It denies the allegations in "XII" and alleges that the said actions and summary proceeding relate to contract obligations of the plaintiff.

13. It denies the allegations in "XIII" that the identity of the limited issues in the New York State suits and part of the issues comprised in the plaintiff's original suit in this Court is shown also from the prayers for relief as set forth in the pleadings in the said suits and alleges that the actions and proceeding instituted in the State Courts were instituted for the purpose of protecting and preserving the rights, interest and property of the defendant, City of New York, contained in and arising out of certain contracts set forth and referred to in said pleadings in such actions and proceeding.

14. It is without knowledge as to the allegations in "XIV."

15. It denies the allegations in "XV" and alleges that such actions were highly meritorious and had they not been enjoined, would have resulted in the granting of the relief therein sought.

16. It denies the allegations in "XVI" and alleges that the proceedings therein taken as set forth in said paragraph were for the purpose of judicially procuring the redress to which the plaintiffs in such actions were entitled.

17. It denies the allegations in "XVII" and alleges that the proceedings taken therein as set forth in said para-
[fol. 1420] graph were for the purpose of judicially procuring the redress to which the plaintiffs in such actions were entitled.

18. It is without knowledge as to the allegations in "XVIII."

19. It denies the allegations in "XIX" except that the said three restraining orders referred to were issued and that the plaintiff herein is subject to the same and alleges that said actions and proceeding were instituted for the purpose of judicially procuring the redress to which the plaintiffs in such actions and proceeding were entitled, and had the prosecution of such actions and proceeding not been enjoined, the said plaintiffs would have procured the relief sought therein.

20. It denies that plaintiff is without adequate remedy at law and that the defendants seek to inflict upon it any irreparable injury and alleges that the obligations of the plaintiff wtih respect to carrying passengers for a five cent rate of fare, were fixed by contracts voluntarily entered into between said plaintiff and the defendant, City of New York.

Wherefore defendant, City of New York, demands judgment dismissing the complaint herein together with costs and disbursements.

George P. Nicholson, Corporation Counsel, Solicitor for Defendant City of New York. Office and P. O. address: Municipal Building, Borough of Manhattan, New York City.

[fol. 1421] *Duly sworn to by George P. Nicholson. Jurat omitted in printing.*

(33,468)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 159

JOHN F. GILCHRIST, LEON G. GODLEY, AND CHARLES C. LOCKWOOD, CONSTITUTING THE TRANSIT COMMISSION, ETC., ET AL., APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fols. 1422 & 1423] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT THE CITY OF NEW YORK TO THE CROSS-PETITION OF DEFENDANT MANHATTAN RAILWAY COMPANY

The defendant, The City of New York, by George P. Nicholson as Corporation Counsel, having appeared herein to challenge the jurisdiction of this Court, and having moved in this Court to strike out portions of the cross-petition of the defendant Manhattan Railway Company herein, and such motion having been denied; without in any wise waiving its objections to the jurisdiction or to the cross-petition of the defendant Manhattan Railway Company, for its Answer to the cross-petition of the defendant Manhattan Railway Company, respectfully shows:

1. Answering "I", it denies that defendant, Manhattan Railway Company is or has been subject to the provisions [fol. 1424] of the Public Service Commissions Law, and alleges that said Company is not now operating and since 1903 has not operated any railroad within the State of New York.

2. It is without knowledge concerning the facts alleged in "V".

3. It is without knowledge concerning the facts alleged in "VI".

4. It alleges that the lease mentioned in "VII" has other material provisions, and refers to the original thereof, a copy of which is hereunto annexed marked Exhibit "A" and made a part hereof.

5. It is without knowledge concerning the facts alleged in "VIII", but alleges that no application was ever made to said Transit Commission, or its predecessor for concurrence or approval of said plan.

6. It is without knowledge concerning the facts alleged in "IX".

7. It is without knowledge concerning the facts alleged in "X".

8. It is without knowledge concerning the facts alleged in "XI".

9. It is without knowledge concerning the facts alleged in "XII".

10. It is without knowledge concerning the facts alleged in "XIII".

11. It is without knowledge concerning the facts alleged in "XIV".

[fol. 1425] 12. It is without knowledge concerning the facts alleged in "XV".

13. It admits the allegations in subdivisions (a), (b), (c) and (d) of paragraph XVI that the Public Service Commission for the First District made certain orders on August 28, 1908; April 15, 1913, and February 18, 1918, prescribing the form and governing the construction and filing of schedules of fares for passenger service on street railroad corporations subject to the jurisdiction of said Commission but for greater definiteness and certainty, and for the effect of said orders, this defendant begs leave to refer to the three orders so made and mentioned in said paragraph and alleges that said orders of the Public Service Commission for the First District were made under and pursuant to the power vested in said Commission by sect. 28 of the Public Service Commission Law and that none of said orders fixed, prescribed or limited the rates of fare set forth in said schedules.

It denies the allegations contained in subdivision (h) of said paragraph XVI that by operation of the provisions of the Public Service Commission Law and of the said orders made by the said Commission plaintiff and the defendant Manhattan Railway Company were or either was required and obligated under penalties, to observe and charge, demand and collect a rate of five cents per passenger and was prohibited under penalties from charging any greater or different compensation for transporting passengers than five cents and alleges that the fare chargeable by plaintiff on its said elevated railroads was fixed at the rate of five cents per passenger by the Elevated Extension Certificate, granted by the Public Service Commission on March 19, 1913, and that the granting and acceptance of said Certificate constituted a contract voluntarily entered into between the plaintiff and such defendant and the defendant City of New York.

[fol. 1426] 14. It alleges that the certificate mentioned in "XIX" was part of a transaction whereby the rate of fare was fixed at five cents by agreement.

15. It admits that the date of execution of the elevated extension certificate, March 19, 1913, was subsequent to the enactment of the statutes specified in 1907 and 1910; it denies that the said Public Service Commission Law conferred any power whatever to regulate rates of fare fixed by contract pursuant to the Rapid Transit Act; it alleges that the approval by the Board of Estimate and Apportionment of such certificate was as the local authority of the City of New York, as well as in its capacity of the chief governing board of such city. Such approval was also the constitutional consent of the local authority of the City of New York to the construction and operation of the railroads therein provided for and such consent was a part of a single transaction, whereby the contracts and other certificates deemed annexed to this answer were authorized and executed, and upon the condition as to rates of fare therein specified; and it further alleges that the rates, fares and charges chargeable by the plaintiff, upon such elevated railroads or any part thereof, were thereby fixed as a condition of the constitutional consent of the local authorities of the City of New York for the construction and operation of the railroads referred to therein. Except as so alleged, it denies the allegations in "XX."

16. Answering "XXI," it alleges that plaintiff, Interborough Rapid Transit Company, as lessee of defendant Manhattan Railway Company, so manipulated the service on the elevated railroads as to diminish the patronage thereof.

It is without knowledge concerning the facts alleged as to the increased costs and the effect thereof.

17. It is without knowledge concerning the facts alleged in "XXII."

[fol. 1427] 18. It is without knowledge concerning the facts alleged in "XXIII."

19. It denies the allegations in "XXIV" that said rate of fare of five cents per passenger has become or was during 1926 and 1927 or now is or will continue to be unrea-

sonable, inadequate and confiscatory of property used and useful in the business of transporting passengers upon the said elevated lines and that the said five-cent fare has deprived and does now deprive and will continue to deprive such defendant of a reasonable rate upon the fair present value of such property, contrary to the Constitution of the State of New York and of the United States and alleges the rate of fare of five cents chargeable on the said railroads was fixed by contract, and that said rate of fare so fixed does not contravene the provisions of the Constitution of the State of New York nor the Constitution of the United States. It is without knowledge as to the other allegations contained in paragraph XXIV.

20. It denies the facts alleged in "XXV," and in further explanation thereof reference is had to paragraphs "A" to "PP" inclusive of this answer, hereinafter set forth.

21. It denies each and every allegation contained in paragraph XXVI, and alleges that the collection or charge of a fare of seven cents per passenger on the Manhattan Division would be contrary to and in violation of the contracts heretofore voluntarily made and entered into between the plaintiff, such defendant and the defendant City of New York, and would yield an unfair and unreasonable return upon the value of the properties owned by the plaintiff or such defendant and actually used in the public service and more than a reasonable compensation for the service so rendered.

[fol. 1428] 22. It denies the allegations of subdivisions (a) and (b) of paragraph XXVII that by action duly taken by its officers and directors in pursuance of power and authority conferred by law, the plaintiff fixed, determined and established the fare of seven cents per passenger as the rate thereafter to be charged and collected instead of the fare of five cents from each passenger upon each the Manhattan Division and the Subway Division of the rapid transit railroad lines operated by the plaintiff; and that it duly filed, published and posted the tariff sheets referred to in said paragraph. It alleges that said plaintiff had no power or authority to establish an unlawful rate of fare and that the Transit Commission was under no legal duty or obligation to reject said tariff sheets when tendered for

filing, and that said Transit Commission had the right to follow its due and regular procedure with respect to the rejection of said tariff sheets, and that said procedure had been adopted and was being followed at the time this action was instituted, and that the failure of said Transit Commission to reject said tariff sheets when tendered for filing did not in any way legalize or recognize the legality of said schedules or the lawfulness of the rate fixed therein.

It further alleges that the charge or collection by the plaintiff of a fare in excess of five cents would be contrary to and in violation of the said contracts.

It denies each and every allegation contained in subdivision (c) of said paragraph, and alleges that the seven cent fare fixed in said tariff schedule sheets had no force or effect, was illegal and void, and contrary to and in violation of the provisions of the said contracts.

23. It admits the allegations contained in "XXVIII" that plaintiff filed an application to the said Transit Commission alleging the grounds and reasons set forth in the quoted paragraphs set forth in said paragraph XXVIII, but denies that said application was duly filed under the [fol. 1429] provisions of Sect. 29 of the Public Service Commission Law and in accordance with the well-established practice of the Transit Commission and the Public Service Commission; and alleges that said application was invalid and void, and of no force and effect in that it contained and provided for the rate of fare of seven cents in violation of and contrary to the provisions of the said contracts fixing a rate of fare of five cents, and that by reason of said contracts the said Transit Commission had no power, authority or jurisdiction to entertain or grant such application for the reason that the fare contained in said application was contrary to and in violation of said contracts.

24. It alleges that the communication quoted in "XXIX" was a self-serving declaration for purposes of publicity.

25. It is without knowledge concerning the facts alleged in "XXX."

26. It denies the facts alleged in "XXXI," except that on February 14, 1928, the actions and special proceeding therein mentioned were commenced.

27. It denies the facts alleged in "XXXIII," except that the proceeding and actions therein mentioned were commenced at or about the time specified.

28. It denies the facts alleged in "XXXIV," and alleges that the proceeding and two actions mentioned related to contract obligations of plaintiff, and it alleges that the defendant Manhattan Railway Company was not a party to either such proceeding or such actions; and in further explanation thereof reference is had to paragraphs "A" to "PP" inclusive of this answer hereinafter set forth.

[fol. 1430] 29. It denies the allegations in "XXXV," and alleges that such actions were highly meritorious and had they not been enjoined would have resulted in the granting of the relief therein sought; and in further explanation thereof reference is had to paragraphs "A" to "PP" inclusive of this answer hereinafter set forth.

30. It denies the allegations in "XXXVI," and alleges that the proceedings therein taken were for the purpose of judicially procuring the redress to which the plaintiff in such actions was entitled; and in further explanation thereof reference is had to paragraphs "A" to "PP" inclusive of this answer hereinafter set forth.

31. It denies the allegations in "XXXVII," and alleges that the proceedings therein taken were for the purpose of judicially procuring the redress to which the plaintiff in such actions was entitled; and in further explanation thereof reference is had to paragraphs "A" to "PP" inclusive of this answer hereinafter set forth.

32. It denies that the Public Service Commission has construed, or the Public Service Commission Law requires and compels the plaintiff to observe such fare of five cents, as alleged in "XXXVIII;" and this defendant alleges that defendant Manhattan Railway Company is required and compelled to observe such fare by reason of the contracts and certificates annexed to this answer.

33. It admits each and every allegation contained in "XL," except that plaintiff and such defendant would be irreparably damaged by reason of the enforcement of the penalties or the multiplicity of suits to which either might be subjected by reason of its acts set forth in said para-

graph; and that it would be without adequate remedy at law. This defendant alleges that whatever damages or [fol. 1431] penalties such plaintiff would be subjected to in charging a greater rate of fare than five cents would be by reason of and because of its own violation of the contract and certificates fixing a rate of five cents voluntarily entered into between the plaintiff, such defendant and the defendant City of New York.

34. It denies that the Mayor, or any other officer of the City of New York ever announced or declared, or had any intention of enforcing any rate of fare against plaintiff or such defendant that is confiscatory as alleged in "XLI;" on the contrary this defendant alleges that it is the intention of said officers, and has been so declared and announced, to require the plaintiff and such defendant to abide by the obligations of the contract between the plaintiff and this defendant; and this defendant denies that such defendant suffers daily or otherwise, confiscation from the continuance of any rates or limitations thereon.

35. It denies each and every allegation in "XLII," and alleges that the five cent fare chargeable by such plaintiff was fixed by Contracts and certificates voluntarily made and entered into between the plaintiff, such defendant and the defendant City of New York.

Further answering, this defendant shows:

A. For many years prior to 1894 the matter of adequate and proper transit facilities in the City of New York was a question of great public concern. In furtherance of the provision of such facilities the Legislature, by Chapter 752 of the Laws of 1894, required the Board of Rapid Transit Commissioners to cause the question whether such railway or railways shall be constructed by the City, and at the public expense, to be submitted to the vote of the qualified electors of the City within which such railway or railways were to be constructed, and at least thirty days prior to the next general election to file with the Election authori- [fol. 1432] ties a request for separate ballots, to be printed and supplied by such electors, one-half of which to read: "For municipal construction of Rapid Transit road" and the other half to read: "Against municipal construction of Rapid Transit road." Such Act further required the

necessary steps to be taken in the conduct of the election and the canvass of votes, and further provided:

"And the said railway or railways shall be constructed by the said City at the public expense if it shall be found from such statements so filed that there is a majority of the votes so cast in favor of such municipal construction."

It was further enacted that in case favorable action was taken upon such referendum it should

"be the duty of said Board of Rapid Transit Railway Commissioners within thirty days after the official declaration of the said voting to proceed to construct the said railway or railways and to make and let all contracts required for the performance of the work necessary to be done and performed in and about the construction thereof."

At the next ensuing general election the referendum received favorable consideration by the electors.

B. While the Board of Rapid Transit Commissioners were endeavoring to carry into effect the project for municipal construction of rapid transit railways, the constitutionality of the Rapid Transit Act of 1894 was assailed, at the suit of Sun Printing & Publishing Company and others, as taxpayers, for the purpose of enjoining the City of New York from employing its funds in the construction of the proposed rapid transit railways. The constitutionality of the Act was upheld in all courts, the final decision being rendered by the Court of Appeals on March 23, 1897.

Notwithstanding this, Manhattan Railway Company, one of the defendants herein, and other railway corporations then existing, continued their attitude of refusal to provide new facilities of their own or to enter into a contract [fol. 1433] with The City of New York for the construction of new lines under the provisions of the Rapid Transit Act.

C. By Chapter 378 of the Laws of the State of New York, of 1897, provision was made to unite in one municipality, under the corporate name of The City of New York, the various counties lying in and about New York Harbor, including the City and County of New York, the City of Brooklyn, and the County of Kings, the County of Rich-

mond, and part of the County of Queens, and to provide for the government thereof.

As a result of the consolidation of these municipalities into Greater New York and the assumption of their outstanding debt by the Greater City, it was found impossible for The City of New York to provide sufficient funds for the construction of new rapid transit railways and for other necessary public improvements. In order to meet this condition, the State Legislature took the necessary steps for submission to the people of an amendment to the state Constitution, so as to exclude from the debt limitations of the City the debts of the separate counties embraced therein; the effect of which was to increase the debt incurring power of The City of New York by about $30,000,000. Such amendment to the Constitution received the affirmative vote of the people and was adopted at the election held in November, 1899.

D. Thereafter, the Rapid Transit Commissioners published an invitation to contractors for bids for the construction, equipment and operation of the first municipally constructed rapid transit railway, the bids for which were opened on January 5, 1900. Before any action could be taken upon such bids, it was found necessary to adjourn the consideration thereof, pending the amendment of the Greater New York Charter in relation to the authorization of Rapid Transit bonds and the form of certificate necessary to make the contract binding upon The City of New [fol. 1434] York. Immediately upon the introduction of a Bill for this purpose, the then Governor of the State, Hon. Theodore Roosevelt, sent an emergency message to the Legislature, and in response thereto such Bill was passed on the following day, and having been accepted by the Mayor of The City of New York, was approved by the Governor and became a law on February 8, 1900.

E. As a consequence of such action, the necessary steps were taken resulting in an agreement dated the 21st day of February, 1900, between The City of New York and John B. McDonald, for the construction and operation of the Manhattan-Bronx Rapid Transit Railroad, known as Contract No. 1, which said agreement is a public record, and a copy thereof is deemed to be hereunto annexed marked Exhibit "A" and made a part hereof.

Such contract has from time to time been modified and supplemented by the following agreements, among others, each of which said agreements is a public record, and a copy thereof is deemed to be hereunto annexed and made a part hereof, as follows:

[fol. 1435]

Date	Subject
(1) February 21, 1900	Modification as to security
(2) June 21, 1900	Fort George Change of Route
(3) January 10, 1901	City Hall Change of Route
(4) May 2, 1901	Broadway Terminals
(5) April 10, 1902	Correcting typographical error
(6) July 10, 1902	Assignment to Lessee
(7) July 21, 1902	Bergen Avenue (149th Street) Change of Route
(8) January 16, 1903	Lenox Avenue Extension
(9) July 16, 1903	Fort Lee Ferry Extension
(10) July 16, 1903	Connection with Manhattan Railroad
(11) November 24, 1903	Continuing Bond
(12) March 24, 1904	Third Track North of Fort George
(13) November 3, 1904	Computation of Rentals
(14) December 1, 1904	Return of Contractor's Deposit
(15) July 9, 1906	Outlet Chambers and Fan Houses
(16) November 1, 1906	Van Cortlandt Park Extension
(17) April 5, 1907	Third Avenue and 149th Street Station Entrances
(18) June 27, 1907	Additional Tracks at 96th Street
(19) June 27, 1907	Ventilation and Cooling
(20) December 12, 1907	Arbitration Provisions
(21) June 1, 1908	Adjustment of Park Avenue Litigation
(22) April 21, 1909	Additional Station Facilities at 181st Street and St. Nicholas Avenue Station
(23) August 3, 1909	Additional Station at Intervale Avenue
(24) August 9, 1909	Additional Station at 191st Street
(25) November 30, 1909	Zoological Park Station
(26) January 18, 1910	Lengthening Station Platforms
(27) December 9, 1910	Additional Entrances and Exits
(28) December 30, 1911	Adjustment of Controversy over Extra Work and Omissions
(29) July 11, 1911 (2)	Reduction of Construction and Equipment Bond and consent to and Assignment of Construction Provisions to Rapid Transit Subway Construction Company.
(30) January 30, 1913 (2)	Reduction of Continuing Bond and consent to and Assignment of Construction Provisions to Interborough Rapid Transit Company.

F. After certain rights and liabilities under said Contract #1 passed by assignment to Interborough Rapid Transit Company, the plaintiff herein, and prior to the completion or beginning of operation of any part of said Manhattan-Bronx Rapid Transit Railroad, said Interborough Rapid Transit Company, under date of April 4, 1903, entered into an agreement with the defendant Manhattan Elevated Railroad Company, whereby it leased the lines of the latter for 999 years and guaranteed to each of the stockholders thereof a return of 7% per annum upon each of their shares of stock in the said Company for such

period, the capital stock of which Company was and is $60,000,000.

[fol. 1436] The necessity for additional rapid transit facilities having become evident even before the completion and opening of the Manhattan-Bronx Rapid Transit Railroad, under date of July 21, 1902, a further agreement was made between The City of New York and the Rapid Transit Subway Construction Company, for the construction and operation of Brooklyn-Manhattan Rapid Transit Railroad, which said agreement was subsequently known as Contract #2, and certain rights and liabilities under which passed by assignment to said Interborough Rapid Transit Company. Said agreement is a public record, and a copy thereof is deemed to be annexed hereto marked Exhibit "B," and made a part hereof, together with the agreements modifying and supplementing the said agreement, as follows:

Date	Subject
(1) September 11, 1902	Passenger Traffic Agreement
(2) December 23, 1904	Substitution of Continuing Bond for Continuing Deposit
(3) January 26, 1905	Borough Hall Change of Alignment
(4) June 9, 1905	Additional Tracks on Fulton Street and Flatbush Avenue
(5) August 10, 1905	Assignment to Lessee
(6) December 14, 1905	Computation of Ren...ls
(7) June 18, 1908	Shuttle Service, Bowling Green to South Ferry
(8) September 22, 1908	Return of Portion of Cash Deposit
(9) January 18, 1910	Lengthening Station Platforms
(10) September 20, 1910	Additional Entrances and Exits
(11) January 30, 1913 (2)	Reduction of Continuing Bond and consent to and Assignment of Construction Provisions to Interborough Rapid Transit Company.

6. In 1906, persons interested in Interborough Rapid Transit Company and Metropolitan Street Railway Company, a corporation owning or controlling an extension system of street railways in the City of New York, procured the organization, under the laws of New York, of a corporation known as Interborough-Metropolitan Company, one of the purported purposes of which was to have a unified system or control of transit facilities in the City of New York, and which said corporation acquired all or practically all of the shares of stock of Interborough Rapid Transit Company, by issuing in exchange therefor $200 in [fol. 1437] par value of its 4½% collateral trust bonds and $99 in par value of its common stock for each share of said

Interborough Rapid Transit Company; and by the issuance and exchange of its stock and bonds acquired control of the street railway system of the Metropolitan Street Railway Company.

The total issue of securities of the Interborough-Metropolitan Company was $225,000,000, consisting of $70,000,000 of 4½% Collateral Trust Bonds, $55,000,000 preferred stock and $100,000,000 common stock. This corporation ended its career in receivership and dissolution and the investment of the public in its securities was completely wiped out.

In the latter part of 1907, in the United States District Court, for the Southern District of New York, in a friendly action brought for such purpose, a Receiver was appointed of the Interborough-Metropolitan Company which, prior thereto, had depleted its assets by the payment of dividends which were never earned, which payments were made the basis of the marketing of its securities. Subsequently, Interborough-Metropolitan Company was reorganized into what was known as the Interborough Consolidated Corporation. Substantially the only difference between those companies was that in the latter the common stock had no par value, and by reason of its being carried at a nominal figure of $5 per share, $95,000,000 of liabilities were written off.

H. In the period and while the transactions hereinafter mentioned were being had and carried into effect, and in particular in the years 1910, 1911 and 1912, the foregoing securities were outstanding, and the Board of Directors of the Interborough Rapid Transit Company, plaintiff herein, was dominated and entirely controlled by the aforesaid Interborough-Metropolitan Company, and its successor, Interborough Consolidated Corporation.

I. For several years prior to 1913 the necessity for additional rapid transit facilities in the City of New York con- [fol. 1438] tinued to be most urgent and a matter of grea' public concern. From time to time the Rapid Transit Act was amended so as to enlarge the powers of the City of New York in relation to Rapid Transit Railways and the use of public money and property for such purposes. Among such amendments are those hereinafter mentioned.

Pursuant to action of the Legislature taken in the years

1908 and 1909, the Constitution of the State of New York was amended in 1909 so as to further increase the power of The City of New York in relation to Rapid Transit facilities, by providing that the debt incurred for such purpose by The City of New York, under conditions specified in the Constitution, should be exempted from the constitutional limitations upon the power of the City to incur debt.

J. At a meeting of the Board of Estimate and Apportionment of The City of New York, held on December 10, 1910, the following proceedings were had and taken:

The following matter not on the calendar for this day was considered by unanimous consent:

(The Mayor, at this point, appeared at the meeting and requested the President of the Board of Aldermen to continue to preside.)

Rapid Transit Railways

Extensions to the existing system; also third-tracking and constructing additions to the 2d, 3d and 9th Avenue Elevated roads, and the completing and putting in operation of the Steinway tunnel.

The Comptroller presented the following:

State of New York, Public Service Commission for the First District, New York, December 20, 1910.

To the Board of Estimate and Apportionment of the City of New York.

Gentlemen: Under date of December 5th, the Interborough Rapid Transit Company submitted a proposition for extensive additions to its subway system, a copy of which is transmitted herewith. This proposition, provided certain features not now satisfactory can properly be adjusted, the Commission is prepared to accept.

[fol. 1439] In submitting this proposition, the Interborough Company stated that it was conditional upon favorable action upon its proposition to third-track and build additions to its 2nd avenue, 3rd avenue and 9th avenue elevated roads and to complete and put in operation the Stein-

way Tunnel. This elevated railroad proposition is generally treated of in its letter of June 10, 1910, a copy of which is also transmitted herewith. The matters embraced in the proposition of June 10, with the exception of the one referring to the Steinway Tunnel, have reached a point where they have been embraced in draft contracts upon which a public hearing is to be held on December 23, and which, when acted upon by the Commission, will be submitted to you for your approval and consent in accordance with the provisions of the Rapid Transit Act.

The fundamentals of the elevated railroad proposition are:

1. Lines

(a) The third-tracking of the 2nd, 3d and 9th avenue elevated lines.

(b) The extension of the 2d avenue line over the Queensboro Bridge into the Borough of Queens.

(c) The extension of the 3d avenue line through Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Brook avenue.

(d) The extension of the 3d avenue line along Webster avenue, White Plains road and other streets to Becker avenue or 241st street.

(e) The extension of the 9th avenue line along River and Jerome avenues and other streets to Woodlawn Cemetery.

2. Terms

(a) The construction to be done and interest in property provided wholly at the cost of the Interborough Company and the Manhattan Railway Company. Such cost is estimated at about thirty-two million ($32,000,000) dollars.

(b) A term for the third-tracking equal to the term of the main franchise with the right reserved to the city to terminate such third-tracking right at any time after ten years from the beginning of operation and a term for the elevated extensions not to exceed eight-five years, subject to termination after ten years.

(c) Rentals to be readjusted at the end of the first twenty-five years and thereafter at intervals of twenty years. The rate for the first twenty-five years to be two

per cent of the increased gross receipts at certain stations in the case of the third-tracking and two per cent of the gross receipts of the extensions.

[fol. 1440] (d) The Steinway Tunnel to be turned over to the city without cost and to be operated by the Interborough Company as a part of the Manhattan-Bronx subway under Contract No. 1 with free transfers, the city to pay one and a half million ($1,500,000) dollars for the extension of the Tunnel, such amount to be repaid as rental, as provided in respect to the present subway in Contract No. 1.

Assuming that certain features of the proposition of December 5 can be adjusted and the details satisfactorily worked out, the Commission believes the acceptance of these general propositions for subway construction to be for the best interests of the city for the following reasons:

(1) The Interborough Company agrees to a provision obligating it to operate future extensions when and as constructed by the city, upon terms to be specified. This is a proposition upon which the Commission has consistently insisted and is of paramount importance if the city subways are to be city subways in fact, as well as in name. Under the present contracts, the city could not compel the operation of additions to its subways without the acquiescence of the Interborough Company. If such a provision had been in Contract No. 1, for instance, steps could have been taken from time to time to relieve congestion by extensions to the present system. Accordingly, in the future the Commission will be able to lay out not only new systems, but also such additions to the present one as traffic conditions warrant. For example, there could be added the Broadway line in Brooklyn, additional tunnels under the rivers and additional trunk lines, should their construction be deemed necessary.

(2) The provisions of the amendments to the Rapid Transit Act proposed by the Commission in 1909 will apply to the extensions, and the city will have the right to take them over at any time after ten years after operation begins by paying an amount to be ascertained as provided in the contracts, but not to exceed the cost to the Interborough plus fifteen per cent, and to decrease during the term in

accordance with the contract provisions. Under this provision in the case of the subway extensions, the city would have the power after the expiration of ten years from the beginning of operation to take over the extensions, and by the addition of a few connecting links, have an entirely distinct and comprehensive subway system.

(3) The Interborough is at once to commence construction in all boroughs, so that some of the lines may be connected with its present system and put into operation within a short time, thus affording the quickest measure of relief.

(4) Arrangements can also be made under the subway proposition for the leveling of the subway terms, so that the entire system, comprising both the present subway and the extensions, will revert to the city at the same time. It [fol. 1441] will be to the advantage of the City to have all parts of the system revert to it at one time.

(5) For the expenditure of $53,000,000, plus the necessary amounts for real estate for right of way the city will become the owner of additional subway facilities embracing 82.4 miles of straight single track, the total estimated cost of which for construction and equipment is $128,000,000. The title to the extensions, however, without reference to the relative participation of city and private funds, will be in the city in precisely the same manner as if built wholly with City funds.

(6) The Interborough proposition involves a single five-cent fare and free transfers. The subway extensions embrace practically all of the Tri-Borough system, with the exception of the portion of the Lexington avenue route south of 42nd street, for which the west side line down 7th avenue may be deemed a substitution, the Canal street route, for which an under-river crossing is substituted, and the Broadway route in Brooklyn. The Jerome avenue branch of the Tri-Borough is to be taken over as part of the elevated extensions. In addition to what is provided in the Tri-Borough, there are provided in this subway proposition the White Plains road extension in The Bronx and the Eastern Parkway extension in Brooklyn, to be operated as a part of the present subway system.

(7) The Pennsylvania Railroad station will be connected with the main transit system in the city.

(8) In addition to providing improved transit facilities in Manhattan, The Bronx and Brooklyn, the elevated proposition embraces two important connections with the Borough of Queens—namely, by means of the Steinway Tunnel and the Queensboro Bridge.

When the Commission took office, the objectionable features of the Elsberg Bill of 1906 were still in effect and the City's borrowing capacity was too small to permit of important subway extensions with city money. To relieve the situation, the amendments to the Rapid Transit Act proposed by the Commission were enacted in 1909, having, as important features, the provision for terminating contracts at any time after ten years from the beginning of operation and the provision for the equal division of profits upon both of which the present Interborough propositions are based. In addition, an amendment to the State Constitution exempting self-sustaining rapid transit bonds from the debt limit was secured, which became effective during the present year. With this legislation the City was in a position to proceed with rapid transit extensions.

Because of its control of the subway lines in Manhattan, The Bronx and Brooklyn and of the elevated lines in Manhattan and The Bronx, the Interborough Rapid Transit Company was in position by needed additional construction [fol. 1442] to give the maximum relief, and the Commission did its utmost to induce that company to submit a proposition consonant with the large return which it was receiving from the present City subway. These efforts were unsuccessful—the only proposition submitted by the Interborough Company prior to that herewith transmitted being impossible of acceptance. Unable to secure the co-operation of the Interborough Company, the Commission, after due opportunity for those interested in the subject to be heard, undertook the preparation of plans and forms of contracts, for the so-called Tri-Borough Rapid Transit Railroad, which is made up of a number of routes from time to time submitted to and approved by the Board of Estimate and Apportionment. An attempt to enlist private capital in the construction of this system was unsuccessful—no bids being received on that form of contract when the time for their re-

ceipt expired on October 20. A large number of bids were, however, received on October 27 for the construction of a major part of the system by sections at municipal expense. While these bids were under consideration, and while the matter of future rapid transit was, by reason of probable early action, a subject of widespread discussion, a proposition was submitted by the Hudson and Manhattan Railroad Company for the equipment and operation of the Tri-Borough system, with some modifications. That offer, which has expired by its own time limit, is an indication that an operator may be found to equip and operate the Tri-Borough system when constructed. If, for any reason, certain features of the details of the present proposition cannot be adjusted, and it be determined to construct the Tri-Borough system, it may be safely assumed that when the time comes there will be bidders to equip and operate it upon satisfactory terms.

The Commission will press the present negotiations with the Interborough Company to a conclusion and embody them in contracts and plans as rapidly as possible, unless your Honorable Board should consider the proposition as generally outlined open to objections which would render your consent impossible when the forms of contracts are finally submitted. Although the principal portions of the routes are already laid out, certain connections have not yet been legalized, and it will take considerable time to perfect them. The Commission respectfully requests that, if there are objections on your part, it be advised at as early a date as possible. If the present propositions are disapproved, the contracts for the construction of the Tri-Borough system, which are now awaiting award, can promptly be acted upon and construction work immediately begun. The Commission will be pleased to receive a statement of the position of your Honorable Board on this subject and will be ready at any time that may be convenient to confer with your Honorable Board, or any Committee thereof.

Public Service Commission for the First District.
W. R. Willcox, Chairman.

[fol. 1443] Interborough Rapid Transit Company, 165 Broadway, New York

June 10, 1910.

Dear Sir: Our further study of the rapid transit situation in this city persuades us that with the greatest despatch upon a part of the city authorities consistent with duty, some time must yet lapse before the actual construction of new subways can be commenced, and that it cannot reasonably be expected that such subways will be available to relieve the traffic congestion of this city within a period of from at least five or six years from the present time. This circumstance, the ever increasing pressure upon the existing subway and elevated lines, particularly the excessive crowding upon the east side elevated roads, and the passage by the recent Legislature of a bill which, if approved by the Governor, will enable the improvement of the elevated lines to proceed without undue delay incident to the settlement of property damages, lead us to now propose the construction of the following elevated railroad improvements:

1. Second Avenue Line

The completion of the third track from City Hall station to 129th street

Queens County Extension—The construction of a two-track extension from a Second Avenue elevated line across Queensboro Bridge to the Queensboro Bridge plaza. This extension when constructed will enable us to operate through elevated trains from Long Island City to Brooklyn Bridge and South Ferry, and afford the citizens of Queens the benefit of free transfers upon the payment of a single five-cent fare, to all parts of the elevated system in Manhattan and The Bronx.

2. Third Avenue Line

The completion of the third track from Pearl and Chambers streets to about 147th street, with the privilege of thereafter extending the third track to the present terminus of the 3d avenue line at Bronx Park. This extension involves the construction of a new bridge across the Har-

lem River, and, because of the junction at the Harlem River with the 2d avenue line, the construction of a four-track line between the Harlem River and 145th street.

We propose to build at this point, through private property and public streets, not at present occupied by elevated structures or covered by any franchises, a two-track connection from about 143d street, through Willis and Bergen avenues, to a connection with the West Farms division of the subway at or about Brook avenue. This connection will enable a diversion of West Farms trains to the 2d and 3d avenue line, and will relieve the pressure upon the Broadway and Lenox avenue divisions of the subway.

[fol. 1444] Becker Avenue Extension—The extension of the 3d avenue line from Pelham avenue through Webster avenue, Gun Hill Road and White Plains avenue, to Becker avenue, as a two-track line, with the privilege of hereafter building a third track from the intersection of White Plains avenue and Gun Hill Road to Becker avenue, in order to provide for the better terminal facilities that will be essential to the satisfactory operation of the enlarged elevated system.

3. Ninth Avenue Line

The completion of the third track from Rector street to 155th street.

Jerome Avenue Extension—The construction of a two and three-track elevated road from about 149th street and 8th avenue across McComb's Dam Bridge to about 162d street and River avenue, thence up River and Jerome avenues to about 194th street, with the privilege of hereafter constructing a third track between 162d and 194th streets. The portion of this line from 162d street and Jerome avenue north may either be built as an elevated extension to be jointly used by the new eastside subways, or may be built by the city as a subway extension under a traffic arrangement whereby it may be used by the elevated road. If built as a subway extension, work should be first begun upon it, so that the structure would be completed in time to operate in connection with the other elevated improvements hereinbefore referred to.

The cost of the construction and equipment of the above extensions may be roughly estimated at approximately

$30,000,000, and this, of course, will be entirely borne by the Manhattan Railway Company and its lessee, the Interborough Rapid Transit Company, with the possible exception of that part of the Jerome avenue line north of 162d street. In view of the very heavy special franchise taxes already paid by the Manhattan Company, aggregating on the basis of the last assessment $46,000 a mile; the cost of acquiring additional easements from abutting property owners over virtually the whole system; the circumstance that this new franchise must be largely confirmatory of what are apparently valid and surviving grants already possessed by the company; and that the construction of the third tracks will not occupy any substantially greater portion of the surface of the streets than is now occupied by the existing structure; it would seem only fair that your Commission should fix the rental for the proposed new third-tracking grant at some very moderate sum, certainly not exceeding two per centum of the increased receipts from stations served by the new third track.

If the enabling act now before the Governor shall be approved and our present proposition should be accepted, we should expect to begin work at once. The advantages of allowing us to immediately proceed may be summarized as follows:

[fol. 1445] (a) The third-tracking improvements can be put into service within approximately two years, thus bringing a by no means inconsiderable rapid transit relief to the city within at least three years less time can be obtained by subway construction.

(b) The pressure upon the 3d avenue line, the travel on which is now more congested than upon any of the rapid transit lines in the city, will be relieved.

(c) If the third track be completed upon the 2d and 3d avenue lines, it will be possible to divert a considerable number of the trains now using the West Farms division of the subway to the 2d and 3d avenue lines. This in turn would give a superior rapid transit service to the citizens of The Bronx, and would at the same time enable this company to materially increase the train movement on the upper Broadway division of the subway; improve the congested conditions along Lenox avenue; and thus give a more efficient service to the upper portion of Manhattan.

Steinway Tunnel

We are aware that in our earlier conferences you urged upon us the desirability of putting the Steinway Tunnel in operation at the earliest possible moment; and that many months ago we assured you that we would be glad to do so if proper legislation could be obtained. There was passed at the recent session of the Legislature a bill, now awaiting final approval, which will make possible the operation of this tunnel. If pursuant to the terms of this act a satisfactory franchise can be obtained from the city authorities for its operation, we propose, in addition to the foregoing elevated improvements, to complete the construction of this tunnel and to operate it as a part of the existing subway, with open communication between the tunnel and the subway system at or near the Grand Central station. An additional line of rapid transit communication will thus be established, with free transfers, upon the payment of a single five-cent fare, between Long Island City and all parts of Greater New York reached by the existing subway lines.

We would suggest that you kindly arrange for as early a conference as possible to act on this application.

Very respectfully, T. P. Shonts, President.

Hon. William R. Willcox, Chairman Public Service Commission for the First District, State of New York, Tribune Bldg., New York City.

Interborough Rapid Transit Company, 165 Broadway, New York

[fol. 1446] December 5, 1910.

Hon. William R. Willcox, Chairman Public Service Commission for the First District, State of New York, Tribune Bldg., New York City.

Sir: At a time when the city must decide whether its capital available for subway construction shall be invested in an entirely new rapid transit enterprise, or be devoted to perfecting that system of subways the title to which is already vested in the city, it is proper that responsible public authorities should have before them the most favorable proposal which the lessee of the city's existing subway

lines, after full consideration, is able to offer. In our consideration of the subject, we have had in mind not only the routes necessary to afford an efficient service to the city, but changes in the present subway contracts and the additional obligations that the company will be called upon to assume.

The Interborough Rapid Transit Company, therefore, begs leave to submit the following proposition:

It proposes the construction of the following natural extensions to the present subway:

West Side Lower Manhattan and Brooklyn Extension

From Times square under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street in Brooklyn, and under Pienapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern Parkway to Utica avenue as a four-track road, and from Utica avenue to Buffalo avenue under Eastern Parkway as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenue, Brooklyn, under Lafayette avenue to Broadway.

[fol. 1447] East Side Upper Manhattan and Bronx Extensions

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lexington avenue, thence under Lexington avenue and the Harlem River to a point south of 149th street as a four-track road; thence dividing, with two tracks to a connection, east to Mott avenue station, with the West Farms branch of existing subway; thence two tracks under Mott avenue, 153d street, and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a

connection will be made with the Jerome avenue extension of the Ninth avenue elevated line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern Boulevard and Whitlock avenue, to a point in private property south of Westchester avenue; thence as a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway at about 179th street, over private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public streets to Bear Swamp road and White Plains road; thence over White Plains road to a connection with the proposed extension of the 3d avenue line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains road and Gun Hill road

The cost of construction and equipping the foregoing lines is estimated at $128,000,000. The Interborough Company hereby offers to build and equip the same for the sum of $53,000,000 to be furnished by the City, the City to provide in addition the necessary easements and rights of way, and the company to supply the funds necessary to defray the additional cost of construction and equipment, which, upon the basis of the above estimate, would amount to $75,000,000. The work will be done as "extras" under the terms of the Rapid Transit contract of February 21, 1900, under which the original subway was constructed and is operated, except so far as the terms thereof may be modified by the provisions of this offer; and the lines when constructed and equipped will be operated by the Interborough Company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

1. The net profits from operations, to be arrived at as hereinafter provided, shall be disposed of as follows:

[fol. 1448] (a) The City to take all net profits for the first five years from the time of beginning operations on any portion of the new subway extensions:

(b) The net profit after five years to be equally divided between the City and the Interborough Company.

2. The net profits shall be determined by deducting from the gross revenue of the extensions charges for the following items, in the order named:

(a) Maintenance of equipment, including an allowance for depreciation;

(b) Maintenance of ways and structures, including an allowance for depreciation;

(c) Traffic expense and cost of conducting transportation;

(d) General and administration expenses;

(e) Taxes, if any;

(f) The actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence and for carrying that portion of the cost of construction not met by the funds contributed by the City and providing a sinking fund of one per centum thereon;

(g) Interest on bonds issued by the City to defray the cost of construction plus one per centum per annum as a sinking fund.

3. The gross operating revenue of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or, if deemed advisable by either the city or the company, from the number of tickets deposited in the chopping boxes on the new extensions or by such other method as upon full consideration may be agreed upon between the parties.

4. If the gross income in any year after providing for the charges above mentioned shall be insufficient to meet the interest and sinking fund upon the construction and equipment bonds issued by the Interborough Company, the deficit for such period shall be borne by the Interborough Company, and shall not be a cumulative charge against future earnings.

5. If the gross income in any year after providing for all charges above mentioned, including interest and sinking fund upon bonds issued by the Interborough Company to defray the additional cost of construction and equipment, shall be insufficient to meet the interest and sinking fund [fol. 1449] upon the City's bonds the deficit sustained by

the City for such period shall accumulate and be a charge against the future profits before any division thereof shall be effected between the City and the Interborough Company.

6. The City will retain the right, now provided for by law, to take over the extensions at any time after ten years from the time that any portion thereof may be put into operation, upon paying to the Interborough Company, (a) the amount of its investment in construction over and beyond the $53,000,000, supplied by the City, plus 15 per centum, which sum shall decrease as the term continues, so that at the end of the full term of the contract under which the said extensions may be built as extras no amount will be required to be paid by the City, and (b) the then reasonable vlue of the equipment.

If this proposition be accepted we are prepared to immediately enter into contracts to carry the same into effect. After public bidding, the contracts will be awarded by us under the supervision of your Commission to responsible bidders for the construction of the lines in sections; and construction work thereupon will be commenced in each borough and upon all sections at once. Each part of the road as completed will be immediately opened for operation so that the outlying territory in Brooklyn and The Bronx will have the earliest possible relief and all other lines will be hurried to completion within an estimated period of five (5) years.

We have considered your suggestion that the present subway leases should be so altered that the terms thereof and of all extensions thereto operated by the Interborough Company should end at the same time. Contract No. 1, under which the Manhattan portion of the subway was built, provides for an original term of fifty years, with the right to renewal for additional term of twenty-five years. Contract No. 2, under which the line from the City Hall park to Flatbush avenue in Brooklyn was built, provides for an original term of thirty-five years, with the right to renewal for an additional term of twenty-five years. We are willing if it can be legally arranged, that these contracts should be so modified that the original terms therof and of all extensions built as extras under Contract No. 1 should be fixed at forty-nine years from the date of the completion

of the extensions, and that the privilege of the renewal terms of twenty-five years should be cancelled.

The Interborough Company also offers to equip and operate, under a lease for a term equal to the unexpired term of Contract No. 1, under which the original subway was built, the 4th avenue subway in Brooklyn, including extensions to Fort Hamilton and Coney Island, when completed, as part of the present subway system for a single five-cent fare, upon the following terms:

The gross earnings of the 4th avenue division, of which a separate account shall be kept between the City and the [fol. 1450] Interborough Company, shall be ascertained from the tickets deposited at the stations upon the division.

From the gross earnings thus ascertained shall be deducted:

1. (a) All station expenses; (b) Maintenance of way and structures; (c) Damages for accidents happening on the division.

2. Other operating costs to be determined according to unit costs on the Interborough system, upon a car-mileage basis:

(a) Conducting transportation; (b) Maintenance of equipment and depreciation; (c) Cost of power; (d) General and administration expenses; (e) Taxes, if any.

3. After the payment of the foregoing charges, the actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence.

4. From the balance of the income then remaining shall be paid interst and sinking fund upon bonds issued by the City to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid annually by the City, but that portion thereof which represents payments made by the City upon bonds issued by the City as hereinbefore provided for shall accumulate and be a charge against future profits, before any division thereof

shall be effected between the City and the Interborough Company.

(5.) The net profits remaining after providing for the foregoing charges shall be equally divided between the City and the company.

The right will, of course, be reversed by the City, under existing provisions of law to supervise accounts relating to construction and operation, and to terminate the lease after ten years.

In the event that the foregoing propositions be accepted and incorporated in formal contracts, the Interborough Company will further agree, upon the same terms and conditions as hereinbefore set forth with respect to the operation of the 4th avenue subway, or upon such other terms as may be agreed upon between the City and the company, to operate such additional extensions to the sytem herein outlined as may hereafter be constructed by the City; provided, however, that the Interborough Company shall not be called upon to operate any extensions the operation of which would result in a financial loss to the company, unless the City shall undertake to make good such loss.

[fol. 1451] The proposition herewith submitted is believed to embrace the following advantages over any other now before the City:

1. Citizens of Brooklyn, Manhattan, Queens and The Bronx may be transported upon the enlarged subway system which may best be described as a four-borough system, to any point, including the shopping and theatre districts of Manhattan, for a single five-cent fare; whereas, under any other plan, to obtain a similar advantage in almost every case, an additional fare of five cents would be required.

2. The extensions proposed can all be completed within a period of five (5) years from the time when the right to begin construction is given; whereas, under any other plan now before the City, a longer period for actual construction would not only be required, but the final completion would be further delayed by the inadequacy of the City's debt margin.

3. The plan above set forth is the only plan which limits the City's contribution to subway construction to the funds which the City now has available for subway purposes;

thus leaving free for additional extensions, or for such other purposes as the City may determine upon, the funds which will be available in each succeeding year.

4. The City under the plan proposed would have in operation a harmonious subway system, with a through four-track line upon the east side and a through four-track line upon the west side of Manhattan, with suitable extensions to The Bronx and Brooklyn; whereas, under any other plan now under consideration the City would have a duplication of rapid transit service upon the upper and lower east side of Manhattan, the present single line only upon the uptown west side of Manhattan, and no rapid transit line at all upon the west side downtown section of Manhattan.

5. If competition with the Interborough Company be the prime consideration, it is believed that by the construction of the proposed extensions the City would be in a position to establish an independent competitive line at an earlier date than would otherwise be possible. Under recent provisions of law the west side down-town extension and the east side up-town extension in Manhattan, together with The Bronx and Brooklyn extensions, could be taken over after ten years from the time when the lines or any part thereof were put into operation. By the construction of a short cross-town line between 7th avenue and Lexington avenue, in the vicinity of either 34th or 42d streets, the City would then possess upon the island of Manhattan a subway system which would be the exact reverse of the subway system now operated by the Interborough Company, with the additional advantage of more comprehensive extensions to parts of Brooklyn and the Bronx, which, in the meantime, by reason of these very extensions, will have developed into profitable territory.

[fol. 1452] It can hardly be expected that within an equal length of time the City's credit would so expand as to enable it to complete an entirely independent system to a point where it would furnish the City with equal competitive advantages. It is suggested, however, that the advantage of competition is not so apparent in the case of City subways as in other avenues of transportation. The usual advantages of competition are a reduction of transportation charges and an improvement of service. But there is no prospect, so far as fares are concerned, that for so ex-

tensive a service as would be furnished by either rapid transit system now under consideration less than five cents would ever be charged; nor is there any prospect that the present five-cent fare upon the existing system would ever be increased. Upon the other hand, so far as service is concerned, the Public Service Commission is vested with full powers of supervision, and can enforce by direct order the performance of that efficient service which under other circumstances is produced only as the result of active competition.

In conclusion, the Interborough Company begs to refer to its proposition to complete the third track upon its elevated system and to build certain elevated extensions in The Bronx to be operated in connection therewith, and to complete and put in operation as a part of the subway system the so-called Belmont tunnel, which proposition has received the approval of your Commission. The cost of carrying out the elevated improvements is estimated at $32,000,000, all of which will be furnished by the Interborough Company. The Belmont tunnel when completed will represent a total investment of approximately $10,000,000, all of which, likewise, except $1,500,000, to be contributed by the City toward the completion thereof, will have been furnished by the Interborough Company. It will therefore be perceived that the contribution which the Interborough Company proposes to make from its funds towards the establishment of a well rounded rapid transit system in this city approximates a total of $107,000,000, against a contribution of $53,000,000 on the part of the City.

Respectfully submitted.

Interborough Rapid Transit Company, by T. P. Shonts, President.

The president of the Borough of Richmond presented the following:

Office of the President of the Borough of Richmond, New Brighton, N. Y.

December 21, 1910.

Hon. William J. Gaynor, Mayor of New York City, City Hall, New York City:

Dear Sir: I learn from the newspapers this morning that the Public Service Commission is forwarding to the Board

of Estimate and Apportionment an important communica-
[fol. 1453] tion upon the subject of new subway construction in The City of New York, and I sincerely regret that I cannot discover that any consideration has been given in the proposed plans to the Borough of Richmond, or that such consideration is even contemplated, except in the far distant future. I therefore wish to submit to you, both as Mayor and as Chairman of the Board of Estimate and Apportionment, the following considerations which I think of great importance to the whole city, as well as to the Borough of Richmond, and which I think should be taken up in connection with the new communication from the Public Service Commission.

Every portion of the City will be directly benefited by the proposed new systems or extensions except the Borough of Richmond, and yet this Borough, because of its deep water harbor facilities and available unoccupied territory, offers the largest opportunities within an equal distance of the City Hall for valuable and varied growth within the City limits.

In the Borough of Manhattan it is proposed to construct without local assessment, a new subway the full length of the island, and extend it in two branches throughout The Bronx. It is proposed to extend subway operation into Queens, through the Steinway tunnel, making it easily possible for later extensions as they may be required. In the Borough of Brooklyn it is proposed to construct subways across its major part, with similar provisions for branch extensions.

If we turn now to the remaining Borough, that of Richmond, we find it the only one not as yet benefited or proposed to be benefited in any way by subway construction, so that its interests must continue to lie practically dormant until other boroughs are first filled with factories and population, and Westchester and New Jersey are satisfied with transportation facilities.

It seems only fair that in the consideration of this problem provision should be made by which the Borough of Richmond may have privileges corresponding at least to that of Queens and the outskirts of Brooklyn, not to mention the still greater benefits to Manhattan and The Bronx.

In other words, in order that the Borough of Richmond

may be given the same treatment as the other divisions of the city, plans now under consideration should bring the subway system at least to the shores of Richmond. In Manhattan, Brooklyn and The Bronx far more than this is done, and in Queens that much is already conceded.

As you know, I have always been a strong advocate of the wisdom of a close physical connection by subway of all the different Boroughs. The subways already constructed, as well as those in contemplation, carry population to the borders of the city, as though intended to make provision for those living beyond, rather than within, its limits. If brought to the Borough of Richmond, such encouragement of the flow of population would develop the city rather than adjacent territory, and correspondingly increase the city's financial resources.

[fol. 1454] What has been done towards the improvement of Richmond has already, according to good financial basis, more than justified the expenditures by increased taxpaying ability meeting interest and sinking fund charges on all outlay.

Another point which should not be overlooked is the fact that it is not alone Richmond's interests which ask for consideration, but the interests of Manhattan business men residing in Richmond, who justly demand transportation facilities for their home district commensurate with those that other Manhattan business men secure for their home districts in Manhattan, Brooklyn, The Bronx and Queens.

The Borough of Richmond has an area nearly equal to that of Manhattan and The Bronx combined, and it urges for itself, and believes that the city as a whole, in the city's own interest, should insist for Richmond the same opportunity to grow that is given other Boroughs of the city.

Respectfully yours, George Cromwell, President of the Borough.

The matter was then referred to the Transit Committee to report to the Board at the meeting of January 5, 1911.

His Honor the Mayor then retired.

K. At a meeting of the Board of Estimate and Apportionment held on January 5, 1911, the following proceedings were had and taken:

Rapid Transit Railways

Extensions to the Existing System; Also Third-Tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Roads, and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company to construct, maintain and operate certain extensions to the existing rapid transit railway, conditional upon favorable action upon the proposition of said Company to third-track and build additions to its 2d, 3d and 9th avenue elevated roads, and to build and put in operation the Steinway tunnel, and requesting a statement of the position of this Board on the subject.

[fol. 1455] This communication was presented to the Board at the meeting of December 22, 1910, and was referred to the Transit Committee to report at the meeting of this day.

The President of the Board of Aldermen, a member of the Transit Committee, presented a report of the majority of said Committee as follows:

To the Board of Estimate and Apportionment.

GENTLEMEN: The Board of Estimate and Apportionment on December 22, 1910, referred to its Transit Commission a communication from the Public Service Commission, in which was transmitted for consideration by this Board a certain proposition that had been submitted on December 5, 1910, by the Interborough Rapid Transit Company to the Public Service Commission, for action by that Commission.

Although it was clearly the legal duty of the Public Service Commission to pass upon this proposition, the Commissioners did not see fit to accept the responsibility but shifted that burden to the Board of Estimate and Apportionment.

The Board of Estimate and Apportionment is in no sense bound to perform the duties prescribed by law for the Public Service Commission, but it has a moral obligation to

do all in its power to protect the interests of the public and advance the City's development in every possible way. Therefore, the members of the Transit Committee of this Board have undertaken willingly to pass upon a question which the Public Service Commissioners apparently were unable or unwilling to decide for themselves

This Committee, which consists of the Mayor, the Comptroller and the President of the Board of Aldermen, has given full consideration, not only to the proposition transmitted by the Public Service Commission, but to the entire problem of the future transit development of the City.

The Committee is divided in its opinion concerning the proposition before it. The Mayor differs from the other members.

The majority of the committee is opposed to the proposition submitted by the Interborough Rapid Transit Company for the following reasons:

1. Because it means the perpetuation and extension under private control of the present subway monopoly which, regardless of its obligations, has persistently exploited the public to satisfy corporate greed.

2. Because all the real benefits in the Interborough plan can be obtained through adherence to the principle of independence.

[fol. 1456] 3. Because the mandate of the people, as expressed in the election of the members of this Board, was against monopoly and in favor of City built and City controlled subways.

4. Because since that mandate was expressed at the polls there has been no change in conditions to justify the violation of the principles then adopted.

5. Because competition in quality and extent of service which can be guaranteed only by municipally owned and controlled subways is absolutely essential to the future development of the City.

6. Because the Interborough Company has proved itself unworthy of the Public trust by showing continued bad faith in its negotiations with the Public Service Commission, by its utter contempt of reasonable regulations,

and in many other ways, even going so far as to offer flagrant defiance to the Commission on the day of the preparation of this report.

7. Because added distrust of the Interborough Company is inspired by the terms of the present offer, which discloses the purpose of the company to place all the burden and the risks of rapid transit extensions upon the City and obtain for itself all the benefits.

We recommend that the Board of Estimate and Apportionment formally commit itself to the immediate construction of an independent system for the following reasons:

1. For the seven reasons already given for the rejection of the Interborough proposition.

2. Because the City has available funds to the amount of $150,000,000, which is much more than is needed for the independent route.

3. Because the routing of the independent system is such that it will carry to their destinations in the various parts of the city at a five-cent fare practically all of the traveling public who will avail themselves of its service.

4. Because an independent subway system is the only comprehensive one which gives the public the use of the Centre street loop and the two bridges, representing already an expenditure of $7,000,000 of public money which otherwise would pass into the control of the Brooklyn Rapid Transit Company, which now monopolizes the territory of Brooklyn and a part of Queens.

5. Because when the independent system is constructed economic necessity will compel the Interborough Rapid Transit Company to build extensions to the present system at its own expense, the facts demonstrating that this can now be profitably done.

[fol. 1457] 6. Because the adoption of the independent system eliminates from the subway discussion the third tracking and extensions of the elevated railroads, unfairly and improperly included in this discussion by the Interborough Company, and leaves this distinctly separate proposition to stand on its own merits.

7. Because the independent system will give quick relief to congested sections of the city and at the same time will force the prompt construction of the natural and logical extensions of the Interborough system with its own funds.

8. Because the history of rapid transit discussion for the past three years shows clearly the general acceptance of the public, the press and the Public Service Commission of an independent route as the best solution of the subway problem in this city.

In support of these reasons we submit the following facts and considerations:

On January 14, 1910, a Transit Committee of the Board of Estimate and Apportionment was created pursuant to the following resolutions:

"Whereas, The City of New York is in urgent need of an immediate solution of the problem of congested transportation facilities; and

"Whereas, The members of the Board of Estimate and Apportionment are severally pledged promptly to relieve this congestion by providing for the construction of additional rapid transit routes or the extension of existing routes; and

"Whereas, The Public Service Commission of The City of New York has for two years, and before that the Board of Rapid Transit Commissioners had for many years, been engaged upon the consideration of the rapid transit requirements of New York City, and the formulation of plans for the construction and development of transportation facilities; and

"Whereas, No relief can be provided without the concurrent action of the Board of Estimate and Apportionment and the Public Service Commission; be it

"Resolved, That the Board do and hereby does appoint a Committee, consisting of the Mayor, the Comptroller and the President of the Board of Aldermen, to confer with the Public Service Commission of the First District for the purpose of determining upon the proper steps to be taken by this Board in making provision for increased rapid transit facilities and for the purpose of formulating a plan for the immediate relief of transit congestion in the City of New York; and be it further

"Resolved, That this Committee be instructed to take into consideration in formulating such plan the existing and prospective borrowing capacity of the City for rapid [fol. 1458] transit purposes; and be it further

"Resolved, That this Committee report to this Board on or before its first meeting in the month of March definite recommendations for the consideration of this Board for the prompt relief of existing transportation conditions and for the adequate provision of additional transit facilities, with recommendations concerning the methods of financing any or all routes proposed to be built, whether by the issue of Corporate Stock, the levying of assessment upon property benefited, or by granting a franchise for construction with private capital."

While the above resolution called for a report by the Transit Committee at or before the first meeting of the Board of Estimate in March, 1910, it was found impossible in view of the negotiations then in process between the Public Service Commission and the various transit companies of the city, to formulate a definite plan for the consideration of the Board or to report definite recommendations with respect to the construction of particular routes at the time specified in the resolution. Your Committee, has, however, held a number of joint conferences with the Public Service Commission and a series of meetings independently of that Commission and has given most careful consideration to the plans which have been under consideration by the Public Service Commission and to those which have been matured by it.

Your Committee has studied the various routes laid out by the Public Service Commission and approved by the Board of Estimate, and has also studied other prospective routes suggested to it either in conference with the Public Service Commission or independently.

The joint conferences between your Committee and the Public Service Commission began early in the month of February. At the first conference, the Chairman of the Public Service Commission laid before the Committee the outline of a rapid transit railroad covering a series of routes heretofore approved by this Board which, taken together, have been described as the Tri-Borough Route.

This route comprises two three-track branches in The Bronx, running respectively from Woodlawn Cemetery and Jerome avenue, southward along Jerome avenue, River avenue and Mott avenue; to a point at or about One Hundred and Thirty-eighth street and Mott avenue; and from Pelham Bay Park and Westchester avenue, southward along Westchester avenue, Whitlock avenue, the Southern Boulevard and One Hundred and Thirty-eighth street to a point of junction with the first described branch. It runs thence in a four-track trunk line by tunnel under the Harlem River to the northerly extremity of Lexington avenue; thence under and along Lexington avenue to Irving place; southward under Irving place to Fourteenth street; [fol. 1459] thence southward under the prolongation of Irving place to Fourth avenue; thence crossing under the existing subway and in a southwesterly direction under the property of Grace Church, to Broadway; thence southward and along Broadway to Park place, thence with two tracks to Vesey street; thence curving southwesterly under Vesey street to Fulton street; thence with three tracks southward to Church street, thence southward to the south end of the proposed Rector street Station; thence with two tracks to Greenwich street at Morris street, thence with four tracks to Battery Place, and there branching out into a terminal station with seven tracks, with two stubs for a loop under Battery Park.

Another two-track branch of this proposed railroad was designed to begin at the Hudson River and Canal street, running eastward under and along Canal street; passing under the proposed Broadway route and under the existing subway to the Manhattan Bridge.

It was proposed to use the present Centre street loop and to complete that loop in Brooklyn by building a two-track subway under Broadway to Lafayette avenue and back under Lafayette avenue to Flatbush avenue, where a junction was to be effected with the Fourth avenue subway now under construction. The Centre street loop was planned to be used as a terminus of the Broadway and Lafayette avenue loop and of the Fourth avenue subway now under construction, which runs from a point at the easterly approach to the Manhattan Bridge under Flat-

bush avenue Extension, Fulton street, Ashland place and Fourth avenue to 40th street as a four-track trunk line.

It was planned to construct two extensions from the Fourth avenue subway at 40th street and Fourth avenue, one three-track line along 40th street, New Utrecht avenue, 86th street and Stillwell avenue to Coney Island; the other a two-track line continuing along Fourth avenue to Fort Hamilton; the latter of these to be a subway throughout; the former to be elevated from 86th street to Coney Island.

The Bronx extension first described were to be elevated, the westerly branch from Woodlawn Cemetery to River avenue and 158th street, the easterly branch from Pelham Bay Park to the Southern Boulevard and Whitlock avenue.

The Commission, at these early conferences, informed your Committee that it was proceeding, with the preparation of plans, specifications and contracts for the construction of those portions of this general rapid transit system, other than extensions in The Bronx and South Brooklyn, not already under construction, namely, the Broadway and Lafayette Loop, the Canal street crosstown line and the Broadway-Lexington avenue trunk line.

The Bronx and Brooklyn extensions were not included in this advertisement for bids owing to the fact that the Public Service Commission, estimating that the time required for their construction would be but two years, considered it unwise to begin construction upon them until the work [fol. 1460] on the trunk lines should have progressed halfway toward completion.

This general system was the subject of frequent conferences between the Commission and your Committee, and as planned had the approval of your Committee. The question of the source of capital for the construction of this system was much discussed. With the approval of your Committee the Public Service Commission advertised two forms of contracts: the one for private capital construction, operation and equipment, title to vest in the City on completion of construction, and the other for construction only and with municipal funds.

These contract forms and specifications were submitted to your Committee for its consideration, late in the spring of 1910. The Committee associated with itself a group of

consulting engineers, consisting of the Consulting Engineer of the Borough of Manhattan, the Consulting Engineer of the Borough of Brooklyn, the Chief Engineer of the Commissioner of Accounts and the Principal Assistant Engineer of the Department of Finance, to whom it submitted, for comment, the contract and specifications for construction with municipal funds. This Engineering Committee reported its criticisms and suggestions for changes, which were duly transmitted by your Committee to the Public Service Commission, with the recommendation that the contract form and specifications be altered accordingly.

After a series of conferences lasting through the greater part of the month of August, between the Chairman of the Commission, the Corporation Counsel, and the Acting Mayor, this form of contract and specifications was materially changed, substantially in conformity with the suggestions of your Committee, with the result that in the opinion of your Committee, a saving of approximately ten million dollars in cost was effected.

The Commission received no bids on the form of contract calling for private construction, equipment and operation, but on the revised form predicated upon construction with municipal capital, received a large number of bids.

At the time of the earliest conference between the Commission and the Committee, members of the Committee were informed by the Chairman of the Commission that negotiations were then under way between him and the operator of the present subway, looking to the construction of logical extensions of that subway by the present operator with funds to be furnished by it. These extensions were those popularly described as completing the H, namely, that down 7th avenue from 42d street, and under its projected prolongation southward, through Liberty street and by tunnel to Brooklyn; and that northward from 42d street under Madison avenue to The Bronx.

The Committee was informed toward the spring of the year that these negotiations then under way for some time, were rapidly maturing to a satisfactory conclusion.

[fol. 1461] At the time when the question of the simultaneous construction of these extensions of the present subway system and the Tri-Borough system, as above out-

lined, was discussed and approved by your Committee (it being always the expressed understanding of both Committee and Commission that such extensions should be constructed, if at all, with the capital of the operator of the present system), it was pointed out by the Commission to your Committee that both the extensions of the Interborough system and the independent Tri-Borough system would, by the time of completion (four or five years hence) afford no greater transit facilities than reasonable foresight indicated would be required.

Upon this proposition no member of your Committee, either at the joint conference or in committee meeting, has ever expressed a contrary view.

From information furnished by the Chairman of the Commission it is the understanding of your Committee that these negotiations between the President of the Interborough Company and the Chairman of the Commission, looking to the construction of the Interborough extensions with Interborough money, continued until early in the spring of 1910. According to the Chairman, his mind and the mind of the President of the Interborough had met upon all the essential features of the plan, details alone remaining to be adjusted. During a suspension of these negotiations the Chairman of the Public Service Commission was astonished to learn of the letter of July 5, addressed by the President of the Interborough Company to the Mayor, a copy of which was later forwarded to the Chairman of the Commission as well. This letter contains the surprising suggestion that these extensions (except that Lexington avenue was substituted for Madison avenue) be constructed for the Company with City funds, with certain guarantees by the City. This letter has within the past two months been described by the President of the Interborough Company as an offer submitted to the Public Service Commission.

To make clear the force of this suggestion of the Interborough Company, your Committee presents the following brief history of the negotiations of that Company with the Rapid Transit Commission and the Public Service Commission:

In the spring of 1907 the Rapid Transit Commission asked for bids for certain rapid transit routes. Their de-

termination to do so followed suggestions from the Interborough Company and the then Metropolitan interests that they would be interested in additional subway construction. A merger of the two interests took place, however, before bids were due and no bids were received. The Interborough wrote to the Commission giving increased cost of construction as its reason for failing to bid. It is to be noted that construction with municipal funds was contemplated.

[fol. 1462] No further steps were taken by the Interborough to supply the extensions the necessity of which it admitted in 1907, until it made application to the Public Service Commission on March 10, 1909, to be allowed to build the Lexington avenue and 7th avenue subway extensions, to lengthen subway platforms and to third-track its elevated lines. This construction work was to be done at the expense of the Interborough Company. The proposition for the 7th avenue and Lexington avenue extensions was declined by the Public Service Commission in May, 1909, because conditioned upon the granting of an operating lease for fifty years with a twenty-five year renewal, a condition impossible under the Rapid Transit Act as it then stood. The third tracking was also declined for the reason that the application called for a perpetual franchise. The matter of lengthening subway platforms was taken up and is now under way.

On June 30, 1909, the Interborough applied for permission to construct the Lexington avenue and 7th avenue extensions, the cost to be paid for by the Interborough, this offer being conditioned upon the granting of certain elevated rights and purchase by the city of the Steinway Tunnel. The Commission, in August, 1909, declined this application because of the conditions and also because in its mind the general proposition did not afford a sufficiently comprehensive rapid transit development. It is to be noted that in both of these applications the Interborough signified its willingness to build subway extensions with its own money and that it so advertised extensively through the medium of the daily press. The following from the morning "World" of April 22, 1909, is a copy of one of the advertisements widely published by the company at that time.

The Safest Rapid Transit in the World

Over nine hundred million passengers were carried in the last two years without a single fatality.

Travel on the elevated and in the subway is the safest in the world.

Month after month we handle these enormous crowds—without fatality—almost without accident.

And in order that your service may be made still better, and that your safety may be further insured, we asked to be allowed to build:

1. An East Side express subway from 42d street to The Bronx, which, connected with the present subway, will give a complete East Side subway.

2. A West Side express subway from 42d street to the Battery, which, connected with the present subway, will give a complete West Side subway.

3. Express tracks on both 2d and 3d avenue elevated lines.

[fol. 1463] The new subways we will build with private money; and when our present subway lease expires, we will turn them over to the City free.

We offer the utmost in safety; the utmost in service. Will you be content with less?

We are ready to act.

Interborough Rapid Transit Company. Theodore P. Shonts, President.

On June 10, 1910, the Interborough asked permission to third-track and extend its elevated lines and to operate the Steinway Tunnel. The Commission has this proposition under consideration at the present time. The Commission, on June 30, 1910, inquired of the Interborough whether, in view of the advantage of considering elevated extensions and extensions to the subway at the same time, the Interborough desired to make any proposition as to subway extensions. The reply from Mr. Shonts, on July 5, 1910, has already been referred to. This was not considered as a proposition from the Interborough until Mr. Shonts within the last two months wrote to the Commission stating that he desired to have it considered as a

proposition. The Chairman of the Commission, in a letter to the Mayor dated July 7, 1910, in reply to one from the latter transmitting a copy of the letter from Mr. Shonts, expressed the objections of the Commission to such a proposition.

Early in the conferences between the Commission and your Committee, the cost of construction of the Tri-Borough system was discussed and estimated by the Commission, for all sections taken together, at $147,000,000, of which $25,000,000 represented the cost of the Centre Street Loop and the 4th avenue line, the former constructed, the latter under construction. Your Committee estimated that, through the operation of the constitutional amendment exempting self-sustaining rapid transit bonds, there would be available in 1910, for subway construction, a total sum of $60,000,000. This, the Public Service Commission estimated, would be sufficient to permit the initiation of construction in 1910 on all those sections of the Tri-Borough route not yet begun and requiring four years for their completion. Your Committee, at the suggestion of the Mayor and on his statement of expected results from the activities of his Tax Commission, estimated that additional sums of from fifteen to twenty millions yearly could be made available for subway construction, beginning with 1911.

Accordingly, for the purpose of securing the necessary funds against diminution through appropriation to other municipal purposes, a resolution was introduced by the President of the Board of Aldermen, and unanimously adopted by the Board on April 8, 1910, setting aside $13,000,000 corporate stock for rapid transit purposes, and pledging thereto all funds made available through the exemption of self-supporting rapid transit bonds. Through the action of the courts, $43,868,325 of such bonds have [fol. 1464] been exempted. There are, therefore, to-day available for and pledged to rapid transit purposes, $56,868,325.

An examination of the rapid transit account by the Comptroller has disclosed the fact that the additional sum of $3,500,000 may be exempted under the constitutional amendment. Application has been accordingly made to the Appellate Division and an exemption of this amount may be expected within a very short time.

The Comptroller estimates that under the operation of the same section of the Constitution, dock bonds to the amount of $60,000,000 may be exempted by application to the Appellate Division. These bonds, under an opinion rendered by Hon. Archibald R. Watson, Corporation Counsel, on the 20th day of December, 1910, may be applied either to dock or rapid transit purposes, at the option of the Board of Estimate. Here, therefore, is another large amount of available credit which, if the necessity were great, could be applied to rapid transit purposes.

The Department of Taxes, replying to an inquiry propounded by the Board of Estimate, has reported that within the next five years the City may expect increases in the taxable value of realty sufficient to produce an added credit in the aggregate of $172,000,000, of which the Department estimates that $60,000,000 will become available on the first of next July. Of this total sum of $172,000,000, at least $60,000,000 could be applied to rapid transit purposes.

It is estimated, therefore, that within the next five years there will be available for subway construction a total of at least $120,000,000, leaving all exempted dock bonds entirely out of consideration and leaving out of consideration, as well, whatever present margin of credit there may be left after voting last year's Corporate Stock Budget. If the City should elect to devote half of the dock bonds to be exempted to rapid transit purposes, it could add another $30,000,000 to this total of $120,000,000. The situation, therefore, since the receipt of the bids on the Tri-Borough Subway has been as follows:

A credit available for immediate use amounting to $60,000,00- with prospective additional available amounts during the next five years amounting to $60,000,000 with a possible additional $30,000,000 from dock bonds, or a total for the five years of $150,000,000.

The gross total of the lowest bids on those sections of the Tri-Borough route advertised, namely, from 138th street in The Bronx down Lexington avenue and Broadway to the Battery, the crosstown Canal street line, and the Broadway-Lafayette avenue loop, amounted to $85,437,570.11. With a credit plainly available sufficient to construct this system and its projected extensions in South

Brooklyn and The Bronx, the Public Service Commission has withheld action upon the bids. A portion of the delay on the part of the Commission in acting on these bids is explained as follows:

[fol. 1465] On the 18th day of November, 1910, the Hudson & Manhattan Railroad Company, by its president, William G. McAdoo, submitted to the Public Service Commission an offer to operate, if constructed, that portion of the Tri-Borough system lying between 138th street in The Bronx and Wall street in Manhattan. This offer proposed a change of the Tri-Borough system by omitting the Canal street cross-town loop and the Broadway leg of the Broadway-Lafayette avenue route, substituting therefor an under-river tunnel running through Wall street in Manhattan and Montague street in Brooklyn, connecting with the proposed Lafayette avenue subway in that borough, this extension to be continued out to the point contemplated in the plans of the Tri-Borough system. Mr. McAdoo's offer did not cover the proposed extensions of the Tri-Borough system in The Bronx, nor did it embrace any plan for the operation of the Fourth avenue subway or its extensions, or of the Centre street loop. While this offer of the Hudson and Manhattan Railroad Company was before the Public Service Commission, the Interborough Company, on the 5th day of December, submitted the proposition which is now referred to this Board and to your Committee for consideration. On December 3d the Hudson and Manhattan Railroad Company, through its president, notified the Public Service Commission that its offer would remain open until December 15 only, and that if no answer were rendered thereon by that day it would be withdrawn by the company. The Public Service Commission, having failed to act upon the Hudson and Manhattan Railroad Company's proposition up to December 15, that company thereupon withdrew its offer, its president in the letter of notification stating as follows:

"Upon mature consideration of the matter, we have become convinced that it is futile for us to attempt to unite with the city authorities in an effort to provide an independent system unless the city authorities are fully determined that an independent system is wanted for the city. In short, there can be no competitive bids between

this company and the Interborough on independence or monopoly. It seems to us essential that one policy or the other shall be decided upon before further progress can be made. If we should submit another offer under present conditions, it would, we believe, simply provoke a long struggle which would result in delaying the final action upon rapid transit, to the possible detriment of the community, since the problem is so acute that delay is, of itself, a serious injury. We are unwilling to participate in an indefinite struggle of this sort."

This left before the Commission the proposal of the Interborough Company and the bids received on the Tri-Borough as first planned.

We will now take up the proposal of the Interborough Company.

The Interborough proposes the construction of the following subways, which it describes as "natural extensions to the present system."

[fol. 1466] West Side Lower Manhattan and Brooklyn Extensions

From Times square, under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street, in Brooklyn, and under Pineapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern parkway to Utica avenue, as a four-track road, and from Utica avenue to Buffalo avenue under Eastern parkway, as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenues, Brooklyn, under Lafayette avenue to Broadway.

East Side Upper Manhattan and The Bronx Extensions

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lex-

ington avenue; thence under Lexington avenue and the Harlem River to a point south of 149th street, as a four-track road; thence dividing with two tracks to a connection, east of Mott avenue station, with the West Farms branch of the existing subway; thence two tracks under Mott avenue, 153d street and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a connection will be made with the Jerome avenue extension of the 9th Avenue Elevated Line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern Boulevard and Whitlock avenue to a point in private property south of Westchester avenue; thence a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway, at about 179th street, over private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public street to Bear Swamp road and White Plains Road; thence over White Plains road to a connection with the proposed extension of the 2d Avenue Line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains and Gun Hill roads.

These new sections all to be operated under a form of indeterminate franchise terminable at any time after the expiration of ten years at the option of the City on payment to the company of its investment plus 15 per cent. less accumulated sinking fund.

[fol. 1467] The Company estimates the cost of these extensions at $128,000,000, of which it proposes the City shall subscribe $53,000,000 and the Company the balance, or $75,000,000. It offers to operate the entire system, old and new, for a single five-cent fare and free transfers. It offers to divide the profits from the operation of its extensions as follows: For the first five years all the profits to go to the City, thereafter the net profits to be divided equally between the City and the Interborough Company. Its offer provides that in determining net profits there

shall be deducted from gross earnings charges in an order named such that interest and sinking fund upon the bonds issued by the railroad company for the construction and equipment of these proposed extensions shall have precedence over interest and sinking fund on the bonds issued by the City. The Company proposes that gross operating revenues of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or if deemed advisable by either the City or the Company from the number of tickets deposited in the chopping boxes on the new extensions, or by such other method as upon full consideration may be agreed upon between the parties. The Company further offers to operate all future extensions to the system as may hereafter be constructed by the City, provided that the Company shall not be required to operate any extension the operation of which would result in a financial loss to the Company, unless the City should undertake to make good such loss. It further offers to alter its present leases of the existing subways in such a way as to terminate both at the same time, taking a term for the entire existing subway of 49 years from the date of the completion of the extensions.

If the present subway system, with the proposed extensions, be outlined upon a City map it is at once apparent that were the extensions of the Interborough system completed as outlined by it, we would have under an indeterminate franchise terminable in ten years, a new series of subways forming a half-system running through South Brooklyn, Eastern Parkway, Lafayette avenue, 4th avenue and the lower west side of Manhattan, and terminating at 42d street and 7th avenue. We would have another half-system of subways under a like franchise running through the eastern and western portions of The Bronx, with a trunk line leading down through the easterly part of Manhattan Island and terminating at 42d street. We would have, under the same character of franchise, a short disconnected section running from the Zoological Gardens in The Bronx northward through White Plains avenue to the City Line.

The first half-system as thus planned requires for its reasonable and successful operation, the west side trunk of the present subway north of 42d street, with its exten-

sions. The second half-system requires for its reasonable and successful operation, the east side trunk of the present subway south of 42d street. The small new extension in the [fol. 1468] middle Bronx could be used only in connection with the extension of the present subway in Bronx Borough and separated from it, would be a rapid transit waif.

These two half-systems and short extension can be bound together and operated as a transit unit only by the use of the trunk lines of the present subway. It has been suggested that at the end of a ten-year period, the City might take over these new half-systems under the terms of the indeterminate franchise proposed, and by constructing a connecting link through one of the side streets between 34th and 42d, could have a complete subway system which would be the reverse of the present system in duplicate, except that it would be more extensive in its outlying branches. Is not this manifestly fallacious? If once the traveling public of New York through a period of ten years, becomes accustomed to a continuous system of through transit in straight lines up and down the west side and up and down the east side of Manhattan, is it reasonable to believe that the governing body of the City could ever contemplate tearing this system apart and forcing the traveling public to adopt wholly new routes to reach given destinations?

It is the conviction of this Committee that to bind into the present system these new subways, as outlined in the proposal, which are really only extensions as frankly stated by the Interborough, inevitably commits the City to their continued operation as integral parts of that system until the expiration of the lease held by the operating company upon the original subway, this, under the proposed modifications, being for a period of 49 years.

This brings up squarely the question of an independent subway system and of effective municipal control. If the argument of this Committee holds good and the proposed lines are incapable of a physical severance from the existing system and of operation independently, then an acceptance of the proposition of the Interborough Company means an abandonment of the construction of an independent subway system, with whatever results that may carry with it. There is another reason why this proposal precludes that kind of municipal control which is dependent

upon the City's ability to take over and operate the new subways constructed. Even were the extensions capable of a physical severance and an independent operation, the form of franchise permitted by the present Rapid Transit Law must provide that the City shall pay to the Company, as a condition precedent to the exercise of its right to take over the new subways, an amount equal to the cost of construction borne by the Company plus 15 per cent. thereon, less accumulated sinking fund. It must also pay over to the Company a sum equal to the fair value of the equipment at the time of assuming control. The aggregate so payable under the proposal of the Interborough Company would approximate the sum of $75,000,000. Your Committee submits that the City's difficulty in finding such a lump [fol. 1469] sum at one time available for payment to the Interborough Company is so great as to amount to practical impossibility. When your Committee respectfully asks this Board, from its understanding of the financial situation of this City, is that sum likely to be found available at any one time during the period of the proposed franchise?

For both of the reasons just stated, your Committee is convinced that the adoption of the Interborough Company's proposal will mean the certain abandonment of all hope of a physically independent subway system capable of severance from the Interborough System and over which The City of New York might exercise the kind of control contemplated by the Rapid Transit Act in its provisions for the grant of indeterminate franchises.

Your Committee will now consider the advisability of such a step. This question divides itself very naturally into a discussion, first, of general principles, and, second, of detailed advantages and disadvantages.

Upon the question of general principles your Committee feels that this Board should first consider whether the commission which its members hold from the people by virtue of their election contains a mandate upon this issue. If it does, then only the weightiest reasons, and only such as may have arisen since the time that mandate issued, should lead the members of the Board to act contrary to their Commission. What was the commission received by the members of this administration from the people at the last municipal election? Six of the eight members of the

present Board of Estimate were elected on a platform that declared all future subways should be owned by the city, should be built with the city's funds, construction by private capital not being permitted except when it is positively demonstrated that the city is financially unable to keep up with the demand for transit extension, and then only on terms that will preserve strict and effective municipal control. This absolutely committed the candidates to the construction of a new and physically independent system of subways—physically independent because strict and effective municipal control cannot be exercised over an extension or section which for its very existence as an operating entity depends upon a main stem over which the city has not, and cannot obtain, control for fifty years. When the people on Election Day approved the declaration that future subways should be built with city funds, it was not because the taxpayers preferred to spend their own money rather than the money of a corporation, but because it was clearly appreciated that only by excluding private capital from the construction of the new subways of the city, could the city secure the kind of control which would enable it to substitute a satisfactory for an unsatisfactory operator. This Board is, therefore, called upon to state whether, with a clear commission from the people to pro-
[fol. 1470] ceed with the construction of the subways with city funds and to establish effective control over them in the city's interest, it shall abandon the principles upon which its members invited the suffrages of the people and assent to establishing a monopoly and abandon control. As already stated, only the weightiest of reasons arising since the popular determination was had would justify that course.

Your Committee submits that in place of the existence of weighty reasons in favor of such a course, there remain the gravest reasons against it. Some of these reasons your Committee submits are to be found in the history of the relations of the Interborough Company with The City of New York, and with the various efforts to compel adequate service by that corporation. That history discloses a corporation always reactionary and always unwilling to comply with the reasonable requirements of authority to improve its system, its service or its equipment; a corporation always disregardful of the public comfort, always con-

temptuous of authority until it faced compulsion brought to bear through the machinery of the law.

Your Committee points out that the attitude of the operator of the present subway, displayed by its disregard of public convenience, the contempt which it has shown for the reasonable orders of the Public Service Commission and its resistance to them, has been due to the fact that that company holds the present subway under a long term lease which is not susceptible of modification by the City or by any municipal or governmental authority. The Interborough Company, intrenched behind the unassailable rights granted it by virtue of its present lease, can afford to flout the City authorities and the Public Service Commission and to despise public indignation since the public has the option either to ride under the conditions offered by the Interborough Company, or to walk.

In a case such as the one presented, the future attitude and behavior of a public service corporation, or of an individual, can be judged only by its record. What has been true of the Interborough Company in the past, it is only fair to assume will be true in the future of that company or of any other company if it be situated and intrenched in like manner. There is but one lever offered to The City of New York through the Public Service Commission by which to control the future operation of future subways, but one safeguard against bad service, bad equipment and bad management. That is found in the provisions of the present Rapid Transit Law, enabling the City to lease its subways under an indeterminate franchise, terminable in ten years, guaranteeing to the municipality the right to change the operator at will, or to undertake operation in its own interests if it should see fit to adopt that course.

If, as is the case under the terms of the Interborough's proposal, there be neither the financial ability on the part of the City to exercise its option to assume control nor the physical layout of routes such as to make possible and [fol. 1471] attractive their independent operation if taken under control by the City, then all the advantages of the indeterminate form of franchise are nullified and lost, and the operator of such a system remains in the position of the present operator, namely, independent, secure, contemptuous and uncontrolled.

A fallacy into which some people seem to have fallen recently is the assumption that the thing most desired, or desirable, is a competition in rates of fare between the operators of two systems. That is not the kind of competition which this City either desires or requires. It is the competition in quality and amount of service that New York needs. While separate operators for the present subway with its future logical extensions and for a new independent subway system would, in the opinion of your Committee, be highly desirable, still it is not of first importance that the operation of those systems should be in different hands if only there be two distinct, separate and self-sufficient systems. The fact that an independent system exists and may at any time be taken by the City from the existing operator and turned over to a new operator, or operated municipally, is alone a complete and sufficient guarantee of adequate service. Once emasculate the system controlled by the City, however, and make it incapable of independent operation, and the threat of future competition disappears and leverage upon the operator is lost.

For all of the foregoing reasons, therefore, because of the decision of the people in favor of municipal control of future subways; because of the history of the Interborough's relations with The City of New York; because of the quality of the service which it has rendered; because of its attitude toward the public and authority, and chiefly because municipal control may be exercised over future subways only if their physical independence be established, your Committee is firmly convinced that the only solution of the transit problem in New York will be found in the immediate construction of an independent subway system over which the City will be at all times in a position to exercise control. To forego the immense material and tactical advantages to be found in the unincumbered ownership of such a system, it would be necessary for the City to find in the Interborough's proposition, advantages in routing, practical operation and economy infinitely greater than those offered by any projected independent system. Moreover, and this your Committee would emphasize as most important, before the City should consider the construction of the extensions for the Interborough Company to the exclusion of its own independent system, it would be necessary

to show conclusively that both could not be had at the same time and at the same cost to the City.

Let us now consider the details of the Interborough's proposition and some of the alleged advantages to be found therein:

Present Term of Lease—The Interborough Company proposes to amend its leases to provide for a flat term of forty-nine years beginning with the completion of the proposed [fol. 1472] extensions. As the proposed extensions will not, according to the Interborough itself, be completed under five years, the forty-nine year term becomes a fifty-four year term calculated from the present time. The present lease has already run six years. The proposed modification, therefore, means a practical reduction of but fifteen years from the aggregate of the original term with renewal period for the longer of the two leases, and of but three years in the case of the shorter. When it is considered that the present lease provides for a re-valuation at the end of fifty years with a general readjustment of terms at that time, which in the case of the shorter lease upon the present system would take place some time within the next thirty-two years, the offer of the Interborough Company to consent to this modification does not strike one as being quite so disinterested and generous as at first sight might be supposed. Its effect would be to extend the period of operation under the present terms for a period of ten years on the longer of the two leases, and for a period of twenty-two years on the shorter of the two leases, while what the company would surrender, would be merely a portion of the renewal term equal to fifteen years on the longer lease and three years on the shorter lease, a right, the value of which to the company or to the City would depend entirely upon the terms fixed for the renewal at the time of the expiration of the original term. In other words, it would operate to extend for a considerable number of years, operation under the terms which are now netting the Interborough Company 17.2 per cent. upon its investment.

Earnings and Expenses of Extensions—The Interborough plan for ascertaining gross revenues from the number of tickets sold or deposited in the boxes at stations along the extensions and for apportioning non-separable operating expenses on the basis of car miles, is calculated to work

great injustice to the City. Take, for instance, persons who come from the neighborhood of 40th street, Brooklyn, or from points beyond, to practically all of the financial district and the congested east side below 42d street, Manhattan. Such passengers will be carried for at least three-fourths of the distance traveled over tracks of the new extensions. Three-fourths of the cost of transportation will be borne by the new extensions. The new extensions, however, will receive 100 per cent. of the revenue arising from the tickets dropped into the box when the passenger is traveling from such sections in Brooklyn to those sections in Manhattan south of 42d street. On the return journey, however, the extensions will still bear three-fourths of the cost of transportation but will receive none of the revenue, the tickets having been deposited along the line of the present subway.

It is believed that more Brooklyn traffic will move up the present east side subway from lower Manhattan to the section south of 42d street, than up the 7th avenue extension, or if it moves up 7th avenue, the bulk of it will stop below 50th street. If it moves up the east side in this way, the new [fol. 1473] extensions will get only half of the revenue and will pay practically all of the operating expenses. If it moves up the west side to points south of 50th street, the new extension will get all of the revenues and will pay all of the expenses, but in this there is no compensation to the extensions for the loss on business moving up the east side leg to points south of 42d street. The bulk of Pennsylvania Terminal and North River Ferry traffic will be commuters who will move north to 50th street to some extent, but for the most part, south to south Manhattan. In such case, again, the new extensions will not get all the revenues and will pay practically all the operating expenses for the traffic in both directions.

West Side traffic originating on 7th avenue south of Times square and terminating below 96th street on the present subway, and traffic arising between 96th street and Times square, and terminating between Times square and South Ferry, will divide the revenues and expenses practically equally between the present subway and the proposed extension. The Seventh avenue Extension will have an advantage on traffic originating on that extension and termi-

nating north of 96th street, in Manhattan, and on that originating in Manhattan north of 96th street and terminating on 7th avenue south of Times square. This is of little comparative significance if we can measure this traffic comparatively by the ticket sales on the present subway at stations north of 96th street, in Manhattan for the year ended June 30, 1910. Such sales amounted to only 32,255,355, out of 268,962,115 total tickets sold on the whole subway.

For the bulk of the traffic originating on the proposed extensions north of Grand Central and in The Bronx, the Interborough plan will work as unfairly for the extensions as it will for the 4th avenue, Brooklyn, branch, nor is this situation remedied if revenues be ascertained from sales of tickets at stations on extensions. A study of the City map and an understanding of the territory served by the present subway and to be served by the proposed extensions north of Grand Central Station, will convince any one that we can take the present subway north of Grand Central Station as a fairly good example of how such a plan would work. An analysis of the special and annual reports of the Interborough to the Public Service Commission for the year ended June 30, 1910, shows that only 45 per cent. of the total tickets sold on the present subway were sold at stations north of Grand Central, and 69 per cent. of the total car miles run on the whole subway were run north of that station. Which means that if the Interborough plan were applied to the present subway north of Grand Central, that part of the subway would bear 69 per cent. of the total operating burden and would receive only 45 per cent. of the revenues. If these ratios are applied to the revenues and operating expenses for the whole subway for the year ended June 30, 1910, we get the following result:

	Line South of Grand Central Station	Line North of Grand Central Station
[fol. 1474] Revenue from sale of tickets	$7,389,544.45	$6,045,990.91
Operating expenses	1,474,499.36	3,281,950.18
Divisional income	$5,915,045.09	$2,764,040.75

Your Committee is convinced that no plan can be devised which can be counted on not to greatly increase the revenues of the present subway at the expense of the extensions, unless extensions and the present subway be operated as a unit and the profits on the whole enlarged system be divided with the City. Your Committee fears that the present plan will in actual operation make such a poor showing for the extensions, that badly needed extensions in the outlying boroughs will not in the future be built because of fear of loss to the City from their operation.

Future Extensions—These considerations bear directly upon the offer of the Interborough to operate all future extensions constructed by the city on terms similar to those laid down for the operation of the 4th Avenue Subway, Brooklyn, that is, the company will operate if the City guarantees it against loss. This will mean that no future extensions of the subway system in New York will be operated during the next fifty years except upon an express guarantee on the part of the City against loss on the part of the operator, and it will also inevitably mean unending importunities and pressure by sparsely settled regions for the construction of spurs and branches at the general city expense. Such lines, when constructed at the general city expense involving interest upon bond and sinking fund are a heavy burden for an operator to carry and will bring with them all the probabilities of deficit and material increases in the annual city budget and tax rates. The people living in these sparsely settled sections must remember that their acceptance of the present offer, apparently attractive to them, will set a definite limit to the development of their boroughs for the next fifty years.

Five-cent Fare—What has been oftenest urged as the greatest advantage to be found in the Interborough proposition is the so-called five-cent universal fare. If we stop for a moment and place side by side maps of the two systems, the Interborough's and the Triborough's assuming the Triborough to be modified in accordance with the Mudson Company's proposal, so far as the substitution of an under river tunnel and upper Broadway section for the Canal street loop and Broadway, Brooklyn, section is concerned, we will find that every portion of the city served by the Interborough is also served by the Triborough system,

with the exception of the west side of Manhattan and the Eastern Parkway district in Brooklyn. The shopping and theatre districts of Manhattan are served by the proposed subway under Broadway north of 10th street to 34th street. [fol. 1475] The Bronx is served equally well by both. South Brooklyn is served equally well by both. The Lafayette avenue region is served equally well by both. The great majority of those who use the subway are persons traveling between their homes and places of business. Travel from The Bronx to Brooklyn and to Manhattan will not have for its destination the upper west side of Manhattan, but the shopping, the theatre, the business and the financial districts. All this travel is accommodated as well by the Triborough system as by the Interborough system. Travel from outlying points in Brooklyn and South Brooklyn to the shopping and business districts of that borough is served as well by the Triborough as by the Interborough system. Travel to the Pennsylvania Railroad station in Manhattan and from all boroughs will be served fairly well by the proposed Triborough system, since that system if modified as outlined by the Hudson Company's proposal, will bring passengers to within a block of the railroad terminal. The only points to which passengers on the Triborough system will be unable to ride for a five-cent fare are points on the west side of Manhattan, to which travel from the other borough is so light as to be practically negligible.

Quick Relief—It has been urged as an advantage in the Interborough's proposition that the construction work on all the proposed extensions can begin at once, whereas under the Triborough plan a trunk line must be constructed first. While it is true that the trunk line of the Triborough must be constructed first for the operation of the Bronx and Manhattan portions, the Broadway and Lafayette lines estimated to require but two years for construction could be used immediately on completion in connection with the Fourth Avenue division. Your Committee also points to the fact that in the Interborough's proposition, that company states that the construction of the extensions is estimated to require a period of five years. The construction of the complete Triborough, with its extensions, is not estimated to require a greater length of time. Moreover, the

construction of the Triborough at once does not preclude immediate relief in several portions of the City, since in the opinion of the Committee it would serve more than anything else to insure the prompt construction of the natural and logical extensions of the Interborough system by that company with its own funds.

Further, attention is directed to the fact that the immediate inception of construction work in all boroughs under the Interborough's present offer will logically have one of two results. If it be planned to bind the outlying extensions into the present subway, immediately on completion and before additional through trunk line facilities are provided to take care of the traffic from such outlying extensions, the only result will be to increase the congestion in the present subway to a point worse than anything ever experienced or imagined, and to increase profits to the operating company by a corresponding amount. If, on the [fol. 1476] other hand, the manifest impossibility of driving all the additional traffic from Brooklyn and The Bronx into the present tube through the Borough of Manhattan, prevents the attempted operation of such extensions as soon as finished, and before the additional trunk line facilities are furnished, the only result must be to burden both the company and the City with a tremendous and needless charge for interest on the securities issued for construction.

Amount of Municipal Investment—Another advantage claimed for the Interborough proposal is that the immediate transit needs of the City will be relieved and satisfied by a gross expenditure by the City of only $53,000,000. In the first place, your Committee would point out that while the construction cost to be borne by the City, amounts to only $53,000,000, it is contemplated in the proposal that the City shall obligate itself to acquire all necessary fees and easements for the construction of the proposed extension. Whatever the cost of these, it must be added to the $53,000,000 in order to ascertain the total cost to the City under the proposal. Once that total has been ascertained it must be understood that it constitutes the price of financing a monopoly and the surrender of municipal control. The question is whether the greater price of an independent system is not justified by the need of independence.

Operation of Future Extensions—One of the advantages urged by the Public Service Commission in favor of the Interborough's proposal is that that company agrees to operate all future extensions constructed by the City. In view of the fact that any operating contract made for the Triborough system would necessarily include a like or better provision, your Committee fails to see what advantage this agreement holds over an independent system.

More Service—It is also urged that the Interborough's proposal has the advantage of serving more territory than the proposed Tri-Borough, and particularly the lower west side of Manhattan Island including the Pennsylvania Railroad Company's terminal. An examination of the map again discloses the fact that in The Bronx the Interborough has really accepted the Tri-Borough's route and added a short extension to its own system northward to White Plains road. In Brooklyn it has again adopted the Tri-Borough's routes, except Broadway, adding an extension of its present system outward along Eastern Parkway to Buffalo avenue. The only territory, therefore, served by the Interborough not served by the Tri-Borough is the lower west side of Manhattan, a limited area in the northern middle section of The Bronx, and the Eastern Parkway District. The extension down the west side of Manhattan has been particularly urged, upon the ground that the City owes to the Pennsylvania Railroad Company, in consideration of the enormous improvement made by the latter, the duty to provide adequate facilities for its traveling public. While your Committee agrees that adequate transit facili-[fol. 1477] ties for this enormous expected traffic are most desirable, it nevertheless is convinced that a higher duty is due from the City to its general population and its undeveloped Boroughs than to the Pennsylvania Railroad Company. Your Committee is mindful of the fact that the greater part of the travel to and from the Pennsylvania Station in this City is composed of those who live in and commute to New Jersey. While these persons should undoubtedly be cared for as soon as possible, nevertheless, if choice between an independent system and service for the Pennsylvania terminal must be made, your Committee feels that the best interests and advantages of the City of New York do not lie in the upbuilding of the New Jersey suburbs,

but rather in the development of Brooklyn, The Bronx, Queens and Richmond, under a rapid transit system effectively controlled by the City. Were it therefore necessary to choose to-day between the extensions of the Interborough system to be affected by the expenditure of municipal funds, and the construction of an independent City system such as the Tri-Borough, your Committee feels strongly that the necessities of the situation and the ultimate good of the City demand the latter.

Your Committee, however, is convinced that the choice indicated is not presented to the City under the existing circumstances. The Interborough Company stood ready a year ago to construct its extensions with its own money. It stood ready in the spring of this year to construct a portion of the above outlined extensions with its own money and with full knowledge that the City proposed simultaneously to construct the Tri-Borough system. Something changed the company's attitude upon this question. Your Committee suggests that possibly the reason for this change of front is found in the fact that the City, through the operation of the constitutional amendment became possessed of available credit to the amount of some $44,000,000, which before was not within its reach. It is always easier for a corporation to use some one's else money rather than its own. It is also quite apparent that should the City accede to the demand of the Interborough Company and denude itself of a considerable part of its now available credit it would thereby render itself unable for an indefinite period to proceed with the construction of an independent City system. It is manifest that the interest of the Interborough in procuring the allotment of City credit to its own purpose is twofold: (1) The use of the City's money in the place of its own; and (2) the annihilation of all danger of competition for the future. Your Committee is convinced that had there not been some development giving the Interborough Company reason to believe that it could procure from the City an allotment of its credit to the Interborough's purposes that company would before his time have been engaged in constructing the logical extensions of its own system with its own funds. Your Committee is convinced that the Interborough Company will be forced, as an economic necessity, to undertake

the construction of those logical extensions with its own [fol. 1478] funds if the City proceeds to construct an independent system in its own interests. These logical extensions are the 7th avenue route southward from 42nd street, the Madison avenue route northward from 42d street, the Eastern Parkway extension in Brooklyn, and the White Plains avenue extension in The Bronx. Being as they are the natural complementary parts of the Interborough system which is now held by that company under an unassailable lease for a period of 50 years, the same arguments and principles lie in favor of their construction with the capital of the operator, which forbid the construction of an independent subway system by any capital other than the City's. Your Committee is convinced that the City can have these natural extensions of the Interborough system, and at the same time, have its independent system if only the members of this Board will stand fast by the principles which, in our judgment, should govern the settlement of this question.

As to the point made by some that there is no room for both systems if constructed simultaneously, your Committee submits the following figures obtained from the Public Service Commission. Beginning with the year 1900, and ending with the year 1910, the total average yearly increase in traffic on all transit lines within The City of New York was 67,795,920. The aggregate increase in traffic in the last five years has been 400,000,000, and in the year 1910 over 1909, was 130,000,000 passengers.

The rate of increase as stated above warrants the belief that the total increase in passengers during the next five years will be at least 500,000,000. This would considerably exceed the number required to support the entire projected Tri-Borough system, if it be assumed that the entire increase of travel would be absorbed by that line, while no travel was drawn by it from any existing transit facility.

At this point let it be understood that the present subway has developed its own business and did not draw its traffic from transit facilities in existence at the time it was opened. On the contrary, traffic has increased on all such lines since the subway was built. The present subway carried 268,962,115 passengers during the year ending June 30, 1910. Although branches of the present subway traversed

sparsely settled territory in Manhattan north of 110th street, and in The Bronx north of the Harlem River, nevertheless traffic thereon had become so profitable by the year ending June 30, 1906, that the ratio of operating expenses to gross earnings on the whole system was 42.23 per cent. This despite the fact that the Interborough was forced to operate many hundred thousands of useless car miles, due to lack of proper storage facilities at South Ferry which, as was pointed out by Bion J. Arnold, a consulting engineer of the Commission, in 1908, attained the enormous total of 1,000,000. The opening of the Brooklyn extension in 1908 greatly relieved this situation and, as pointed out by the Public Service Commission in its annual report for the [fol. 1479] year ending June 30, 1908, increased the whole traffic on the subway by at least 8.48 per cent.

If the above-outlined natural Interborough extensions were constructed by that company at a cost of $70,500,000 (the cost of these extensions as estimated by Mr. Shonts), and added to its system, and no additional traffic attracted to that system as completed, the present income of the Interborough system would be sufficient to pay fixed charges and a reasonable profit upon the entire investment. The facts with respect to cost and income of the Interborough system are as follows:

The City's disbursements to December 31, 1909 (including $2,260,000 arbitration amount not yet actually paid), were $54,514,417. The investment by the Interborough, as stated by the company, was $39,447,093. The net profits of the Interborough for the fiscal year ending June 30, 1910, were $6,769,572. In other words, the Interborough on its present income could retain a 6 per cent profit on its own investment and pay fixed charges on over $70,000,000 additional, above the present $54,500,000 invested by the City. As Mr. Shonts has stated that the extensions proposed by him would cost $70,500,000, it may be seen that the present profit of the Interborough would by itself sustain the cost of the extensions, leaving the income from the increased traffic on the extensions to swell the profits of the company.

The tremendous operating advantages to the Interborough to be found in the extensions of its system as outlined, require no exposition. Where it now must operate along a devious route north and south, it would then be able to

operate on straight lines and at the same time to operate local service around two distinct loops, the one from the Battery to 42d street, the other from the Battery to Harlem. It has, moreover, been estimated by Mr. Bion J. Arnold, the Commission's Consulting Engineer, in a report rendered December 31, 1908, that Lenox avenue cars are diverted a distance of .85 mile in order to use the Broadway tracks between 103d and 42d streets, at a cost of 7.57 cents per car mile. During the year ending June 30, 1910, there were operated on Lenox avenue, 1,930,468 cars, which if Mr. Bion J. Arnold's figures be applied, means a loss of 7.57 cents per car mile for the useless mileage. If this were saved by a direct route it would mean an annual economy of over $124,000. This would be sufficient to pay the 6 per cent fixed charges, including sinking fund requirement on over $2,000,000, which would go a long way toward paying the cost of a connecting East Side link between 42nd street and the Lenox avenue branch, without any regard to the increased business that would come, or to the short running time from The Bronx to 42d street. In other words, it would pay the Interborough Company to build a connecting link between those points along which to carry its Bronx traffic directly to a point below 42d street, even if that company anticipated and drew no traffic from the region traversed by such connecting link.

[fol. 1480] What the incoming and outgoing traffic at the Pennsylvania Terminal will be, no one can at present estimate. Whatever this may prove to be, however, it would fall naturally to the Interborough, if it should see fit to construct the Seventh avenue extension southward.

Your Committee believes that it has reviewed in this report all of the alleged advantages to be found in the Interborough Company's proposal. Upon final analysis, all these advantages in the opinion of your Committee disappear and leave the bare issue of monopoly against independence. This monopoly of the underground rapid transit of New York is the prize for which the Interborough Company is contending, and the goal toward which every effort of that company has been directed. It is to win that prize that every speciously attractive feature in the proposal of the company has been incorporated. The soph-

istry employed by the company in its argument that the proposed extensions are capable of severance and operation independently by a new operator or by the City has already been exposed in the earlier portion of this report. Had the company been in good faith in this matter it might easily have so framed its offer as to disarm in part this greatest of objections. It might have offered to surrender its present lease in so far as that lease covers the present system south of 42d street and north of Liberty street and to accept in lieu thereof an indeterminate franchise over this portion of its present route, asking in return, as a consideration of this surrender a flat term of forty-nine years over the proposed 7th Avenue Extension southward. This, it will be observed, would give the Interborough Company as much as it now has, namely, a trunk line from the northern to the southern end of Manhattan Island, but would guarantee to the City a continuous, cohesive and complete subway system running from the northern end of The Bronx to the southern extremity of Brooklyn, which as far as its physical layout is concerned, could be taken under control by the City at the end of ten years, if it were found necessary, and operated by it directly or through a lease as an independent system, and whose severance from the Interborough system after the end of ten years would not demand of the traveling public a revolution in their habits of travel. Even this, had the Interborough Company seen fit to suggest it, would have left the insuperable difficulty lying in the necessity for a lump sum payment of upwards of $75,000,000 by the City as a condition precedent to assuming control. Had the Interborough Company genuinely desired to offer the opportunity for municipal control, it might have further suggested the application of the City's contribution exclusively to the construction of those lines only lying on the East Side of Manhattan, in The Bronx, and in Brooklyn, and the application of its own capital exclusively to the construction of the 7th Avenue Extension southward. This would have materially reduced the amount of the lump sum payable by the City to the Company in the event of the assumption of control. While modifications such as these would in all probability still [fol. 1481] leave serious objections to a contract for the construction of this system of extensions in partnership

with the Interborough Company, it would at least have demonstrated good faith on the part of that Company in this matter, whereas the absence from the Interborough's offer of such terms which would appear to your Committee to be self-suggestive, demonstrates, more than anything else, that the sole object of that Company is to secure a grip upon the transit situation which no amount of effort by the City in the future could succeed in shaking.

Your Committee feels that it should direct the particular attention of the Board to the fact that the Interborough's proposal does not contemplate the full operation of the Centre Street Loop, nor does it contemplate the utilization of the City's two great bridges. The logical situation thus created is that the Centre Street Loop must either remain unused or must be used by the Brooklyn Rapid Transit Company as a terminal for those portions of its service which can be diverted from the Brooklyn Bridge. This is the result for which the Brooklyn Rapid Transit Company has long been striving. The great disadvantage suffered by the 4th Avenue Subway by reason of the proposed plan for ascertaining gross revenues and operating expenses has already been pointed out earlier in this report. It would appear that in asking a guarantee the Interborough's offer to operate this branch had purposely been made so unattractive to the City that the City would be forced to reject the terms, and then in the event of acceptance of the other portions of the Interborough's offer, the 4th avenue line would fall to the Brooklyn Rapid Transit Company. This, together with the operation of the Centre Street Loop by that company, would continue the present division of territory between the Interborough and the Brooklyn Rapid Transit Company for the indefinite future, a division which gives both companies the fat and only a little of the lean, and which would compel the payment of double fares by persons wishing to reach the center of Manhattan from Brooklyn, or South Brooklyn from lower Manhattan. With the Centre Street Loop and the 4th Avenue Subway in its possession, the Brooklyn Rapid Transit Company would be in the enjoyment of a very practical and effective monopoly of rapid transit in Brooklyn. The Interborough Company once in possession of the routes comprised in its proposed extensions may forever defy competition throughout the other boroughs of the city.

In this connection your Committee also desires to call attention to the fact that the only offers ever received from the Brooklyn Rapid Transit Company to operate either the loop or the 4th Avenue Subway have been so poor that their terms have not insured even interest and sinking fund on the cost of construction of these lines.

Attention is directed to the fact that the Public Service Commission in its communication informs this Board that the proposal of the Interborough Company to construct sub-[fol. 1482] way extensions is conditioned upon the acceptance by the City of its proposal to third-track and extend its elevated roads. The third-tracking plan is not a new one. Years ago the Rapid Transit Commission received repeated requests from the Interborough Company and its predecessor, to permit the third-tracking of the 2d and 3d avenue elevated lines. This privilege has always been regarded as one of enormous value to the railroad company. Permission has always been denied upon the ground that a grant of such value to the company should be made conditional upon the extension of the company's subway system with the company's funds. It has further always been vigorously opposed upon the ground of injury to abutting property, the attendant unsanitary conditions and the unsightly nature of this structure. In this connection it is worthy of note that the company which was at the time operating the elevated lines, through its vice-president, Mr. Bryan, stated, in the year 1906, that it was prepared to accept twenty-five year franchises for the third tracking of its line. At the present time the Interborough Company's proposal demands nine hundred and ninety-nine year franchises for the same rights. The Company also demands at the present time eighty-nine year franchises for the extension of its elevated system.

Further, your Committee desires to call attention to the fact that this proposition, which includes the operation of the Steinway Tunnel, wholly fails to meet the situation in the Borough of Queens. It makes the easterly extremity of the Steinway Tunnel the limit of operation. No adequate transit is offered to Queens by this plan, and while the operation of the Steinway Tunnel is not dependent upon the acceptance by the City of the subway portion of the Interborough Company's general proposition, your Committee points out that adequate provision for this borough might

well be made a condition of the acceptance of any elevated railway and Steinway Tunnel agreement.

The point, however, which your Committee chiefly desires to impress upon the Board is that the rights which were at one time regarded by the Rapid Transit Commission of this City as so valuable to the Railroad Company that they were refused except upon condition of subway extension by that Company with its own funds, and which within the last few weeks have been described to the members of your Committee by some of the members of the Public Service Commission as veritable gold mines for the Company, are now demanded by that Company as a condition precedent to its acceptance of certain other rights which in the opinion of your Committee are of themselves of such tremendous value that their parallel is not to be found in any city in the world.

The question presented to this Board in considering this matter at the present time is twofold: First, of principle: shall the City insist upon a new and independent subway municipally controlled, in accordance with the platforms on which the members of this Board were elected; second, an [fol. 1483] essentially practical question: shall the members of this Board deliberately create a monopoly of underground rapid transit in favor of the Interborough Company, turning over to that Company all the City's subways for a period of fifty years, on terms which give to the Company the profits, and to the City the risk—and this in the face of the history of the relations of the Interborough Company with the City of New York?

In order that the issue of monopoly as against an independent City-controlled subway system may be placed squarely before this Board, your Committee offers the following resolutions:

To determine the principle by which this Board shall be guided in its action with regard to the construction of new subways and the extension of existing subways.

Resolved:

First—That the available credit of the City be devoted to the construction of an independent municipally owned and controlled subway system whose integrity as an operating unit can be forever maintained.

Second—That the present or future available credit of the City shall not be lent, in whole or in part, to any exist-

ing corporation or individual for the extension of any existing system of subways until such independent system shall be completed and in operation.

Respectfully, Wm. A. Prendergast, Comptroller.
John Purroy Mitchel, President of the Board of Aldermen.

The Comptroller moved the adoption of the foregoing resolutions.

Which motion was lost by the following vote:

Affirmative—The Comptroller and the President of the Board of Aldermen—6.

Negative—The Mayor and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—10.

The President of the Borough of Manhattan offered the following:

Resolved, That the communication of the Public Service Commission, addressed to this Board under date of December 20, 1910, with relation to the general proposition of the Interborough Rapid Transit Company, together with all reports or other papers relating thereto, be referred for consideration to the Board as a Committee of the Whole; and be it further

Resolved, That before taking further action the Board invite the Public Service Commission into conference upon the said proposition or any proposed modification thereof, or [fol. 1484] upon any alternative proposition, that the Commission may have to present or that may be presented to it.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

L. At a meeting of the Board of Estimate and Apportionment held on January 19, 1911, the following proceedings were had and taken:

Rapid Transit Railways, Extensions to the Existing System, also Third Tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Roads and the Completion and Putting in Operation of the Steinway Tunnel

At the meeting of January 5, 1911, the communication from the Public Service Commission presented to this Board at the meeting of December 22, 1910, relative to the proposition of the Interborough Rapid Transit Company, together with the reports and other papers relating thereto, were referred, for consideration, to the Board as a Committee of the Whole.

The Secretary presented the following:

City of New York, Office of the Mayor

January 11, 1911.

To the Board of Estimate and Apportionment:

As this Board has already voted against the report of my two associates on the Transit Committee it is not necessary for me to file a minority report, which I was unable to present at the last meeting of the Board for the reason that my said associates did not find it convenient to let me have a copy of their report in advance. But it may be well that I at least present a report that I do not agree to a number of statements as of fact in the majority report, and at the same time I desire to call attention to some other things in the said report which are founded, it seems to me, on an erroneous conception of the law and the facts, and which give a false color to the report throughout.

First. They say they oppose the proposition of the Interborough Company that the City build certain extensions of the present subway (I quote): "Because the mandate of the people, as expressed in the election of the members of this Board, was against monopoly and in favor of city-built and city-controlled subways." This refers to the political platforms in the last City election. These platforms did favor city-built and city-controlled subways, in language more or less definite. The drafters of them seemed to have been under the delusion that some other [fol. 1485] kind of subways could be built under the sections of the statute which apply to the building of the City subways. But that is not so. The statute is beyond dispute. The said sections provide only for the building of City subways by the City through the Public Service Commission. There is no other way to build them. Though

platform-makers did not know this, we should not be astray in respect of it. The present offer of the Interborough is not that it be permitted to build subways, but that the City build subways, and to eke out the scant credit and funds of the City, it offers to pay to the City in the course of construction all capital necessary in excess of $53,000,000 to be contributed by the City all told. The City builds the subways and owns them from the start. There is no other way. It is too bad to see a contrary notion, and that we purpose to follow it, put in the minds of people who do not examine the matter for themselves, and unconsciously, it may be, depend wholly for their inspiration or information upon vicious sources.

The false notion, long abroad, and industriously disseminated, that private capital, or a private capitalist who was often named, built the present subways in Manhattan and The Bronx, has not yet been wholly driven out of men's minds. It took a few of us several years to dissipate it to some extent. Not one dollar of private capital went into the construction of the said subway. The City put every dollar into it. Nor did it loan the capital to build it, as is sometimes loosely said. On the contrary, it built the subway and owned it from the moment of completion and leased it for operation. It loaned no money r credit t anvone to build it. The mistage was made of giving too long a lease of it when built. That we are now striving to rectify by having the 75-years' term and renewal scaled down to 49 years or less. When the extension under the East River and over into Brooklyn was built some years afterwards, completion and conditions were such that of the $10,000,000 of capital used the City put in only $2,000,000, the company putting in the balance. And yet, for such is the statute, the City was the builder with these funds, and not the company, and the City owned the subway from the start the very same as though it put in all of the capital.

I regret to have to recur to things so fundamental, but I do it only that no one shall be misled if I can prevent it. Of course my said associates do not mean to mislead, and none of us will be misled. But what about others? All I say is that my said associates have not made this matter clear, and that their report as a whole tends to make people believe that the offer of the Interborough is to build for

itself, and thereby get some ownership or control which it would not otherwise have, whereas its offer is that the City build under the statute. It could not make any other kind of an offer, because there is no law for it. The City is to receive interest and a sinking fund out of earnings, and the profits of operation are to be divided equally between the City and the company.

[fol. 1486] Second. The report of my associates substantially admits that if what is called the Triborough route should be built by the City, the Interborough Company would probably be the successful bidder to operate it, when bids for operation should be advertised for as required by the statute after construction is completed; if, indeed, any bidder for operation at all could be found. But they say (I quote): "It is not of first importance that the operation of those systems" (namely, of the Triborough and of the present subway) "should be in different hands, if only there be two distinct, separate and self-sufficient systems." But, pray, if both systems are operated by the same company, or by allied or subsidiary companies, how are they "distinct" and "separate"? These words and the phrase "independent system" may be very attractive, but I hope they will delude nobody. But the history of the world shows how potent attractive, but empty words and phrases, always have been in misleading thoughtless people. It is well that owing to our splendid system of schools the illiterate and thoughtless are no longer the majority among us.

Third. I have expressed a doubt in the foregoing whether any bid to operate the Triborough would be forthcoming. The cost of constructing and equipping that system is put at $250,000,000. I believe no competent person has claimed that it would be less than $225,000,000. But if we say $200,000,000, the case is still hopeless.

Five and one-half per cent. of that sum for annual interest and sinking fund is $10,500,000. The highest estimate of gross receipts from operation of the system that anyone has made is $16,000,000. Forty per cent. of that for maintenance and operation would be $6,400,000. This added to the said interest and sinking fund amount of $10,500,000 already shows a deficit, without going into other items. But the case is worse, for the gross receipts would probably not reach $16,000,000. As is well known that system was recently

put up for bids for operation in advance of construction, but no bid was forthcoming. No one with private capital for investment could see anything but a deficit ahead. Some are glad of this, because they have in mind, although they keep it to themselves pretty well, that for lack of a bidder the City would be forced to operate the road, and this is the object which they are striving for. Some time in the future, namely, when the public virtue and intelligence of the community is fit for it, the City will be operating all of its public utilities, including city railroads, but that time has not come yet in my judgment.

Fourth. The report of my associates shows that City funds to build the Triborough route would be slow in coming, on account of the ordinary expenses of the City which have to be met yearly, but it says that if great needs exist, the dock funds can be used to build subways. I regret to hear this suggestion made. There are certain things which [fol. 1487] need to be done to improve our docks, and for the handling of freight along our docks, which are as essential to the prosperity of this City as the building of subways. The Dock Commissioner has already prepared the plan for a railroad along the docks to handle the freight, and to supersede the surface tracks of the New York Central running down through the City. A bill is now being prepared to be sent to the Legislature to carry this out. The purpose is to apply the dock funds to this, among other things.

Fifth. The report of my two associates says that a year ago the Interborough Company offered to furnish all the funds needed for the City to build the extensions to the present subway, and ask what has caused that company to change its mind in that respect. The Interborough Company never made such an offer. It did offer to furnish the money to the City to build the extension from 42nd street down Seventh avenue and to the Battery, and the extension up Lexington avenue to The Bronx. The extensions which it now proposes that the City should build, and to which it offers to contribute, are in mileage four times the length of the fragments embraced in the said offer by it a year or more ago. Let us not confound things. No doubt that company would be only too glad to renew the said offer and

have it accepted. But no doubt the Public Service Commission would promptly reject it now as it did then, and say that, "The lean must go with the fat"; that no proposition to build subways would be considered unless they embraced extensions into the outlying boroughs. The profitable trunk lines through Manhattan must go with the less profitable and the unprofitable lines into the other boroughs. The said report of my associates also leaves the impression that the present proposition that the City build extensions adopts the "Triborough routes." The contrary is the case. The Triborough system, so-called, was made up principally of routes which were laid out years ago by the old Rapid Transit Board as extensions of the present subway. The present subway is only a fragment of what these men laid out as a system to be owned and controlled by the City forever. I have not heard a single reason advanced why the City should now abandon that system and build another system, "independent," as it is called. The new system would have to be operated by a company just as the present subway is, and in all probability by the present operating company. What would be gained by that? What we need of all things is to stick to what was designed from the beginning, namely, that since the City builds and owns the subways it should build one great comprehensive system to connect all of the boroughs, and be operated on a single fare of five cents throughout the whole system. I am unable to comprehend why anyone should ask that two or more systems be built, thereby introducing the necessity of paying a new fare every time you change from one line to another. No matter how many systems of subways we should have they would all be under the control of the Pub-[fol. 1488] lic Service Commission as to the kind of cars to be used, the headway, the speed, the length of trains, and in every respect as to accommodation, as is all prescribed by the statute. Will anyone say that the Public Service Commission could control two or more separate companies in these respects better than it could control one?

Sixth. If we carry out the present proposition, and thereby have all of the subway extensions built by the City, the City to put in only $53,000,000 of the capital, all in excess, estimated to be $75,000,000, to be contributed by pri-

vate capital, the City will then be able to devote its funds hereafter to the building of extensions in the boroughs as they become necessary. It can, for instance, build extensions such as through Queens to connect with the Steinway Tunnel, in Brooklyn to connect the Fourth avenue subway with Coney Island, and also with the Borough of Richmond under the water, as has been pointed out by the President of that Borough. If the City ferries to that borough are to continue to create the present huge deficit, the quicker the subway extension to St. George be built the better, for the interest and sinking fund charge on the cost thereof would be less that such ferry deficit, as now appears.

Seventh. The said report states that the credit of the City should not be loaned to any existing company for extensions. This can only mislead those who do not know the law of the case as laid down by the statute, although not so intended. The City is not permitted to loan its money or its credit to any company. All it can do is build the subways itself through the Public Service Commission as I have already pointed out, and yet some will continue to repeat that the proposition is that the City should loan the money to the company. Indeed, some go so far as to say that the proposition is to give it to the company; to make a present of it. But of course we must at some point cease to regard such statements, however we may regret to see thoughtless persons misled by them.

Permit me to say in conclusion that the vast majority of the intelligent people of the City of New York desire that this Board now go forward in this great matter, after a year already spent in leading up to it. It is justly expected of us that we do now proceed immediately. An end should come to this perpetual talking and arriving at no result. The Public Service Commission is now ready to proceed to formulate construction and operation contracts, and if there be any delay the cause is here in this Board.

Respectfully submitted.

W. J. Gaynor, Mayor.

[fol. 1489] Which was ordered printed in the minutes and referred to the Committee of the Whole.

Subsequently the President of the Borough of Manhattan stated that at the conference of the members of the

Board yesterday, it was proposed that a committee be appointed by the Mayor to confer with the Public Service Commission for the First District in relation to the proposition of the Interborough Company, and he offered the following resolution:

Resolved, That a committee of three members of the Board be appointed by the Mayor to represent the Board in conference with the Public Service Commission upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it; such committee to report back to the Board from time to time as it may direct.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The Comptroller, in explanation of his vote in the affirmative, stated that such action did not in any way bind him to enter into negotiations with the Interborough Company, if it is understood that the only matter before the Board at the present time is the entering into of such negotiations.

M. At a meeting of the Board of Estimate and Apportionment held on February 2, 1911, the following proceedings were had and taken:

Rapid Transit Railways, Extensions to the Existing System, also Third-tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Roads and the Completion and Putting in Operation of the Steinway Tunnel

A communication, dated January 27, 1911, was received from the Mayor's office, informing the Secretary of the appointment by His Honor, the Mayor, of the following committee, pursuant to resolution adopted January 19, 1911, that a committee of three members of the Board be appointed by the Mayor to represent the Board in conference with the Public Service Commission upon the pending proposition of the Interborough Rapid Transit Company to operate certain extensions to the existing rapid transit

lines, etc., or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present: The President of the Borough of Man- [fol. 1490] hattan, the President of the Borough of The Bronx and the President of the Borough of Richmond.

Which was ordered filed.

By unanimous consent, the President of the Borough of Manhattan offered the following:

Resolved, That the special committee appointed in pursuance of the resolution adopted by the Board at its meeting of January 19, to confer with the Public Service Commission with relation to the pending proposition of the Interborough Rapid Transit Company, or to such alternative plans, including independent routes, as may be presented, be authorized to confer also with the officers of the Interborough Company, with a view toward ascertaining whether that Company will enter into a contract for the construction, equipment and operation of subway extensions upon terms acceptable to the City; and be it further

Resolved, That the committee be requested to report to the Board as early as may be practicable the results of such conferences, in order that the Board, if the general terms proposed prove acceptable to it, may authorize the Public Service Commission to proceed with the negotiation of a contract.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

N. At a meeting of the Board of Estimate and Apportionment held on June 13, 1911, the following proceedings were had and taken:

The Board met in pursuance of the following call:

City of New York, Office of the Mayor

June 12, 1911.

In pursuance of the provisions of Section 226 of the Greater New York Charter, the Board of Estimate and

Apportionment requests the Mayor to call a meeting of said Board on Tuesday, June 13, 1911, at 12:30 o'clock p. m.

W. J. Gaynor, Mayor; Wm. A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens; George Cromwell, President, Borough of Richmond.

[fol. 1491] Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways: Extensions to the Existing System; also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads, and the Completion and Putting in Operation of the Steinway Tunnels

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company to construct, maintain and operate certain extensions to the existing Rapid Transit Railway conditional upon favorable action upon the proposition of said Company to third track and build additions to its Second, Third and Ninth Avenue Elevated Roads, and to build and put in operation the Steinway Tunnel, and requesting a statement of the position of this Board on the subject.

At the meeting of June 8, 1911, the President of the Borough of Manhattan, Chairman of the Conference Committee of the Board having this matter in charge, stated a report was being prepared, and by motion, duly adopted, Monday, June 12, 1911, at 3 p. m., was fixed as the date to consider the matter.

His Honor, the Mayor, then called a meeting of the Committee of the Whole for 2 p. m., Monday, June 12, 1911.

His Honor, the Mayor, reported that the Committee of the Whole had met in the Mayor's office, Tuesday, June 13, 1911, at 12 o'clock noon, had considered the report of the Conference Committee and had agreed to recommend to the Board that a special meeting be held Wednesday, June 21, 1911, at 10:30 o'clock a. m., to consider the report and recommendations of the Committee.

The President of the Borough of Manhattan, Chairman of the Conference Committee of the Board, presented the report, which is as follows:

City of New York, Office of the President of the Borough of Manhattan, City Hall

June 13, 1911.

To the Honorable Board of Estimate and Apportionment.

GENTLEMEN: Your Committee was appointed under a resolution adopted by the Board on January 19, 1911, to confer with the members of the Public Service Commission for the First District, as the Commission has suggested, "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

[fol. 1492] Under a subsequent resolution adoption January 31, 1911, your Committee was empowered also to confer, in conjunction with the Commission, "with the officers of the Interborough Company with a view toward ascertaining whether that Company will enter into a contract for the construction, equipment and operation of subway extensions upon terms acceptable to the City."

Your Committee has since been in constant conference with the Public Service Commission, and is prepared to submit its findings and recommendations. For the reason that in the development of the subject before us the two bodies have worked, in a sense, coordinately, our conclusions are submitted in a joint report which is presented herewith.

We recommend that the program of action proposed be approved by the Board, and that its policy in dealing with the rapid transit contracts to be submitted for its consideration in the near future shaped accordingly.

We recommend that your Committee be continued for such further conferences with the Public Service Commission as may be necessary, and with authority to represent the Board in submitting to the operating companies the statement of the terms upon which the City would be willing to grant the franchises and operating rights for which they have applied.

We suggest the time allowed for the receipt of definite answers from the companies in question be limited by resolutions of the Board, and that the final action of your Board be taken at the earliest practicable date.

The Public Service Commission is prepared to proceed with the preparation and award of contracts, and to take such further action as may be necessary upon its part, as soon as the decisions of the Board have been taken.

We wish, in conclusion, to express our high appreciation and approval of the course the Public Service Commission has taken in this juncture. Its invitation to the Board to confer directly upon those matters in which the concurrent action of the two bodies is necessary was intended to expedite the process of reaching final determination, and to hasten the work of actual subway building. We believe that the work done in conference will have that effect.

Whatever course is now taken will require the original action of the Commission upon all of the matters within its jurisdiction; but the agreement in advance we now present upon those matters requiring the action, at one stage or another, of both bodies, is likely, we believe, to bring about a solution of the transit problem within the very near future.

Throughout our close touch with the Commission and its work, we have been impressed by the vast amount already accomplished in preparing for the situation with which the City now deals. The Commission's labors, both before and since the development of the present situation,

will prove, we believe, to be of great and lasting public value. All of which is respectfully submitted.

[fol. 1493] George McAneny, President of the Borough of Manhattan; Cyrus C. Miller, President of the Borough of The Bronx; George Cromwell, President of the Borough of Richmond.

To the Honorable Board of Estimate and Apportionment.

GENTLEMEN: The Public Service Commission, under date of December 20, 1910, submitted to the Board of Estimate and Apportionment a proposition of the Interborough Rapid Transit Company dated December 5, 1910, for the construction jointly with the City, and for the equipment and operation by that company, of certain additions to the present subway system. The Commission, in its letter of transmittal, stated that this proposition, "provided certain features not then satisfactory could be properly adjusted," would be acceptable to it; and added as follows:

"The Commission will press the present negotiations with the Interborough Company to a conclusion and embody them in contracts and plans as rapidly as possible unless your honorable Board should consider the proposition as generally outlined open to objections which would render your consent impossible when the forms of contracts are finally submitted. Although the principal portions of the routes are already laid out, certain connections have not yet been legalized, and it will take considerable time to perfect them. The Commission respectfully requests that, if there are objections on your part, it be advised at as early a date as possible. If the present propositions are disapproved, the contracts for the construction of the Tri-Borough system, which are now awaiting award, can promptly be acted upon and construction work immediately begun. The Commission will be pleased to receive a statement of the position of your honorable Board on this subject and will be ready at any time that may be convenient to confer with your honorable Board, or any Committee thereof."

As differences of opinion existed in the Board of Estimate with relation to the terms upon which the Interborough Company should be granted further operating rights, and as to whether such further rights should be

granted at all, the Board concluded that it would appoint a committee to confer with the Commission, and to report its conclusions before the Board undertook to decide officially whether or not the proposals submitted were "open to objections that would render the consent of the Board impossible unless modifications were made."

The Board, which on January 5 had referred the general subject to the Committee of the Whole, voted on January 19, 1911, the appointment of a sub-committee of three of its members to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

Under this resolution, the Mayor named the President of the Borough of Manhattan, the President of the Borough of The Bronx, and the President of the Borough of Rich-
[fol. 1494] mond as members of the Conference Committee. On January 31, 1911, the Committee was empowered also to confer, in conjunction with the Commission, "with the officers of the Interborough Company with a view toward ascertaining whether that company will enter into a contract for the construction, equipment and operation of subway extensions upon terms acceptable to the City."

Proposals Considered

Under this broad authority the members of the Public Service Commission and the Committee of the Board of Estimate and Apportionment have, since February 1, been in almost daily session. They have considered not only the proposal of the Interborough Company dated December 5, 1910, but also an amended proposal from the same company, submitted at a later date; and two proposals of the Brooklyn Rapid Transit Company relating to the improvement and extension of its existing elevated system in Brooklyn and Queens, and the operation of a comprehensive system of subways to be built by the City.

The conferees have considered, also, the advisability of a third system, to be operated independently or by one of the existing companies, as well as certain other proposals with relation to the construction and operation of rapid transit lines.

Consideration has not been confined to specific proposals for separate lines, but has included the development of a comprehensive plan and the basic principles that must underlie a satisfactory policy for the future.

Proposal of the Interborough Company

The Interborough Company, in its offer of December 5, 1910, upon which the two bodies first went into conference, proposed as follows:

(I.) That the City and the company unite in the construction of the following new lines:

(a) The Lexington avenue and 7th avenue subway extensions necessary to the completion of the so-called "H" system in Manhattan;

(b) The Southern boulevard and Westchester avenue line, partly by subway and partly by elevated structure to Pelham Bay Park in The Bronx;

(c) A connection from the Lexington avenue subway to a point of conjunction with the proposed elevated extension on Jerome avenue in The Bronx, and another with the present subway near 149th street;

(d) An elevated connection proceeding from the West Farms division of the subway at 179th street, northward through White Plains road to Gun Hill road, there to connect with proposed elevated extensions;

(e) A new East River tunnel, to be built in connection with the company's present Brooklyn lines, to permit a further subway extension from its present terminus at Atlantic and Flatbush avenue through the Eastern parkway to Buffalo avenue; and

(f) The Lafayette avenue line, from Flatbush avenue to Broadway, Brooklyn.

[fol. 1495] (II.) That the company would build and equip the foregoing lines for the sum of $53,000,000 to be furnished by the City; the City to provide in addition, the necessary easements and right of way, and the company to supply the funds necessary to defray the additional cost of construction and equipment which, upon the basis of their estimates, would amount to $75,000,000.

(III.) That the new lines be built as "extras" under the terms of the Rapid Transit contract dated February 21, 1900, under which the original subway was constructed

and is operated, except so far as the terms thereof might be modified by other provisions of the new offer.

(IV.) That the lines, when constructed and equipped, be operated by the company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

(a) The City to take all net profits for the first five years from the time of beginning of operation on any portion of the new lines;

(b) The net profits on the new lines after five years to be divided equally between the City and the company;

(c) The net profits to be determined by deducting from the gross revenue of the new lines in the order named:

The charges for maintenance, depreciation, traffic expenses, taxes, etc.;

Interest and sinking fund charges upon the funds raised by the company to carry its share of the cost of construction and equipment;

Interest and sinking fund on the bonds of the City;

(d) The gross operating revenue to be ascertained "from the number of tickets sold at stations along the extensions, or, if deemed advisable by either the City or the company, from the number of tickets deposited in the chopping boxes on the extensions; or by such other method as upon full consideration may be agreed upon between the parties."

(e) The gross operating expenses to be determined on the basis of the number of car miles operated and according to the unit car mile costs on the company's entire system.

(V.) That if the gross income in any year, after providing for all of the charges above mentioned, is insufficient to meet the interest and sinking fund upon the bonds of the company, the deficit for such period would be borne by the company, and not carried as a cumulative charge against future earnings.

(VI.) That if the gross income in any year, after providing for the charges mentioned including interest and sinking fund upon the company's bonds, is insufficient to meet interest and sinking fund upon the City's bonds, the deficit thus sustained by the City would accumulate and be a charge against the future profits before any division thereof proceeds between the City and the company.

(VII.) That the City retain its right provided for by law to take over the new lines, as one system, at any time after ten years from the date that any portion thereof may be put into operation, upon paying to the company
[fol. 1496] (a) The amount of its investment in construction over the $53,000,000 supplied by the City, plus fifteen per centum, such sum to decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment.

(VIII.) That the contracts for operation of the new lines be given for a period of forty-nine years from the date of completion of new lines, and that the present subway leases should be so altered that the terms of all should end at that time.

(IX.) The company offered also to operate all extensions either under construction by the City or to be built by it hereafter, in addition to the lines it proposed to operate on a profit-sharing basis, upon an understanding that the City carry all losses from the operation of such lines; such losses, however, to be cumulative, and to be paid out of future receipts when any such line reaches a profit-yielding basis.

Elevated Lines and the Belmont Tunnel

In a supplementary communication to the Public Service Commission, under date of December 5, 1910, the Interborough Company added that its general offer for the construction and equipment of subways "is predicated upon the acceptance by the City authorities of the offer of that company covering the elevated improvements and the completion and operation of the Belmont tunnel, although the latter proposition is not in any way dependent upon the subway offer."

The proposition of the Interborough and Manhattan Elevated companies, upon the acceptance of which the subway proposals were conditioned was submitted to the Commission under date of June 10, 1910, and covered the following points:

1. The third tracking of the 2d, 3d and 9th avenue elevated lines of the company's Manhattan system.

2. The extension of the 2d avenue line across the Queensboro Bridge to the Queens plaza.

3. The extension of the 3d avenue line from Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Park avenue.

4. The extension of the 3d avenue line along Webster avenue, White Plains road and other streets to Becker avenue or 241st street.

5. The extension of the 9th avenue line over the Harlem River and Jerome avenue to Woodlawn Cemetery.

6. The construction work to be done and the property to be provided wholly at the expense of the Interborough or Manhattan Company (estimated by the company at $32,000,000), and the lines to be operated on the following terms:

(a) The term for each of the third tracking franchises to be perpetual, thus following the terms of the main franchises of which they would become a part; with the right, however, reserved to the City to terminate the new franchises at any time after ten years from the beginning of operation;

(b) The term of the elevated extensions to be eighty-five years, subject to terminate aften ten;

[fol. 1497] (c) The rate of rental to the City for the new franchises to be two per cent. of the increased gross receipts at the express stations in case of third tracking, and two per cent. of the gross receipts of the extensions; this rate to be subject to revision at the end of twenty-five years;

(d) The Steinway tunnel to be conveyed to the City and to be operated as part of the original subway system, upon payment by the City of $1,500,000 to cover the cost of the extension of the tunnel to Grand Central Station, such amount to be repaid as rental, as provided under the general terms of the present subway contract.

Proposal of the Brooklyn Rapid Transit Company

While the discussion of the Interborough Company's proposal was under way, the Public Service Commission, on March 2, received the proposal of the Brooklyn Rapid Transit Company for the operation of certain proposed new subways to be built by the City and of other City lines now under construction, in conjunction with the company's existing elevated lines and such of its surface lines as were

originally operated by steam. The plan submitted did not call for the use of any street or right of way in the Borough of Manhattan for which application had been made by the Interborough Company, though in Brooklyn it did propose to take over the Eastern Parkway extension which the Interborough Company had included in the proposed system, and the 4th avenue line which the Interborough had offered to operate upon the agreement of the City to carry all incidental losses. The Lafayette avenue line, the Brooklyn Company offered to include in its plan; but advised that it be omitted. In general, the company proposed:

1. That a new subway be constructed in Manhattan from the Battery to 59th street by way of Church street, Broadway and 7th avenue, with an extension easterly on 59th street across the Queensboro Bridge to a point of conjunction with the Brooklyn Company's elevated system;

2. That the Broadway line be connected with the Fourth avenue and other subway lines in Brooklyn through the construction of a new tunnel at the Battery under the East River;

3. That the company, at its own expense, construct elevated extensions:
(a) from the old City line easterly in the Borough of Queens to Jamaica.
(b) from Williamsburg Bridge northwardly across Newtown Creek and by way of Jackson avenue to Queensboro Bridge;
(c) from the present terminus of the Third avenue line to Bay Ridge;

4. That the company, at its own expense, elevate its present steam surface lines in South Brooklyn, as well as the extension of the Lutheran Cemetery line from Ridgewood to Fresh Pond road;

5. That it third track its present lines on Fulton street, Myrtle avenue and Broadway;

6. That it operate the so-called Bridge Loop subway lines in Manhattan with extensions:
(a) by way of Delancey street and Spring street to Broadway;

[fol. 1498] (b) by way of Canal street to Broadway; and (c) from the present Centre street terminus at the Brooklyn Bridge southward through Nassau and Broad streets to the Battery tunnel;

7. That it operate, whenever built, a tunnel line between the present terminus of the 4th avenue line on 42d street, in Brooklyn, under the bay to Staten Island.

The Brooklyn Company, in this communication, made no proposition as to operating terms, but added:

"If the plan we have outlined appeals to the judgment of the Commission and of the Board of Estimate and Apportionment as having merit, we shall be pleased to take up with you and the Board of Estimate and Apportionment the question of terms and division of cost.

"We may say, generally, that the terms proposed by us would not be less favorable than those presented in any offer now under consideration by your Commission and the Board of Estimate.

"The offer would include an agreement, under equitable arrangement, to operate any extensions of the above routes in any of the five boroughs which might be necessary in the future for the development of transportation facilities."

Supplementary Offer of the Brooklyn Company

The conferees immediately took up the consideration of this offer. As they were informed, however, that the use of Broadway from the Battery to 59th street for the purposes of a Brooklyn connection, might result in the withdrawal of the Interborough Company's offer, the conferees suggested to the Brooklyn Company that it consider the broadening of its proposal to include those lines contiguous to its system which, in the event of such a withdrawal, would be left to some operator other than the Interborough. The company replied that the plan it had originally submitted was prepared primarily for the purpose of serving Brooklyn, and incidentally the growing needs of those portions of the congested districts of Manhattan through which the Brooklyn traffic naturally flows. It added, however, that in order that the City might not be deprived of the advantages of a comprehensive system, it would be

willing to equip and operate that portion of the so-called Triborough route proceeding from the intersection of the proposed line on Broadway at 9th street northward to The Bronx, with such natural extensions in The Bronx as the City might provide.

As a result of the discusison of this phase of the situation and of the needs of other sections of the city, recognized by the conferees, the Brooklyn Company, on April 25, submitted a supplementary proposition offering to operate a system embracing the lines it had originally proposed and the following additional lines—all on a basis of an equal division of profits with the City:

1. The proposed Lexington avenue section of the Triborough route, from Ninth street north to The Bronx;

2. The Southern boulevard and Westchester avenue line, as a subway, as far as the Bronx River.

[fol. 1499] 3. The Jerome avenue line as far as the Kingsbridge road;

4. Elevated lines proceeding easterly from the Queensboro Bridge to
(a) Astoria, and
(b) Woodside and Corona;

5. The proposed line running easterly from Union Square, Manhattan, under the East River to the Eastern District of Brooklyn to East New York, the precise route in Brooklyn to be determined hereafter;

6. The Nostrand avenue extension, from Eastern Parkway to Flatbush avenue; and

7. Livonia avenue extension, from the Eastern Parkway at Buffalo avenue to New Lots road.

The company offered to operate also, on an extension basis—that is, the losses from operation to be carried by the City, subject to liquidation from the surplus profits of the inner lines—the following:

1. The northern section of Westchester avenue line, from the Bronx River to Pelham Bay Park;

2. The northern section of the Jerome avenue line, from Kingsbridge road to Woodlawn;

3. An elevated extension on Utica avenue, Brooklyn, running south from the Eastern Parkway; and

4. The tunnel from the present terminus of the Fourth avenue subway, in Brooklyn, under the Bay to Staten Island.

The operating terms proposed by the Brooklyn Company, in its supplementary offer, include the following:

1. That the City should pay the cost of construction of all subways and of all elevated lines not at present contiguous to the Brooklyn system, while the company would pay the cost of extending and third tracking its own lines, and the cost of equipment of all lines; that it should operate all both new and old, as well as future extensions, as one system;

2. That the rate of fare should be universally five cents, with the exception of fares to or from the Coney Island district, which should be ten (10) cents; upon the proviso "that the said fare of ten cents may at any time and for any period be reduced to such figure not less than five cents as will be sufficient to yield from such Coney Island operation the fair cost thereof plus a reasonable profit."

3. That the tenure of the contract for all of the lines, subway or elevated, constructed by the City, and of the new elevated extensions to be constructed by the company where they follow public streets and places, be for ten years, subject to recapture by the city at any time thereafter; except that the tenure of the so-called Bridge Loop lines in Manhattan, as extended through Nassau and Broad streets, together with the incidental use of the bridges, shall be for twenty years, as the statute permits, with the privilege of renewal under an adjustment of terms for a second period of twenty years.

4. That all of the lines described as "original" or inner lines in either of the company's proposals be operated on the following basis as to receipt and expenditures:
[fol. 1500] The gross receipts from the operation of all such lines to be pooled, and the receipts to be divided equally between the City and the company, after the following deductions in the order named:

(a) Operating expenses, provisions for depreciation, renewal and obsolescence;

(b) Taxes, insurance, and rental of leased lines, if any;

(c) An amount to be retained by the company equivalent to the net earnings of the existing lines operated by the Brooklyn Rapid Transit system in connection with the proposed new lines as of the year preceding the beginning of operation under the proposed contract with the City;

(d) Interest and amortization upon the new capital supplied by the company both for construction and equipment;

(e) Interest and amortization upon the cost to the City of the lines constructed by it.

5. That the contract contain a separate provision as to terms of compensation for the use of the Centre street subway and the bridges, to go into effect in case the City exercises its option to terminate the franchises of the other subway lines within the company's proposal after ten years.

6. That in addition to the lines the company is willing to operate upon the basis of half and half division of profits, it will operate as "extensions" any additional lines that the City may construct on the following basis:

(a) Extensions agreed upon by the City and the Company to be governed by and included in the general provisions of the contract as to receipts and deductions therefrom, applicable to "Original Lines."

(b) Extensions required by the City and not concurred in by the company to be operated as part of the entire plan, but the financial operations of such extension to be kept in a special account and determined as follows:

The accounting of receipts upon extensions to be based upon the value of the tickets collected at the stations on each, with the miscellaneous station and way earnings; and the expenses of operation to be ascertained upon the passenger basis, to be determined according to unit cost on the entire system covered by the contract, including the extensions.

After the payment of the expenses of operation there shall be paid out of earnings the actual annual charges for carrying the cost of equipment necessarily and properly allotted to each extension, and for providing a proper sink-

ing fund; and that from the balance then remaining shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction;

That where the income is insufficient to meet the foregoing charges, any deficits shall be paid annually by the City; and

That all of the remaining net proceeds, after the deductions have been made, shall be divided in proportion of three-fourths to the City and one-fourth to the company.

[fol. 1501] The Brooklyn Company's Offer to Operate a Broader System

The Brooklyn Company, in its letter of April 25, repeated its willingness to operate a more comprehensive system than that covered by its first proposal, if the City so desired, and if mutually acceptable terms could be reached, as follows:

"In case the City should desire to make a different disposition of this East Side-Manhattan-Bronx line, either as embodied in the Interborough plan or otherwise, we are perfectly willing that such a course should be taken—provided that this disposition will not deprive the people of Brooklyn, Queens and Richmond of the use of Broadway as a distributing Manhattan subway, or not postpone such use to some indefinite time in the future.

"If, however, the operation of the additional East Side lines which we have described should fall to us, then our proposition becomes no longer a three-borough but a five-borough proposition, and imposes considerations and responsibilities from which we have no disposition to shrink, but which, accompanied by the severe terms insisted upon by your Committee as to revocable franchises, rates of fare and equal division of profit, necessarily require conservative judgment in the expenditure of private capital and a limitation of risk in the equipment and operation of extensions."

Negotiation of Terms

The Committee of the Board of Estimate, following a discussion of the general subject in the sessions of the Board, sitting as a Committee of the Whole, informed the

officers of the Interborough Company, at the first of the conferences attended by them, that the proposals of the company as submitted would not be acceptable to a majority of the Board; and that the Board could not be expected to pass favorably upon any of the contracts for the operation of the new lines desired by the company, unless their underlying terms were modified radically. Upon this understanding the conferences proceeded.

The modifications proposed, it may be said, covered incidentally those points upon which the Public Service Commission had itself been prepared to urge changes.

The conferees, in their negotiations with the representatives of each of the applicant companies, have proceeded upon the theory not only that the routes operated by either, if either secured a contract, would go as far as possible toward giving the City the comprehensive transit service its needs demand; but that in the fixing of operating terms common principles should apply to each. All of the modifications with regard to terms proposed to the Interborough Company at the opening of the negotiations were repeated to the Brooklyn Company when its first offers were received, as well as certain others peculiar to the form of contract the Brooklyn Company seeks. We shall not attempt to rehearse in detail the course of these negotiations; but may recapitulate the results as follows:

[fol. 1502] Revised Interborough Terms

The Interborough Company, in a communication dated May 9, submitted the following proposed changes in its original offer designed to meet, in some measure, the objections the conferees had raised.

1. To meet the demand for further routes, the company proposed to add to the system originally contemplated:

(a) A two-track subway connecting with the Williamsburg terminus of the proposed Lafayette avenue line in Brooklyn, proceeding thence through the Eastern District and under the East River to Union square in Manhattan, up Broadway to 42d street, and thence by 7th avenue to 59th street, easterly by way of 59th street and the bridge to a connection with the Queensboro plaza—that part of the line, so proposed, from 14th street and Broadway to

Long Island City involving the use of this much of the through Broadway line proposed by the Brooklyn Company;

(b) Elevated lines proceeding from the Queensboro plaza to (1) Astoria and (2) Woodside.

The company proposed also:

2. To build and operate the proposed Jerome avenue line as an extension of the subway system, and under a forty-nine year lease, rather than as an extension of the 9th avenue elevated line, as at first proposed, under an eighty-five year lease. The company proposed, however, to terminate the new line at Kingsbridge road and, in any event, to reserve trackage rights to its elevated system.

3. To build the proposed White Plains extensions to the 3d avenue line north to the Gun Hill road and White Plains road also as a subway extension with trackage rights reserved to the elevated.

4. To accept a modification of its present leases with the City, "provided the lien of any duly authorized mortgage be not disturbed," so that either the present East Side subway from 42d street south to the Battery or the present West Side subway from Times square north shall be held by the lessee under the ten-year recapture clause; thus enabling the City to possess a through line upon either the East Side or the West Side, in exchange for an indeterminate lease of forty-nine years upon the proposed West Side extension from Times square south, or the reverse of this plan, reserving to either of the lines exchanged traffic rights for the elevated trains from White Plains road and Jerome avenue, as well as the right to connect the southerly end of Lenox avenue extension under the terms of Contract No. 1—the difference in value of the lines to be adjusted by agreement between the company and the City whenever an exchange is effected, or if such an agreement cannot be reached, then by arbitration upon terms and conditions to be agreed upon.

5. To agree with the City, if the termination of all subway franchises be synchronized at forty-nine years from the date of beginning of operation of the new extensions, and provided the City, in the meantime, shall have taken

over the new sections of the Interborough system under the ten-year clause, to give the City the privilege of taking over also the lines of the present subway "upon tendering to [fol. 1503] the Interborough Company a sum equal to the aggregate estimated profits of the company for the five-year period immediately preceding the time at which the City may hereunder accept such said option, and upon otherwise complying with the terms of the lease."

6. To allow all over a three per cent profit to the company from the lines to be operated on a half and half basis—in excess of the carrying charges of its investment in construction and equipment—to apply toward the carrying of deficits upon the operation of extensions, under the terms proposed by the City.

7. That all costs of construction be divided evenly between the company and the City.

The company estimated that the adoption of the additional routes it proposed would increase the total cost of construction and equipment of the new lines from $128,000,000 (the original estimate) to $167,745,880; of which amount the cost of equipment, to be borne wholly by the company, would be $31,956,880. The cost of construction would, upon these estimates, amount to $135,780,000, of which one-half, or $67,556,500, would be borne by the City and the balance by the company; making a total outlay by the company, upon its own figures, of $99,524,380, the cost of real estate not included.

It is the conviction of the conferees that the City should not permit any part of Broadway between Vesey street and 42d street to be occupied by any company in a way which will interfere with the establishment of a trunk line subway. For this reason they do not favor the construction of a two-track subway for the Interborough Company between 59th street and 14th street via 7th avenue and Broadway to connect with the 59th street line upon the one hand and the 14th street, Eastern District subway upon the other. Such a line would provide no service that would not be afforded by the present subway and the 7th avenue extension, provided the 59th street line were extended to 8th avenue or the river and the 14th street line were carried across town. The proposed line would not only prevent the construction

of a trunk line in Broadway but would prevent the routes on 59th street and Broadway from being carried westerly so as to afford communication with all of the longitudinal transit lines in Manhattan.

The conferees believe that the modification of the company's existing contracts, permitting the City to recapture after ten years either the existing 4th avenue line south of 42d street or the Broadway line north of 42d street, upon exchange of the corresponding legs of the opposite north and south line, would strengthen the City's general position in the matter of future recapture. We have, therefore, pressed the acceptance of this clause.

The conferees believe that the proposed clause permitting the recapture of the entire system—old lines and new—after thirty-five years, would add also to the City's freedom in dealing with the possibilities of the future. While the plan proposed would give the City no ultimate right or advantage that could not be secured through condemnation proceedings, it would, undoubtedly, be valuable in relieving the City from the expense of such proceedings, as well as from the delay which, if the City were not in [fol. 1504] accord with the operating company, might be protracted.

The conferees are also of the opinion that if the leases of the old and new lines are to be synchronized, the date when they shall terminate might properly be fixed at forty-nine years from the beginning of operation of any new line, providing that period shall not begin later than five years from the present time. The contract should provide, however, for the leveling of the renewal periods without alteration of the original terms of the existing contracts.

The company has not agreed to the following modifications of its offers, suggested by the conferees:

1. The adoption of the cost-per-passenger basis as against the car-mileage basis in estimating operating expenses on the new lines.

The conferees believe that the acceptance of the proposed plan—that receipts be computed upon the basis of tickets collected and that expenses be computed upon the basis of the number of car miles operated—would be unfair, that it would seriously handicap the new lines while adding con-

sideral le sums to the already large profits upon the present lines and that it would hinder the construction of additional subways in the future under the terms of the contract now being considered.

It is essential that the lines to be constructed should not only receive their fair share of the earnings but should not be charged with more than their fair share of the operating expenses. Under the plan proposed, the Lexington avenue subway in Manhattan, 4th avenue subway in Brooklyn, and any other line that might be built, like the 14th street-Eastern District line, would be deprived of their fair share of the receipts and yet would be charged with operating expenses out of all proportion to the relative distances which the passengers would ride upon the present lines and the new lines about to be added or to be added in the future.

The conferees believe that the adoption of the cost-per-passenger basis would be fair to the City, to the Company and to the many areas which will need rapid transit in the near future. No method has been suggested which is equally fair to all interests, but perhaps such a method exists and, if found, would be acceptable to the conferees.

This subject has been discussed at length in an appendix, and it is unnecessary, therefore, to repeat the discussion here. It will be sufficient to mention a few of the points which are essential to any fair method. It is naturally the desire of the conferees to extend the 5-cent fare zone in all directions from the center of the City. This cannot be accomplished unless the large profits from the profitable short-haul traffic on inside lines is used to offset the expenses of carrying residents to the more distant localities. If those portions of the present subway lying in the upper part of Manhattan and The Bronx had been financed upon the car-mile basis and could not call for assistance upon the short-haul traffic in lower Manhattan, they would today be a burden upon the City, and the City would be paying deficits for their operation, notwithstanding the fact that the Interborough Company is earning from 17 to 18 per [fol. 1465] cent upon the money actually invested by it in the subway. The short-haul traffic on inside lines in New York City is probably the most highly lucrative of any city in the world, and if the large profits from such traffic may not be used to offset deficits on outside lines, the

indecent congestion and overcrowding which characterizes certain tenement house districts must continue and probably grow worse rather than better. This question is, therefore, of vital importance not only to the outlying districts which are in need of rapid transit facilities but to the whole City because of its intimate relation to the City's health and well-being. It is unnecessary to point out the many difficulties which are connected with the application of the car-mile basis and the ease with which the cost-per-passenger basis could be applied. Suffice it to say, that if the operating company desired to take advantage of the City under the former method, it could be done easily. It is probable, further, that differences of opinion would constantly arise as to the accuracy of the computation and whether the car-mileage upon the extensions was larger than reasonably required. There are many other objections which make the plan an impossible one.

2. The inclusion in the construction account of the cost of real estate and easements.

Although the City's expenditures for real estate and easements for the present subway were paid from the City's general bond account, the conferees see no reason why similar expenditures in the future should not be treated as part of the cost of subway construction and the bonds issued amortized from the receipts of the new lines. The anticipated cost of real estate upon the Interborough lines outside of 7th avenue—where the bulk of the cost will be borne from the street opening fund under the proposed projection of the avenue itself southward to Canal street—would not be great; amounting, perhaps, all told, to $4,000,000. This amount is certainly a part of cost and should so be considered.

3. The exclusion of banking discounts from the cost of construction.

The discussion of this subject is given in an appendix from which it will be seen that it is of first importance. The Interborough Company desires that all discounts upon bonds shall be added to the money cost and that the 15 per cent bonus shall be computed not only upon the actual cost in money, but upon the discounts.

The conferees do not propose that the Company shall be prohibited from issuing bonds at a discount, or paying reasonable brokerage charges, but merely that, if it does follow such a course, it shall not compel the City to pay these discounts and brokerage charges, and 15 per cent thereon in addition to the actual amount of money invested in the undertaking of the Company.

4. The right of the City to transfer lines, recapturable after ten years, to a second operator with one intermediate recapture.

This provision, which the conferees deem essential, the Interborough Company has shown a disposition to accept, if an agreement is reached upon other terms.

[fol. 1506] Elevated Lines and the Steinway Tunnel

The application of the Interborough and Manhattan companies for the necessary franchises to construct and operate additional tracks upon the Manhattan elevated lines, and to construct and operate elevated extensions in The Bronx and to Queens, has been considered by the conferees. The Interborough Company has uniformly insisted that, while it was willing to provide the facilities upon terms to be agreed upon, it would not carry out any plan for the extension of its subways unless the elevated franchises were also accepted. As the Company has maintained this position throughout the present conferences, it became necessary to consider the terms upon which the Company would grant the elevated franchises at the same time that the discussion of the subway proposals proceeded.

The conferees are in agreement that the third tracking of the Manhattan lines is necessary to the full utilization of this important system. Objections have been raised from time to time, based upon the general theory that no new elevated structure of any sort should be built in the Borough of Manhattan, as well as upon questions of local discomfort. The conferees are convinced, however, that as the structures already exist, the advantage to be gained through the improvement proposed would be greater than the objections to the addition of a third track.

When the present conferences were begun, the Public Service Commission had prepared two certificates under the Rapid Transit act; one relating to the additional tracks enumerated in the Company's proposition of June 10, 1910, and one to the elevated extensions. The Commission and the Company had agreed upon the major portion of these certificates; but upon certain essential points there were differences of opinion, and the certificates have not yet been formally adopted.

The principal point of difference remaining related to the share of the profits of the future system that would fall to the City by way of compensation for the new franchises. The companies had proposed that the City receive 2 per cent of the increase in the gross receipts at express stations and on the extensions—a method that would have netted the City probably not more than $75,000 or $100,000 a year. They had also proposed to convey to the City the title to the Belmont tunnel, and to operate the tunnel line as part of the present subway system under Contract No. 1, upon payment by the City of the amount required to adapt the Manhattan terminal of the tunnel to its proposed new uses, estimated at $1,500,000.

The conferees urged that as these two propositions had no logical relation to each other they should be separated and each treated upon its own merits. They had proposed that, instead of 2 per cent of the increase in the aggregate gross receipts at certain stations, the City should receive 50 per cent of the increase in net profits upon the entire system, the average annual net profits for the two years ending June 30, 1911, to be taken as the basis for computing the increase.

[fol. 1507] The representatives of the Company have agreed, meanwhile, that the Belmont tunnel, which, including carrying charges during the past three years, has cost the Company, according to its statement, $8,600,000, should be conveyed to the City, if the City so elects, for $3,000,000, or entered in the construction cost of any continuous railroad of which it may become a part at a like sum.

The conferees believe that the third-tracking franchises sought by the Manhattan Company should be granted only upon terms that adequately compensate the City for the extraordinary-valuable rights they would confer.

Revised Terms of the Brooklyn Company

Many of the terms proposed in the Brooklyn Company's supplementary offer of April 25 were reached as the result of the negotiations proceeding between the conferees and the Company before the offer was definitely formulated. They include the acceptance of such mooted points as:

(a) The cost-per-passenger basis as against the car-mileage basis in estimating operating expenses on the new lines;

(b) The inclusion in the construction account of the cost of real estate and easements;

(c) The exclusion of banking discounts from the cost of construction;

(d) The right of the City to transfer lines recapturable after ten years to a second operator without intermediate recapture.

In the course of the further negotiations, following the receipt of the letter of April 25, the Company agreed, further:

1. To omit from the account of carrying charges upon its investment any allowance for amortization upon the new capital supplied for equipment—this item being otherwise covered in the provision made for depreciation and obsolescence.

2. To merge with the present elevated lines of the Brooklyn Union Company, in a manner satisfactory to the Public Service Commission, the Canarsie line and the Lutheran Cemetery extension, now operated under leases, and to strike from the account of operating expenses any provision for the "rental of leased lines."

3. To submit the entire plant the Company proposes to merge with the City lines to a physical examination by a Board of Engineers appointed by the Public Service Commission, and, before any contract is made, to make good any deferred maintenance that the Commission, upon the report of such engineers, may require.

The Company has also informed the conferees that it will be able to effect a traffic arrangement with the Hudson

and Manhattan Railroad Company for the exchange of passengers between the stations of the latter Company at Broadway and 33d street and the Grand Central Station without the payment of extra fare in either direction.

The conferees have not yet pressed to a conclusion with the Brooklyn Company the following further modifications, which they believe should be made:

[fol. 1508] 1. The amount of the allowance to be reserved from the gross receipts in lieu of the net earnings of the present lines:

The conferees believe that the reservation of an equivalent of the receipts of its existing lines, before the profits of the proposed new system are applied to the carrying charges upon the new lines, is perfectly proper and fair to the City. They believe, however, that the basis for estimating the amount to be paid annually should be the sum of the net profits of the year ending June 30, 1911. The Company originally proposed that the profits of the year immediately preceding the beginning of the operation of the new plan be taken as the basis. It was argued by the conferees that, as traffic upon the old lines would be considerably stimulated during the three years immediately before operation by the knowledge that new connections were to be made, the Company would not be entitled to the benefits of the increased rate; that, in any event, an allowance of the present year's earnings—approximately $3,000,000—would constitute a fair return upon the estimated value of the Company's plant.

In the course of the negotiations after April 25, the following substitute was proposed:

1. The Company to accept annually from the gross receipts a sum to be determined as follows:

To the aggregate amount of receipts collected on all said existing lines in Brooklyn and Queens shall be added an amount equal to the receipts at the Manhattan terminals of the Brooklyn and Williamsburg bridges during the year prior to beginning of operation in Manhattan beyond the present terminal of either of said bridges, plus advertising and miscellaneous receipts of existing lines. From the total amount of such receipts shall be deducted for operating expenses a sum computed by multiplying the number

of fares represented in receipts from passengers, as ascertained above, by the average operating cost per passenger on the entire system.

The balance of receipts as thus calculated shall be the sum above referred to, to be retained by the Company as the net earnings of existing lines, provided that in no given year shall the amount thus appropriated exceed the sum of $3,500,000, nor be less than the amount of net earnings from operation of the Brooklyn Union Elevated Railroad Company for the fiscal year ending June 30, 1911.

The conferees have considered this proposed substitute at some length, and with great care, but are still of the opinion that the allowance to be made should be based upon the operation of the year preceding the contract—that is, the year ending June 30, 1911.

2. Coney Island Fare—The Company proposes to retain the present 10-cent fare on the lines reaching Coney Island, arguing that the recent examination by the Public Service Commission demonstrated the fact that the roads in question would not yield a fair return upon a 5-cent basis, and that it accordingly should not be required to accept the lower rate. The conferees are of the opinion, however, that as the City allows the Company to reserve to itself the aggregate rate of present net profit on its elevated [fol. 1509] lines, without regard to the segregated profit or loss of individual lines, no reason remains why a 5-cent fare should not be extended to this as to other parts of the City.

South Brooklyn and Staten Island

The conferees suggest that action upon the projected new South Brooklyn lines be deferred for the reason that the various alternatives presented for the disposition of these lines and their connections require more attention than it has yet been possible to give; and for the further reason that certain plans now in course of development for the connection of Staten Island may have an important effect upon the ultimate solution.

The original proposition of the Brooklyn Company, dated March 2, involved

(a) The elevation of the so-called Sea Beach, Culver and West End lines and the connection of these lines with the 4th avenue subway at 43d street; and

(b) An extension of the present 3d avenue elevated line to Fort Hamilton.

The Company estimated that the cost of this work, together with incidental terminal improvements at Coney Island, would be about $12,000,000, and in its supplementary proposition of April 25 it submitted the following alternatives: Either

1. That any or all of the South Brooklyn extensions, when elevated, be treated as extensions of the 4th avenue subway, under franchises revocable after ten years; or

2. That the City construct the original extensions of the 4th avenue subway embodied in the plan of the Tri-Borough route, and that these be included in the lines to be equipped and operated by the Company under its general proposal.

In the event of the adoption of the latter alternative, the Company offered to apply toward the construction of the City lines the money it originally proposed to spend upon its own lines.

Under the Company's original plan, the tunnel line to Staten Island, when built, would proceed from the present subway terminus at 43d street. It has been proposed, in the course of the conferences, that in order to make a closer Staten Island connection, it would be better to extend the 4th avenue line to about 65th street. The conferees are of the opinion that in the laying out of the comprehensive transit system that they have in view provision should be made looking toward an early start upon the Staten Island connection. They are now informed that the Department of Docks and Ferries has under consideration the practicability of connecting Staten Island and Brooklyn with a tunnel and marginal line for the carrying of freight from the trunk line railroads now discharging along the Staten Island water front. It has been stated that such a line, if built, could readily be used for both passenger and freight service; and that very possibly it could be constructed from funds contributed jointly by

the railroads and the City. The cost has been estimated at about $12,000,000, so that the City's share, if such an arrangement were feasible, would not exceed $6,000,000. We [fol. 1510] are also advised by the Engineers of the Board of Water Supply that such a tunnel might be used for the carriage to Staten Island of the water mains of the Catskill system, which it is now proposed to lay in the bed of the Narrows. The saving thus effected in the cost of the water tunnel the engineers estimate at $1,000,000, if the line is available within three or four years. A very substantial premium is thus placed upon proceeding promptly with a Staten Island connection. We recommend that the City allow at least $5,000,000, over and above the amounts saved, as its share of the cost of a projected tunnel to Staten Island, to be connected with the 4th avenue subway. A general communication on this subject from the President of the Borough of Richmond is attached hereto (Appendix XVIII).

Immediately following the settlement of the general question submitted, we should be prepared to take up the definite working out of the layout of the lines serving South Brooklyn, Staten Island and Coney Island.

Conclusions of the Conferees

Throughout their deliberations the conferees have been in agreement that the policy of the City in dealing with the transit situation should embody these principles:

I. That future rapid transit lines should follow as closely as possible the development of a logical and well-ordered City plan;

II. That the City should provide, as rapidly as the means at its command permit, not only for relief of congested areas, but for the opening of lines through those sections that, though relatively undeveloped, offer promising opportunity for the better distribution of population;

III. That the location of particular routes should be determined by the City, for the City's reasons, and not necessarily to conform to plans proposed by operating companies;

IV. That the occupation of lines in the hands of private operators should be kept within the City's control, and that the City should always have the power to retake the component parts of a system capable of independent operation at any time that it may deem such a measure necessary.

V. That where a proper measure of control can be maintained, it is good policy and correct economy to utilize and extend the facilities offered by existing rapid transit lines already at the service of the City, rather than to reduce the uses of such lines through wasteful competition.

VI. That the available funds of the City should be used for new construction work and placed where they will aid best in preserving the City's strategic position.

VII. That the City should have a full and fair share in all profits derived from the operation of new lines; not only as a matter of the rightful enjoyment of the fruits of its own franchises, but as a means of hastening the release of its self-supporting investments from the constitutional debt [fol. 1511] limit and of the construction of additional transportation facilities;

VIII. That the basis of operation, in every case, shall be such as to secure a proper contribution from the earnings of the more profitable inside or "short haul" lines to help support the less profitable or outlying lines, thus assuring to the City proper service and equitable returns from each system as a system, and not as a section of scattered routes, with the gains of those most profitable reserved for private enjoyment;

IX. That the actual operation of the lines should continue under strict control, and that the contracts for operation should embody not only the essential provisions of the Public Service act, but such other guarantees of the character of equipment furnished or the adequacy of operating service as the City may exact; and

X. That no plan should be adopted or proposal accepted that will prevent the development of the entire City as a social and economic unit or hinder the logical extension of transportation facilities in the future.

In considering the present transit situation of the City, and the alternatives developed in the course of these negotiations, the conferees have not only given attention to the vast amount of underlying detail, but have kept constantly in mind the relation of the several propositions involved to the principles above set forth.

Without rehearsing further the history of the negotiations, or the points of difference between the operating offers, or between the City's representatives and the representatives of either operator, they are now prepared to recommend that the following action be taken:

Proposed Routing Terms

I. That the City construct, at its own expense, a new subway connecting with the 4th avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occasion may require, and four tracks from 9th street northward;

(d) A two-track line from 59th street easterly to and over the Queensboro bridge, then to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan bridge by way of Canal street to Broadway.

II.—That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the Com- [fol. 1512] pany's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III.—That the City construct, also at its own expense, the following two-track extensions of the bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg bridge by way of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn bridge to the Wall street district—by way of Nassau and Broad streets.

IV.—That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the bridge loop lines with their proposed extensions, in such form as to link these lines with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

V.—That the City construct, at its own expense, a new two-track subway, proceeding from Union square in Manhattan easterly under 14th street and the East River to the Eastern District of Brooklyn, and thence to a point to be later determined, and that, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI.—That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that acting upon the alternatives presented for the routing and constructing be withheld temporarily and referred back to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII.—That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of Rapid Transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West

Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th street and Southern boulevard to Westchester avenue, and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times square under 7th avenue, as extended, Varick street, West Broadway and Greenwich street to the Battery, as far as possible as a four-track road;

[fol. 1513] (d) A two-track tunnel via Whitehall street to the Borough Hall in Brooklyn.

VIII.—That if an agreement be reached upon terms, the City enter into a separate contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line;

(c) To Woodside and Corona; and (d) to Astoria.

The lines converging at the Queensboro plaza, if this contract be accepted, to be connected also by way of the Queensboro bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the construction cost of the continuous line proposed, the tunnel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX.—That, if an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

(a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern parkway to Buffalo avenue; also a two-track subway extension from the Eastern parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern parkway by way of Buffalo and Livonia avenues through the Brownsville district to New Lots road.

X.—That the cost of construction of all of the lines to be built and operated by the Interborough Company under these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI.—That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII.—That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII.—That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union square or 9th street; and that, if an agreement on terms be reached with the Brooklyn [fol. 1514] Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV.—That, if the Interborough Company fails to accept a lease for the operation of the proposed line from 42d street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro bridge.

XV.—That, if the Interborough fails to accept a lease for the operation of the Eastern parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI.—That, if a contract be made with the Brooklyn Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

XVII.—That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union square, Manhattan, and the projected Lafayette avenue line from Broadway to Flatbush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII.—That, if neither the Interborough Company nor the Brooklyn Company accepts leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so-called Triborough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX.—That the Public Service Commission, in any event, proceed to prepare and award contracts for the construction of the lines to be built and owned by the City, as rapidly as practicable, in order that work may be started immediately.

XX.—That the franchises sought by the Interborough and Manhattan companies for the third tracking and extensions of their elevated lines in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

Proposed Operating Terms

We propose that the grant of operating rights for any of the above-named lines be conditioned upon the acceptance of the following terms:

I. Rate of Fare—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II. Terms of Leases—That all contracts for the operation [fol. 1515] of lines title to which is vested in the City, whether such lines be constructed by the City or by the Company, or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company, may be leased for twenty years, with the privilege of renewal, upon an adjustment of terms, for twenty years in addition.

III. Provision for Recapture—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus 15 per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

IV. Cost of Construction—That the costs of construction, whether borne by the City or by the operator, or upon

a basis of division between the City and the operator shall be the cost in money and shall include:

(a) All contracts for original construction work, or
(b) For station finish;
(c) All carrying charges during construction;
(d) Engineering expense;
(e) Extras and damages;
(f) Real estate and easements; and
(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V. Division of Profits—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of:
(a) The value of the tickets collected at stations;
(b) Miscellaneous earnings from stations;
(c) A pro-rata of advertising and other general receipts.

The fixed cost of operation shall include:
(a) Station expenses;
(b) Maintenance of way and structure;
(c) Damages for accidents; and
(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;
[fol. 1516] (f) Maintenance of equipment, renewals and depreciation;
(g) Cost of power;
(h) General and administration expenses; and
(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charges of the operator for carrying the cost of equipment; with provision for a sinking

fund not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs of construction or costs of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum.

Provided—

4. That if the gross income in any year, after providing for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the deficit for such period shall be borne by the operator solely; and

Provided further—

5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI. Operation of Extensions—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall be governed by and included in all of the general pro-

visions of the contract with relation to operation and the division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

[fol. 1517] (c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII. Supervision of Contracts and Accounting—That the right be retained, through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in such profits are based.

Terms Applying to the Interborough Company

We propose that any contract made with the Interborough Company shall, in addition to the general terms prescribed, include the following:

I. Leveling of Leases—That, as part consideration for the lease of new lines for the fixed period of 49 years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases from its existing lines so that these shall expire coterminously, 49 years from the beginning of operation of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the Company, through its right of 25 years renewal, would remain in possession until 1979. The lease of Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with, the renewal period, in 1968. Under the leveling process, all of the leases, new and old, revert to the City in 1964.

H. Exchange of Lower Manhattan Lines—That, as further consideration for the lease of new lines, the Interborough Company consent to the modification of Contracts Nos. 1 and 2 so as to provide that the City at any time after ten years may, if it so elects,

(a) Take over that portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn; or

(b) That portion of the existing subway running northward from 42d street to 96th street, with its Van Cortlandt Park and West Farms extensions; the company in such event to receive in exchange a lease upon either

(a) The 7th avenue line, from 42d street south to Borough Hall, Brooklyn; or

(b) The Lexington avenue line, from 41st street to The Bronx, with its projected extensions, for the balance of the term of forty-nine years from the beginning of operation as herein defined.

—the purpose of this clause being to give the City the right to take over a continuous north and south line, if it so desires, at any time after ten years, giving the company in exchange a continuous line under the conditions of its present lines, and to reserve to the City the option of taking whichever of the two lines may better suit its needs and purposes under the conditions that may exist when the [fol. 1518] exchange is effected; also

That in the event of an exchange the respective values of each extension affected shall be appraised on the basis of the earning capacities at the date of appraisal; the difference in value, if there be any as so determined, to be adjusted by the payment by the City to the company of any excess found in favor of the lines taken over by the City, or payment by the company to the City of any excess in value found in its favor; the company, in any event, to reserve trackage rights for the elevated trains from White Plains and Jerome avenue lines and the right to connect the southerly end of its Lenox avenue extension, under the terms of Contract No. 1.

Provisions to be embodied in the contract that will enable the City to take either line subject to any mortgages now liens thereon, or to compel the company to assign its rights to a third party designated by the City; the com-

pany to co-operate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract.

III.—Purchase of Existinig Lines—That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment to the company of the sum equal to the company's aggregate estimated profits for the unexpired portion of the lease, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization.

Terms Applying to the Brooklyn Company

We propose, further, that any contract made with the Brooklyn Company shall, in addition to the general terms prescribed, include the following:

I.—Earnings of Existing Lines—That, in lieu of all earnings on its existing lines, the company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated to be pooled with the receipts of the City-built lines, for distribution in accordance with the general terms agreed upon.

II.—Leased Lines—That the company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now holds under lease, and that no allowance be made under [fol. 1519] the head of operating expenses for further rental of any of such leased lines.

III.—Examination of Plant—That the company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or current earnings to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before the lines pass into the proposed new system.

IV.—Management—That the entire system of subways and elevated lines shall be under the management of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commissions Law.

Terms Applying to the Manhattan Elevated Lines

We propose that any contracts made with the Interborough Company and the Manhattan Company for extensions to and third tracking rights upon the lines of the Manhattan Company shall include the following terms:

I.—That the net profits upon all the elevated lines operated by the Interborough Company, in excess of the average net profits for the two years from July 1, 1899, to June 30, 1901, proper deduction having ben made for depreciation, shall be divided equally between the company and the City.

II.—That the City shall have the right to take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another operator; such operator to pay the amount specified in the certificates to the Interborough Company direct.

III.—That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV.—That the payment to be made for equipment, in the event of recapture, shall be fixed with due regard to its then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V.—That the rate of fare shall not exceed five cents.

Results the City Should Secure

If the course of action we propose meets with the approval of the Board of Estimate and Apportionment, the result, in our judgment, must be a solution of the transit problem that will conform with the general principles we have set forth, and that will permit an early start upon a comprehensive system of rapid transit lines meeting the needs of the City for some time to come.

It would add to that part of the City's system at present operated by the Interborough Company every line embraced in the company's offer of December 5, 1910, except.

(a) The Lafayette avenue line in Brooklyn, which, although a necessary line under certain circumstances, the conferees believe should be withheld until it is apparent [fol. 1520] whether or not a sufficient measure of relief is secured to the Eastern District through the other new lines proposed; and

(b) The Fourth avenue line, which the company did not seek, and which it has declined to operate upon any other basis than an assumption of all operating losses by the City.

It would link with the present system of the Brooklyn Rapid Transit Company all of the lines embraced in that company's proposition of March 2, except the Eastern parkway line.

It would add to the Interborough system, in addition to the lines originally proposed by the company.

(a) The Proposed new Manhattan-Queens lines running easterly from Times square by way of the Steinway tunnel to the Queensboro plaza and branching to Astoria and Corona;

(b) The further extension of the Jerome Avenue and White Plains road lines;

(c) The further extension from the Eastern parkway through Nostrand avenue and Livonia avenue in Brooklyn.

It would add to the Brooklyn company's system, in addition to the lines originally proposed:

(a) The line from Union square, Manhattan, to the Eastern District; and

(b) The projected tunnel line to Staten Island.

It would add, in all, 87 miles of new rapid transit railways to the City's present system, and would carry all but a slight percentage of the passengers of rapid transits lines, to their normal destination, for a five cent fare.

The City's Control

If the adjustment that we propose is adopted, there will be six systems of new lines subject to recapture separately by the City after ten years, and susceptible of rearrangement in any future combination of lines for independent operation that the City may choose to make. These groups would be:

(a) The Lexington avenue and 7th avenue lines of the Interborough system, with their north and south extensions, which would be subject to recapture for independent operation either through the building of a new crosstown line between 34th and 40th streets, reversing the route of the present lines, or through the exercise of the City's right to exchange the parallelling sections of the system south of 42nd street;

(b) The Queens-Manhattan lines through 42d street and under the East River to Astoria, Woodside and Corona;

(c) The Eastern parkway line, with its extensions, in Brooklyn;

(d) The Broadway (Manhattan) and 4th avenue (Brooklyn) system, running from Queens through the heart of Manhattan to Brooklyn, and branching into South Brooklyn, Coney Island and Staten Island;

(e) The Bridge Loop lines, with their control of the Brooklyn elevated system; and

[fol. 1521] (f) The line from Union square under the East River and through the Eastern District to the populous centres about East New York and Ridgewood.

With all of these strategic links subject to the control of the City, either through the exercise of the right of recapture, or through the transfer of leases from one operator to another, it is difficult to believe that the City will be unable to maintain a mastery of the rapid transit situation of the future.

The Estimates of Future Traffic

It has been urged that the linking of the Brooklyn system with the projected Broadway line—upon which the plan for the broader relief of Brooklyn depends absolutely—would result in a reduction of the present revenues of the Interborough Company to a point that would forbid the carrying of its own proposed new lines. We believe, however, that fears of this sort are without basis. The conferees have accepted throughout their consideration of the matters before them estimates of future traffic prepared, from every available source, by the statisticians of the Public Service Commission. The figures of the past show that street railway traffic generally in New York City increases in the ratio of the square of the increase in population. Even if future growth falls beneath this rate, it is certain, at least, to increase at a rate not less than double the rate of increase of population—provided, of course, that additional rapid transit facilities are available. The rate of increase in the current decade (1910-1920) has been estimated variously from 38.7 per cent. (the rate in 1900-1910) to 45 per cent. No one has estimated it at less than 35 per cent.

With these conservative figures as a basis, it is assumed that the traffic of the next ten years will increase not less than 70 per cent. which would mean that the traffic of 1920 would give the rapid transit lines 1,000,000,000 additional five-cent fares annually. The experience of the Manhattan surface lines, as shown in the tables bearing upon this point (Appendix XV.) indicates that practically all of this increase is likely to accrue to the new lines. This would mean an advance, at the end of ten years, of at least $50,000,000 annually in the gross receipts; indicating the ability of the traffic of ten years hence to carry an investment of $333,000,000 over the investment in the present rapid transit lines.

The conferees have recognized that the revenues derived from the growth of the future will be distributed through all parts of the extended system; but they have no doubt that the share falling to the short haul district—as well as the contributory yield of the long haul lines they are planning to link with the short haul district—would be amply

sufficient to carry not only the new Manhattan lines of the Interborough Company, but the proposed line on Broadway. The Interborough Company's earnings upon its investment in the present subway are between 17 and 18 per cent. The figures of the Public Service Commission indicate that, although the percentage of profit on all the old lines must, of necessity fall temporarily within the first [fol. 1522] years of operation of the new, the margin remaining to the Interborough Company would be ample to carry its present investment.

The City's Financial Ability

In dealing with the financial considerations underlying the general plan proposed, the conferees have kept in mind not only the probable traffic yield of the future, but the ability of the City to carry its part in the furnishing of funds for construction.

Upon the basis of figures furnished by the officials of the City, the amount of available credit, above the constitutional margin of indebtedness, during the next five years will be as follows:

Cost of the New Lines

Margin on June 30, 1911, general	$15,000,000 00
Special credit for transit purposes on June 30, 1911, reserved under the recent constitutional amendment exempting self-supporting investments	60,000,000 00
Ten per cent. of the additional assessed valuation of the City, becoming effective July 1, 1911	80,000,000 00
Ten per cent. of the estimated increase of assessed valuation during the four years following	120,000,000 00
Proportion of the current City debt paid annually through taxation	50,000,000 00
Total	$325,000,000 00

Allowing a deduction of $25,000,000 to take care of uncollectible taxes to be balanced, under a recent statute,

through the issue of bonds, this would leave $300,000,000 for all purposes, including subways. We are advised also that, in addition to the $60,000,000 reserved specially for subway investments, would be, therefore, $113,200,000; and, from this sum, for use during the next five years.

The estimates of cost of the lines at present projected, prepared by the Public Service Commission's engineers, are given in full in Appendix VI. They show that the total cost of the lines that would be constructed by the City for operation by the Brooklyn Company would be $58,400,000—in addition to $27,800,000 already contracted for or spent by the City for lines under construction—and $26,400,000 to be expended by the company—a total of $112,600,000.

They show that the lines to be constructed for the Interborough Company—if an allowance of $3,000,000 be included for the Belmont tunnel—would cost $109,600,000, half of which amount—or $54,800,000—would be borne by the City and half by the Company.

The total amount of money that the City would be called upon to invest in the new lines, in addition to its present subway investments, would be, therefore, $113,200,000; and, if there be added the allowances proposed for the South Brooklyn lines—$10,000,000—and allowances for real estate, the City's share of which is estimated at $8,000,000—the outlay in view would be $131,200,000.

[fol. 1523] The Interborough Company figures, in addition, an aggregate of $21,000,000 for new equipment, and the Brooklyn Company $24,000,000.

The total outlay, exclusive of real estate, which cannot be estimated definitely, would be, if all lines are included:

	Construction	Equipment	Total
By the City	$123,200,000 00		$123,200,000 00
By the Interborough	54,800,000 00	$21,000,000 00	75,800,000 00
By the Brooklyn Company	26,400,000 00	24,000,000 00	50,400,000 00
			$249,400,000 00

It is not proposed, however, that construction work calling for all of this outlay would or could be commenced at once; nor would it be possible to enter into contracts during the coming year that would call from the City for more than $80,000,000.

The estimates submitted by the companies (Appendices VII. and VIII.) are somewhat higher than those of the Commission; due, no doubt, to varying bases of calculations; the Interborough Company including, for instance, an allowance of 20 per cent. for extras upon all of its construction work, as against 5 per cent. figured by the Commission's engineers.

If the Interborough Company fails to accept the leases proposed for it, the total cost to the City for carrying a comprehensive system operated by the Brooklyn Company would be not more than $10,000,000 in addition to the figure indicated as the aggregate of the City's share of the separate systems.

It would appear, therefore, that the carrying out of the plan we propose, as well as the adoption of any of the alternatives offered, would be well within the City's means; and that there is no reason why a start upon actual construction should not be made immediately after the decisions of the Board of Estimate and Apportionment have been reached.

While concurring in the general findings and recommendations of this report, Commissioner Maltbie remains of the opinion that the construction of a complete system wholly from public funds, and leased as a unit to an operating company under the ten-year recapture plan provided in the Rapid Transit Act, would, in his judgment, "give to the City greater control over the transit situation of the future and afford the needed relief from present congestion at an earlier date."

We have included in the appendices to the report tables showing in addition to estimates of cost, the relative mileage of the systems of operation proposed, the relative areas served for a five-cent fare by each of the lines projected and the aggregate of such service under the pending proposals, the comparative mileage of routes and trackage under pending proposals upon which the City would share profits, the legal status of the proposed new routes, and the probable periods of duration of construction work; be-

lieving this method to be, perhaps, the most convenient for the presentation of these details.

Respectfully submitted.

For the Committee of the Board of Estimate and Apportionment: George McAneny, Chairman. Cyrus C. Miller, George Cromwell. For the Pub- [fol. 1524] lic Service Commission: William R. Willcox, Chairman. William McCarroll, Edward M. Bassett, Milo R. Maltbie, John E. Eustis.

New York, June 5, 1911.

1. Proposal of the Interborough Rapid Transit Company, Dated December 5, 1910, with Supplementary Letter of the Same Date

Interborough Rapid Transit Company, 165 Broadway, New York

December 5, 1910.

Hon. William R. Willcox, Chairman Public Service Commission for the First District, State of New York, Tribune Building, New York City.

Sir: At a time when the City must decide whether its capital available for subway construction shall be invested in an entirely new rapid transit enterprise, or be devoted to perfecting that system of subways the title to which is already vested in the City, it is proper that the responsible public authorities should have before them the most favorable proposal which the lessee of the City's existing subway lines, after full consideration, is able to offer. In our consideration of the subject, we have had in mind not only the routes necessary to afford an efficient service to the City, but changes in the present subway contracts and the additional obligations that the Company will be called upon to assume.

The Interborough Rapid Transit Company, therefore, begs leave to submit the following proposition:

It proposes the construction of the following natural extensions to the present subway:

West Side Lower Manhattan and Brooklyn Extension

From Times square under 7th avenue as extended, Varick street, West Broadway, and Greenwich street to Liberty street as a four-track road, and from Liberty street to the Battery as a two-track road, with a branch from the intersection of Greenwich street and Liberty street, under Liberty street and East River to Pineapple street in Brooklyn, and under Pineapple and Fulton streets to a connection with the Brooklyn extension of the existing subway, as a two-track road; with a further extension from the terminus of the Brooklyn extension of the existing subway at Atlantic avenue under Flatbush avenue and Eastern Parkway to Utica avenue as a four-track road, and from Utica avenue to Buffalo avenue under Eastern Parkway as a two-track road; also a two-track extension from the existing subway at Lafayette and Flatbush avenues, Brooklyn, under Lafayette avenue to Broadway.

East Side Upper Manhattan and Bronx Extensions

From about 35th street and Park avenue, under Park avenue and private property at or about 42d street to Lexington avenue, thence under Lexington avenue and the Harlem River to a point south of 149th street as a four-track road; thence dividing with two tracks to a connection, east [fol. 1525] of Mott avenue station, with the West Farms branch of the existing subway; thence two tracks under Mott avenue, 153d street, and River avenue, to 157th street, and from 157th street over River avenue to about 162d street as an elevated structure. At 162d street and River avenue a connection will be made with the Jerome avenue extension of the 9th avenue elevatd line of the Manhattan Elevated Railroad.

A two-track subway extension, diverging from the proposed Lexington avenue extension at about 138th street, and running thence under private property, 138th street, Southern boulevard and Whitlock avenue, to a point in private property south of Westchester avenue; thence as a three-track elevated railroad over Whitlock avenue and Westchester avenue to Pelham Bay Park.

A two-track elevated extension from the West Farms division of the present subway at about 179th street, over

private property to a point between Bronx Park and the property of the New York, Westchester and Boston Railway Company; thence north over private property and public streets to Bear Swamp road and White Plains road; thence over White Plains road to a connection with the proposed extension of the 3d avenue line of the Manhattan Elevated Railroad at a point north of the intersection of White Plains road and Gun Hill road.

The cost of constructing and equipping the foregoing lines is estimated at $128,000,000. The Interborough Company hereby offers to build and equip the same for the sum of $53,000,000, to be furnished by the City, the City to provide in addition the necessary easements and rights of way, and the Company to supply the funds necessary to defray the additional cost of construction and equipment, which, upon the basis of the above estimate, would amount to $75,000,000. The work will be done as "extras" under the terms of the rapid transit contract of February 21, 1900, under which the original subway was constructed and is operated, except so far as the terms thereof may be modified by the provisions of this offer; and the lines when constructed and equipped will be operated by the Interborough Company as parts of the existing subway system, with a single five-cent fare and free transfers, upon the following terms:

1. The net profits from operations, to be arrived at as hereinafter provided, shall be disposed of as follows:

(a) The City to take all net profits for the first five years from the time of beginning operations on any portion of the new subway extensions;

(b) The net profits after five years to be equally divided between the City and the Interborough Company.

2. The net profits shall be determined by deducting from the gross revenue of the extensions charges for the following items, in the order named:

(a) Maintenance of equipment, including an allowance for depreciation;

(b) Maintenance of ways and structures, including an allowance for depreciation;

[fol. 1526] (c) Traffic expense and cost of conducting transportation;

(d) General and administration expenses;

(e) Taxes, if any;

(f) The actual annual charges of the company for carrying the cost of equipment and providing a partial sinking fund of three-fourths of 1 per centum per annum to meet obsolescence, and for carrying that portion of the cost of construction, not met by the funds contributed by the City and providing a sinking fund of 1 per centum thereon;

(g) Interest on bonds issued by the City to defray the cost of construction, plus 1 per centum per annum as a sinking fund.

3. The gross operating revenue of the new extensions shall be ascertained from the number of tickets sold at the stations along the new extensions, or, if deemed advisable by either the City or the Company, from the number of tickets deposited in the chopping boxes on the new extensions of by such other method as upon full consideration may be agreed upon between the parties.

4. If the gross income in any year after providing for the charges above mentioned shall be insufficient to meet the interest and sinking fund upon the construction and equipment bonds issued by the Interborough Company, the deficit for such period shall be borne by the Interborough Company, and shall not be a cumulative charge against future earnings.

5. If the gross income in any year, after providing for all charges above mentioned, including interest and sinking fund upon bonds issued by the Interborough Company to defray the additional cost of construction and equipment, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained by the City for such period shall accumulate and be a charge against the future profits before any division thereof shall be effected between the City and the Interborough Company.

6. The City will retain the right, now provided for by law, to take over the extensions at any time after ten years from the time that any portion thereof may be put into operation, upon paying to the Interborough Company, (a) the amount of its investment in construction over and beyond the $53,000,000 supplied by the City, plus 15 per

centum, which sum shall decrease as the term continues, so that at the end of the full term of contract under which the said extensions may be built as extras no amount will be required to be paid by the City, and (b) the then reasonable value of the equipment.

If this proposition be accepted, we are prepared to immediately enter into contracts to carry the same into effect. After public bidding, the contracts will be awarded by us under the supervision of your Commission to responsible bidders for the construction of the lines in sections; and construction work thereupon will be commenced in each Borough and upon all sections at once. Each part of the road as completed will be immediately opened for operation, so that the outlying territory in Brooklyn and The Bronx will have the earliest possible relief, and all other lines will be hurried to completion within an estimated period of five (5) years.

[fol. 1527] We have considered your suggestion that the present subway cases should be so altered that the terms thereof and of all extensions thereto operated by the Interborough Company should end at the same time. Contract No. 1, under which the Manhattan portion of the subway was built, provides for an original term of fifty years, with the right to renewal for additional term of twenty-five years. Contract No. 2, under which the line from the City Hall Park to Flatbush avenue in Brooklyn was built, provides for an original term of thirty-five years, with the right to renewal for an additional term of twenty-five years. We are willing, if it can be legally arranged, that these contracts should be so modified that the original terms thereof and of all extensions built as extras under Contract No. 1 should be fixed at forty-nine years from the date of the completion of the extensions, and that the privilege of the renewal terms of twenty-five years should be cancelled.

The Interborough Company also offers to equip and operate, under a lease for a term equal to the unexpired term of Contract No. 1, under which the original subway was built, the Fourth Avenue Subway in Brooklyn, including extensions to Fort Hamilton and Coney Island, when completed, as part of the present subway system, for a single five-cent fare, upon the following terms:

The gross earnings of the 4th avenue division, of which a separate account shall be kept between the City and the Interborough Company, shall be ascertained from the tickets deposited at the stations upon the division.

From the gross earnings thus ascertained shall be deducted:

1. (a) All station expenses;
   (b) Maintenance of way and structures;
   (c) Damages for accidents happening on the division.

2. Other operating costs to be determined according to unit costs on the Interborough's system, upon a car-mileage basis;

   (a) Conducting transportation;
   (b) Maintenance of equipment and depreciation;
   (c) Cost of power;
   (d) General and administration expenses;
   (e) Taxes, if any.

3. After the payment of the foregoing charges, the actual annual charges of the Company carrying the cost of equipment and providing a partial sinking fund of three-fourths of 1 per centum per annum to meet obsolence.

4. From the balance of the income then remaining shall be paid interest and sinking fund upon bonds issued by the City to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid annually by the City, but that portion thereof which represents payments made by the City upon bonds issued by the City as hereinbefore provided for shall accumulate and be [fol. 1528] a charge against future profits, before any division thereof shall be effected between the City and the Interborough Company.

5. The net profits remaining after providing for the foregoing charges shall be equally divided between the City and the Company

The right will, of course, be reserved by the City, under existing provisions of law, to supervise accounts relating

to construction and operation, and to terminate the lease after ten years.

In the event that the foregoing propositions be accepted and incorporated in formal contracts, the Interborough Company will further agree, upon the same terms and conditions as hereinbefore set forth with respect to the operation of the Fourth Avenue Subway, or upon such other terms as may be agreed upon between the City and the Company, to operate such additional extensions to the system herein outlined as may hereafter be constructed by the City; provided, however, that the Interborough Company shall not be called upon to operate any extensions the operation of which would result in a financial loss to the company, unless the City shall undertake to make good such loss.

The proposition herewith submitted is believed to embrace the following advantages over any other now before the City:

1. Citizens of Brooklyn, Manhattan, Queens and The Bronx may be transported upon the enlarged subway system, which may best be described as a four-borough system, to any point, including the shopping and theatre districts of Manhattan, for a single five-cent fare; whereas, under any other plan, to obtain a similar advantage in almost every case an additional fare of five cents would be required.

2. The extensions proposed can all be completed within a period of five (5) years from the time when the right to begin construction is given; whereas, under any other plan now before the City, a longer period for actual construction would not only be required, but the final completion would be further delayed by the inadequacy of the City's debt margin.

3. The plan above set forth is the only plan which limits the City's contribution to subway construction to the funds which the City now has available for subway purposes; thus leaving free for additional extensions, or for such other purposes as the City may determine upon, the funds which will be available in each succeeding year.

4. The City, under the plan proposed, would have in operation a harmonious subway system, with a through four-

track line upon the East Side and a through four-track line upon the West Side of Manhattan, with suitable extensions to The Bronx and Brooklyn; whereas, under any other plan now under consideration, the City would have a duplication of rapid transit service upon the upper and lower East Side of Manhattan, the present single line only upon the up-town West Side of Manhattan, and no rapid transit line at all upon the West Side down-town section of Manhattan.

5. If competition with the Interborough Company be the prime consideration, it is believed that by the construction of the proposed extensions the City will be in a position to establish an independent competitive line at an earlier date than would be possible. Under recent provisions of [fol. 1529] law the West Side down-town extension and the East Side up-town extension in Manhattan, together with The Bronx and Brooklyn extensions, could be taken over after ten years from the time when the lines or any part thereof were put into operation. By the construction of a short cross-town line between 7th avenue and Lexington avenue, in the vicinity of either 34th or 42d streets, the City would then possess upon the island of Manhattan a subway system which would be the exact reverse of the subway system now operated by the Interborough Company, with the additional advantage of more comprehensive extensions to parts of Brooklyn and The Bronx, which in the meantime, by reason of these very extensions, will have developed into profitable territory.

It can hardly be expected that within an equal length of time the City's credit would so expand as to enable it to complete an entirely independent system to a point where it would furnish the City with equal competitive advantages. It is suggested, however, that the advantage of competition is not so apparent in the case of City subways as in other avenues of transportation. The usual advantages of competition are a reduction of transportation charges and an improvement of service. But there is no prospect, so far as fares are concerned, that for so extensive a service as would be furnished by either rapid transit system now under consideration less than five cents would ever be charged; nor is there any prospect that the present five-cent fare upon the existing system would ever be

increased. Upon the other hand, so far as service is concerned, the Public Service Commission is vested with full powers of supervision, and can enforce by direct order the performance of that efficient service which, under other circumstances, is produced only as the result of active competition.

In conclusion, the Interborough Company begs to refer to its proposition to complete the third track upon its elevated system and to build certain elevated extensions in The Bronx, to be operated in connection therewith, and to complete and put in operation as a part of the subway system the so-called Belmont tunnel, which proposition has received the approval of your Commission. The cost of carrying out the elevated improvements is estimated at $32,000,000, all of which will be furnished by the Interborough Company. The Belmont tunnel when completed will represent a total investment of approximately $10,000,000, all of which, likewise, except $1,500,000, to be contributed by the City toward the completion thereof, will have been furnished by the Interborough Company. It will therefore be perceived that the contribution which the Interborough Company proposes to make from its funds towards the establishment of a well-rounded rapid transit system in this City, approximates a total of $107,000,000, against a contribution of $53,000,000 on the part of the City.

Respectfully submitted.

Interborough Rapid Transit Company, (Signed) by T. P. Shonts, President.

(Copy.)

[fol. 1530] Interborough Rapid Transit Company, 165 Broadway, New York

December 5, 1910.

Dear Sir: Referring to our proposition relative to subway extensions sent you to-day, I think you understand from our personal conferences that this subway proposition, the same as all of our previous ones, is predicated upon the acceptance by the City authorities of the offer of this Company covering the elevated improvements and the completion and operation of the Belmont tunnel, although

the latter proposition is not in any way dependent upon this subway offer. I find upon re-reading our letter of even date, I did not mention this fact therein, and in order to prevent any misunderstanding am writing this note calling your attention to it, and also reminding you that our understanding with the bankers is also based on this view of the matter. Inasmuch as your Commission has already approved our elevated offer, we assume that the same will be accepted by the Board of Estimate and Apportionment as well, and that, therefore, the condition herein referred to has practically been complied with. Respectfully submitted,

Interborough Rapid Transit Company, (Signed) by T. P. Shonts, President.

Hon. Wm. R. Willcox, Chairman, Public Service Commission, New York City.

II. Proposal of the Interborough and Manhattan Companies, Dated June 10, 1910

Interborough Rapid Transit Company, 165 Broadway, New York

June 10, 1910

Dear Sir: Our further study of the rapid transit situation in this City pursuades us that with the greatest despatch upon the part of the City authorities consisent with duty, some time must yet elapse before the actual construction of new subways can be commenced, and that it cannot reasonably be expected that such subways will be available to relieve the traffic congestion of this city within a period of from at least five or six years from the present time. This circumstance, the ever increasing pressure upon the existing subway and elevated lines, particularly the excessive crowding upon the East Side elevated roads, and the passage by the recent Legislature of a bill which, if approved by the Governor, will enable the improvement of the elevated lines to proceed without undue delay incident to the settlement of property damages, lead us to now propose the construction of the following elevated railroad improvements:

1. Second Avenue Line

The completion of the third track from City Hall station to 129th street.

Queens County Extension—The construction of a two-track extension from the 2nd avenue elevated line across Queensboro Bridge to the Queensboro Bridge Plaza. The extension when constructed will enable us to operate through elevated trains from Long Island City to Brook-[fol. 1531] lyn Bridge and South Ferry, and afford the citizens of Queens the benefit of free transfers, upon the payment of a single five cent fare, to all parts of the elevated system in Manhattan and The Bronx.

2. Third Avenue Line

The completion of the third track from Pearl and Chambers streets to about 147th street, with the privilege of thereafter extending the third track to the present terminus of the 3d avenue line at Bronx Park. This extension involves the construction of a new bridge across the Harlem River, and, because of the junction at the Harlem River with the 2d avenue line, the construction of a four-track line between the Harlem River and 145th street.

We propose to build at this point, through private property and public streets, not at present occupied by elevated structures or covered by any franchises, a two-track connection from about 143d street, through Willis and Bergen avenues, to a connection with the West Farms division of the subway at or about Brook avenue. This connection will enable a diversion of West Farm trains to the 2d and 3d avenue line, and will relieve the pressure upon the Broadway and Lenox avenue divisions of the subway.

Becker Avenue Extension—The extension of the 3d avenue line from Pesham avenue through Webster avenue, Gun Hill road and White Plains avenue to Becker avenue as a two-track line, with the privilege of hereafter building a third track from the intersection of White Plains avenue and Gun Hill road to Becker avenue, in order to provide for the better terminal facilities that will be essential to the satisfactory operation of the enlarged elevated system.

3. Ninth Avenue Line

The completion of the third track from Rector street to 155th street.

Jerome Avenue Extension—The construction of a two and three-track elevated road from about 149th street and 8th avenue across Macombs Dam Bridge to about 162d street and River avenue, thence up River and Jerome avenues to about 194th street, with the privilege of hereafter constructing a third track between 162d and 194th streets. The portion of this line from 162d street and Jerome avenue north may either be built as an elevated extension to be jointly used by the new East Side subways, or may be built by the City as a subway extension under a traffic agreement whereby it may be used by the elevated road. If built as a subway extension, work should be first begun upon it, so that the structure would be completed in time to operate in connection with the other elevated improvements hereinbefore referred to.

The cost of the construction and equipment of the above extensions may be roungly estimated at approximately $30,000,000, and this, of course, will be entirely borne by the Manhattan Railway Company and its lessee, the Interborough Rapid Transit Company, with the possible exception of that part of the Jerome avenue line north of 162d street. In view of the very heavy special franchise taxes already paid by the Manhattan Company, aggregating on [fol. 1532] the basis of the last assessment $46,000 a mile, the cost of acquiring additional easements from abutting property owners over virtually the whole system; the circumstances that this new franchise must be largely confirmatory of what are apparently valid and surviving grants already possessed by the Company; and that the construction of the third tracks will not occupy any substantially greater portion of the surface of the streets than is now occupied by the existing structure; it would seem only fair that your Commission should fix the rental for the proposed new third tracking grant at some very moderate sum, certainly not exceeding two per centum of the increased receipts from stations served by the new third track.

If the enabling act now before the Governor shall be approved and our present proposition should be accepted we should expect to begin work at once. The advantages

of allowing us to immediately proceed may be summarized as follows:

(a) The third-tracking improvements can be put into service in approximately two years, thus bringing a by no means inconsiderable rapid transit relief to the City within at lease three years less time than can be obtained by subway construction.

(b) The pressure upon the 3d avenue line, the travel on which is now more congested than upon any of the rapid transit lines in the City, will be relieved.

(c) If the third track be completed upon the 2d and 3d avenue lines, it will be possible to divert a considerable number of the trains now using the West Farms division of the subway of the 2d and 3d avenue lines. This in turn would give a superior rapid transit service to citizens of The Bronx, and would at the same time enable this Company to materially increase the train movement on the Upper Broadway division of the subway; improve the congested conditions along Lenox avenue; and thus give a more efficient service to the upper portion of Manhattan.

Steinway Tunnel

We are aware that in our earlier conferences you urged upon us the desirability of putting the Steinway Tunnel in operation at the earliest possible moment; and that many months ago we assured you that we would be glad to do so if proper legislation could be obtained. There was passed at the recent session of the Legislature a bill, now awaiting final approval, which will make possible the operation of this tunnel. If pursuant to the terms of this act, a satisfactory franchise can be obtained from the City authorities for its operation, we propose, in addition to the foregoing elevated improvements, to complete the construction of this tunnel and to operate it as a part of the existing subway, with open communication between the tunnel and the subway system at or near the Grand Central Station. An additional line of rapid transit communication will thus be established, with free transfers upon the payment of a single five cent fare, between Long Island City and all parts of Greater New York reached by the existing subway lines.

[fol. 1533] We would suggest that you kindly arrange for as early a conference as possible to act on this application.

Very respectfully, T. P. Shonts, President.

Hon. William R. Willcox, Chairman, Public Service Commission for the First District, State of New York, Tribune Building, New York City.

3. Proposal of the Brooklyn Rapid Transit Company, Dated March 2, 1911

Brooklyn, N. Y., Office of the President

March 2, 1911.

Hon. William R. Wilcox, Chairman, Public Service Commission for First District, 154 Nassau street, New York:

Dear Sir: The subway situation, as reflected by public and official discussion, may be sized up above as follows:

1. That there is a very outspoken and persistent sentiment, particularly in the Borough of Manhattan, for an independent subway route.

2. That there is an equally determined sentiment in favor of reasonable extension of existing subway lines in Manhattan and from Manhattan into the Boroughs of The Bronx and Brooklyn, this sentiment particularly favoring an extension of the present subway north of 42d street on Lexington avenue, and south of 42d street on 7th avenue.

3. That there is a stronger sentiment in Brooklyn for subway extensions from Manhattan into Brooklyn than there is any possibility for many years of satisfying with any employment of either municipal or private funds, and in consequence there is a natural reluctance, both on the part of the City and on the part of the operators of the existing subway, to assume the almost certain financial loss which would follow such extensions.

4. That there is widespread sentiment, both in Brooklyn and Queens, that the people of those Boroughs should be carried from Brooklyn and Queens to points within reasonable limits in Manhattan for no additional fare.

5. That the great expense of modern subway construction (requiring the carrying of fifty times as many passengers to pay interest on the cost as must be carried on a surface railroad, and probably five times as many passengers as are necessary to pay interest on the cost of an elevated railroad) makes it imperative that either municipal or private funds should be invested only where the investment will furnish facilities for the greatest number.

Assuming that we have correctly diagnosed the present situation, and with the desire to the extent of our opportunity and ability to assist in the proper solution of the problem, we submit for the consideration of your Commission and of that of the Board of Estimate and Apportionment a plan, which, in our judgment, will harmonize existing differences of opinion, and, taking things as we find them (including mistakes of the past on the part of the City and of the transportation companies, all, nevertheless, representing capital invested in good faith) will give to [fol. 1534] the people of all boroughs the immediate relief which they most need, and present a scheme of transportation, which, in addition to satisfying present demands, may be gradually extended to meet all reasonable requirements of the future.

In general, we propose:

1. That the desired extensions through Manhattan and The Bronx of the present Interborough system on the East Side, north of 42d street, and on the West Side, south of 42d street, be allowed.

2. That a new subway be constructed in Manhattan from the Battery to 59th street, via Church street, Broadway and 7th avenue, with an extension eastwardly on 59th street to a connection with the Queensboro Bridge, through which subway passengers on all of our existing rapid transit lines in Brooklyn and Queens, and on proposed extensions, subway and elevated, may be carried either without change of cars or by transfer, as traffic conditions demand, without additional fare.

3. That an additional tunnel be constructed under the East River, from the vicinity of the Battery to Brooklyn, connecting both with the proposed new subway in Man-

hattan and with the subway lines in Brooklyn, now under construction, and others to be constructed.

The accompanying map indicates the manner of carrying out the above plan. It involves:

In Brooklyn

(a) The 4th and Flatbush avenue subway, now under construction from Manhattan Bridge to 43d street, connected at or near its southerly terminus with four rapid transit lines, extending southward and eastward, of which one will be the extension of the 3d avenue elevated to Fort Hamilton, another, a four-track elevated on New Utrecht avenue, from 39th street to 62d street, with a double-track elevated extension over the old West End route to Coney Island, a third will be a three-track elevated on the Sea Beach right of way from 62d street to Coney Island, and the fourth will be a double-track elevated railroad on the old Culver route from 10th avenue to Coney Island—including the elimination of present or future grade crossings on all of these former steam railroads.

(b) A proposed tunnel under New York Bay, between the 4th avenue subway and Staten Island.

(c) A four-track subway on Flatbush avenue, from a connection with the 4th avenue subway, easterly to Park Circle, thence separating into two branches, one branch being a two-track subway on Flatbush avenue to a junction with the Brighton Beach railroad, entirely reconstructed as a four-track railroad, and the other branch being a two-track subway, eastwardly, on Eastern parkway to Pitkin avenue, thence a two-track elevated railroad to a connection with the former Kings County Elevated tracks at Snediker avenue.

(d) An extension of the Kings County Elevated Railroad from old City line eastwardly through the Borough of Queens to Jamaica as a two-track elevated railroad.

[fol. 1535] (e) A third track on the Fulton street elevated from Brooklyn Bridge to East New York.

(f) A third track on the Broadway elevated from Williamsburg Bridge to East New York.

(g) A connection between the Myrtle avenue elevated railroad and the Broadway elevated railroad, and a third track on the Myrtle avenue elevated railroad from Broadway to Ridgewood.

(h) The elevation of the Lutheran Cemetery railroad from Ridgewood to Fresh Pond road with three tracks.

(i) A new elevated railroad from the Williamsburg Bridge up Grand street to Leonard street, northwardly on Leonard street and Manhattan avenue to Newtown Creek, thence over Newtown Creek and on Jackson avenue to a connection with the Queensborough Bridge. (It might be desirable to choose different streets for a portion of this route.)

In Manhattan

(a) The construction of a subway on Church street and Broadway from the Battery to 42d street, thence on 7th avenue to 59th street and easterly on 59th street to a connection with the Queensborough Bridge. The subway to be four tracks from City Hall to 59th street, two tracks from 7th avenue, on 59th street, to Queensboro Bridge, and partly three tracks and partly two tracks south of City Hall, via Church street to the Battery.

(b) Connection between the Williamsburg Bridge, via Delancey and Spring streets and the Broadway subway.

(c) Connection between the Manhattan Bridge, via Canal street and the Broadway subway.

(d) Connection (if grade permits) between the Brooklyn Bridge and the Broadway subway.

(e) An extension of the Centre street subway with two tracks through Nassau and Broad streets to Beaver street and thence to a connection with the proposed subway on Church street.

(f) A new tunnel connecting with the Church street-Broadway subway and with the extension of the Centre street subway in lower New York and extending under the East River to Montague street, Brooklyn, and thence via Montague, Fulton and Willoughby streets to a connection

with the 4th avenue subway on Flatbush avenue extension; this route to be changed in Brooklyn if deemed desirable to serve better the needs of Brooklyn Heights and the shopping district in Fulton street.

(g) The use of the Centre street subway to the extent that it may offer terminal and connection facilities, particularly with reference to traffic over the three Brooklyn bridges and as a part of the Nassau-Broad street subway extension.

The above plan covers, generally, every section of Brooklyn and part of Queens and furnishes sixteen independent rapid transit lines, mostly equipped for express and local service, from Brooklyn and Queens into Manhattan, with through transportation or free transfer to points in Manhattan reached by the Broadway subway between 59th [fol. 1536] street and the Battery, and by the extended Centre street subway between Delancey and Beaver streets.

It offers a maximum flexibility of operation and of distribution of passengers between Manhattan and Brooklyn, easily adapted to changing currents of travel.

It furnishes, with the Centre street and 4th avenue subways now under construction, the use of twenty-three miles of additional subways and the effective utilization therewith of sixty-seven miles of elevated railroad routes.

It brings into service, as great highways of travel, four East River bridges instead of one and creates one additional East River tunnel.

By arrangement with the Hudson and Manhattan Railroad, passengers on the Broadway, Manhattan, subway line could be transferred to the Grand Central Depot, and an interchange of travel with the Jersey tubes would be made easy, both at Church street and at 33d street. The Pennsylvania Railroad station, on 7th avenue, could be made readily accessible.

Not of small importance, either, is the opportuntiy permitted by the elevation of the present steam railroads in South Brooklyn and the Ridgewood section to eliminate grade crossings—now a menace to life and a deterrent factor in the development of those localities.

As compared with the principal offer now under consideration by your Commission and the Board of Estimate,

our plan would furnish 82.37 miles of rapid transit routes in Brooklyn and Queens, as against 17.6 miles covered by the other offer, with better facilities for the distribution of this traffic in Manhattan over the territory where 98 per cent. of the people want to go—namely, between 59th street and the Battery. It would involve probably no greater investment of City capital than the City would immediately be committed to in good faith by the acceptance of the other proposition, with the assurance of much greater return on that investment. And assuming that the present subway lines will be extended north and south on the east and west sides of Manhattan, this supplementary plan would give for the entire City as nearly perfect a system of transportation for the capital invested as any system which could be devised, having due regard to existing conditions and capital already invested by the City.

No other subway or elevated plan is possible of realization within the next generation, at least, which would serve so large an area or satisfy the requirements of so many people. Its proposed and existing lines directly traverse every ward in Brooklyn, reaching 1,600,000 inhabitants, and with Manhattan and Queens connections, the total population to be directly served and benefited is not less than four millions. Development would be stimulated in 23,000 acres in Brooklyn alone, now substantially unoccupied—an area one and six-tenths as large as the Borough of Manhattan, and likely, within ten years after the inauguration of this transportation plan, to house at least a million additional people.

It is our suggestion that the City should construct the subways and that we should equip and operate them upon such terms and for such period as may be agreed upon, in connection with our existing and proposed elevated rail- [fol. 1537] roads. We should expect the City also to assume as heretofore, its reasonable share of the cost of eleminating crossings of streets at grade over the lines of the former steam railroads. The estimated expense to which the company would be subjected for carrying out its part of the above plan is between fifty and sixty millions of dollars. The cost to the City, in addition to what has already been contracted for, would probably not exceed the amount to which the City would morally (if not legally)

commit itself by the promised extensions in Brooklyn of subways now under construction and others covered by the Interborough offer. Instead, however, of this sum being invested in routes which will concededly be unprofitable and will serve only a small fraction of the population, it will be invested in routes which will serve practically all the population of Brooklyn, a large part of the population of Queens and all of the population of Manhattan Island south of 59th street. Morever, the proposed investment by the City would fit in perfectly with any future subway extensions or plans either in Manhattan, Bronx, Queens, Brooklyn, or the Borough of Richmond.

If the plan which we have outlined appeals to the judgment of the Commission and of the Board of Estimate and Apportionment as having merit, we shall be pleased to take up with you and the Board of Estimate the question of terms and division of cost.

We may say, generally, that the terms proposed by us would not be less favorable than those presented in any offer now under consideration by your Commission and the Board of Estimate.

The offer would include an agreement, under equitable arrangement, to operate any extensions of the above routes in any of the five Boroughs which might be necessary in the future for the development of transportation facilities.

The accompanying map also includes the proposed subway on Lafayette avenue. We think this is a mistaken route and a questionable investment of capital, and we suggest that it be eliminated, for with the adoption of our plan the people in the section covered by that route would have facilities better than those offered by the construction of this subway. Nevertheless, it may be included in the general proposition if deemed wise by the City.

Respectfully submitted.

Brooklyn Rapid Transit Company, by T. S. Williams, President.

IV. Supplementary Proposals of the Brooklyn Rapid Transit Company, Dated April 25 and May 2, 1911

Brooklyn Rapid Transit Co., 85 Clinton Street, Brooklyn, N. Y., Office of the President

April 25, 1911.

Hon. George McAneny, Chairman Special Committee Board of Estimate and Apportionment; Hon. William R. Willcox, Chairman Public Service Commission for the First District, New York City:

[fol. 1538] Gentlemen:—Referring to our transit proposition of March 2, 1911, and to the situation as it has since developed in many conferences with your joint committee, we respond to your request for a formal statement as to our attitude toward a possible enlargement of the scheme of transportation outlined in our previous communication, and as to detailed terms and conditions under which we will agree to equip and operate, in connection with our own rapid transit lines as proposed to be improved and extended, certain subway and elevated lines to be constructed by the City.

In one essential respect the situation has radically changed since our proposition of March 2 was presented.

The purpose of that offer was primarily to enable us to furnish adequate transportation facilities to the people of Brooklyn and part of Queens, with the possible extension thereof to the Borough of Richmond. These three Boroughs embrace a population of over two millions, or nearly as much as the population of Manhattan. A large part of the people of these three Boroughs goes daily to and from Manhattan. No plan of transportation will be sufficient or satisfying which does not, so far as practicable, convey such persons without change of cars and for no additional fare within reasonable limits in Manhattan. To meet this requirement we suggested, not only some amplification of existing subway facilities in lower Manhattan and a new tunnel under the East River, but a trunk distributing subway on Broadway from the Battery to 7th avenue, thence to 59th street and under 59th street to the Queensboro Bridge.

The desirability of this plan has been generally conceded. Indeed, there has, in seven weeks' public discussion, been practically no criticism of it or objection to it as a transportation plan. It has received continuous and painstaking scrutiny by your Committee. The proposal did not conflict or interfere with any logical development of subways in Manhattan. It furnished a much-needed relief for Manhattan transportation south of 59th street. It covered no streets there for subway construction in which other applications were pending. In short, it was not in fact, or in purpose, a competitive proposal—for, except as to comparatively small sections of route in Brooklyn, it was entirely supplemental to the proposition of the Interborough Rapid Transit Company than and now under consideration by your Committee. And its adoption would have fitted in admirably with the important features of the Interborough plan—namely, the east and west side extensions of the present subway and elevated extensions in The Bronx.

The Addition of the Lexington Avenue Route

Our proposition had not been before you two weeks, however, before it was suggested that the result to the City of approving our route as to Broadway might be the withdrawal of the Interborough's offer of December 5, 1910, and the loss to the City of its then existing opportunity for a new east side subway running from 42d street, Manhattan, into The Bronx; and we were asked in that event whether we would consider the additional equipment and operation of such a line. Our reply was filed with you on [fol. 1539] March 14, and we hereby reiterate the same as therein set forth, to wit:

"The plan which we have submitted (that of March 2, 1911) was prepared primarily for the purpose of serving Brooklyn and incidentally serving the growing needs of the congested portion of Manhattan and not interfering with logical extensions of existing subways in Manhattan. Nevertheless in order that the City may not be deprived by the adoption of our plan of the advantages of an extension of the existing subway on the east side of Manhattan, we are prepared to state our willingness to equip and operate that portion of the so-called Tri-Borough route from its

intersection with our proposed route on Broadway at 9th street northwardly up the east side and into The Bronx. This additional route to be included as to terms and conditions in our general proposition of March 2, 1911. The route referred to is the same for the construction of which bids were recently received by the Public Service Commission. As to proposed elevated and subway extensions from the northern terminus of this route we shall be prepared to equip and operate such extensions under the same provisions as to extensions as are embodied in the memorandum submitted informally herewith in response to further inquiry of the Joint Committee as to terms under which extensions generally might be operated under our proposal of March 2. * * *

"We shall also expect that the specifications for construction of the east side route be so modified as to reduce the probable cost to the minimum amount consistent with efficient operation."

In the discussion which followed the presentation of this memorandum it was objected that the merging into a four-track subway extending southerly on Broadway from 9th street of the traffic contributed by a four-track subway on Broadway north of 9th street and by a four-track subway on the east side north of 9th street would present a difficult operating situation. We suggested that if feasible a two level six-track subway be constructed on Broadway between 9th street and City Hall, which, by proper use of express tracks and proper spacing of express stations, would, in our judgment, fill the operating requirements. If, however, this should not be deemed feasible from either an engineering or operating point of view, we suggested, and do now suggest, that the Lexington avenue subway be not connected with the Broadway subway, but be brought down through the Bowery and Park row to Chambers street and there connected with the Nassau and Broad street subway described in our communication of March 2. As to this latter suggestion it was pointed out by members of the Public Service Commission that the Bowery-Park row route was intended to be used at some indefinite time in the future as part of a new 3d avenue subway route. It is respectfully submitted that possible conditions twenty-five years hence ought not to interfere with immediate

transit needs, but in any event if we should receive a contract for equipment and operation under the indeterminate franchise plan the objection would not be an obstacle to [fol. 1540] the carrying out of such future plans, or the construction in the Bowery and Park row might be so designed as to provide for both proposed Lexington avenue and future 3d avenue routes.

We, therefore, hereby repeat our willingness to operate, in addition to the lines specified in our proposition of March 2, that portion of the Tri-Borough route referred to north of 9th street, or north of Chambers street, if the route be extended southerly through Bowery and Park row. The remainder of the original so called Tri-Borough route from 9th street to the Battery on Broadway and Church street was, of course, included in our proposition of Mar. 2.

In case the City should desire to make a different disposition of this East Side-Manhattan-Bronx line, either as embodied in the Interborough plan or otherwise, we are perfectly willing that such a course should be taken—provided that this disposition will not deprive the people of Brooklyn, Queens and Richmond of the use of Broadway as a distributing Manhattan subway, or not postpone such use to some indefinite time in the future.

A Five-Borough Route

If, however, the operation of the additional East Side line which we have described should fall to us, then our proposition becomes no longer a three-borough but a five-borough proposition, and imposes considerations and responsibilities from which we have no disposition to shrink, but which, accompanied by the severe terms insisted upon by your committee as to revocable franchises, rates of fare and equal division of profit, necessarily require conservative judgment in the expenditure of private capital and a limitation of risk in the equipment and operation of extensions. We have been perfectly frank with the public and with the City's representatives, and desire to be now, in the assumption that the maximum available amount of either municipal or private capital for transit facilities shall be expended where it will furnish the greatest relief to the greatest number. A disproportionate expenditure in districts of scant population may be, from some points

of view, justice to those localities, but it may also be an absolute injury and injustice to much larger numbers of people. We believe that it is the first duty of the company and the City to take care, within the measure of their respective abilities, of the transportation requirements of the people of the congested territory, but in discharging that duty to lay out routes which while now and probably indefinitely in the future serving the greatest number, will present the framework of a comprehensive and logical system, permit the possibility of extension along consistent territorial lines, and allow the greatest flexibility of operation as tides of travel change.

With this principle in view, so far as it can be applied under existing conditions, and recognizing the desirability of incorporating in our proposition a method whereby extensions may be constructed and operated from time to time as deemed wise by the City, and at the same time an automatic check may be applied to prodigal expenditures for this purpose, we propose, for convenience in statement [fol. 1541] of terms and conditions, that the lines under discussion with your committee and those embodied in our plan be classified in two divisions—one comprising those now constructed and operated, those under process of construction and those to be immediately constructed, these three being designated as "Original Lines"—and the other comprising branches, additions and extensions, or new lines, to be designated as "Extensions." Under the head of "Original Lines" we propose to include the following:

Original Lines

(a) Subway from Battery to 59th street, via Church street, Broadway and 7th avenue and on 59th street from 7th avenue to the Queensboro Bridge.

(b) Centre street subway with extensions through Nassau and Broad streets.

(c) Connections between Manhattan and Williamsburg Bridges and Broadway (Manhattan) subway and between Brooklyn Bridge and Centre street subway, and the necessary use of the bridges.

(d) Tunnel under the East River from lower New York to Flatbush avenue or 4th avenue via Pineapple street route or such other route as may be agreed upon.

(e) That portion of the Triborough route from 9th street and Broadway north to the points in The Bronx covered by the bids recently taken by the Public Service Commission, or, if said route be extended southerly via the Bowery and Park row to Chambers street, then from Chambers street north to the aforesaid points in The Bronx (Mott and River avenue, 157th street, 3d avenue and 138th street).

(f) The 4th avenue subway now under construction from Manhattan Bridge to 43d street, Brooklyn.

(g) The proposed subway on Flatbush avenue from an intersection with the 4th avenue subway to the junction of the Brighton Beach Railroad at Malbone street.

(h) Subway on Eastern parkway from Flatbush avenue to Buffalo avenue.

(i) Existing elevated lines of the Brooklyn Union Elevated Railroad Company and leased lines.

(j) Elevated extension from Queensboro Bridge via Long Island City and Greenpoint to a connection with the Williamsburg Bridge and with the Broadway or Myrtle avenue elevated lines of the Brooklyn Union Elevated Railroad Company.

(k) Extension of the Myrtle avenue elevated railroad to Lutheran Cemetery.

(l) An extension of the Kings County elevated railroad from old City line to Jamaica.

(m) Extension of the 3d avenue elevated railroad to Fort Hamilton.

(n) Rapid transit extensions from the terminus of the 4th avenue subway through South Brooklyn (subject to possible consideration outlined further on in this communication).

[fol. 1542] Extensions

Under the head of "Extensions" will be included any possible future extensions, with the expectation that the construction of all or part of the following will be contemplated by the City, as soon as practicable, and the equipment and operation undertaken by the Company under the terms applicable to "Extensions."

Bronx—River and Jerome avenue extension. Southern boulevard and Westchester avenue extension.

Staten Island—Tunnel to St. George.

Brooklyn—Nostrand avenue extension. Livonia avenue extension. Utica avenue extension. Eastern District line connecting with tunnel under East River and subway under 14th street, Manhattan—precise route in Brooklyn to be determined later.

Queens—Astoria and Woodside-Corona lines.

Terms and Conditions of Proposed Contract

I. Division of Cost

Except as possibly modified in the contingency suggested in paragraph VI below, we do not care to change the terms of our proposal as to division of cost—namely, that the City should pay the cost of construction of subways and extensions or connections thereof, and that we should pay the cost of elevated extensions of our existing rapid transit lines and the cost of equipment of all lines, and that we should operate all rapid transit lines, new and old, and future extensions, as one system.

II. Rates of Fare

The fare to be five cents for one continuous ride over any part of the said system, including "Original Lines" or "Extensions," with the exception that fares to or from the Coney Island district shall be ten cents; provided, however, that the said fare of ten cents may at any time and for any period be reduced to such figure, not less than five cents, as will be sufficient to yield from such Coney Island operation the fair cost thereof, plus a reasonable profit.

III. Tenure of Contract

We agree that the contract for equipment and operation of all lines, subway or elevated, constructed by the City, and of the new elevated extensions constructed by the Company on public streets and places, may be terminated by the City after ten years, pursuant to the provisions of the Rapid Transit Act, except that the tenure of possession of the so-called Centre Street Loop as extended through Nassau and Broad streets, and the connecting bridges, shall be for twenty years, with the privilege of renewal for twenty years additional. This exception is necessitated by the fact that the large expenditure required for the reconstruction and third-tracking of our elevated lines intended to be operated over the Williamsburg and Brooklyn Bridges into said subway would not be jsutified if at the [fol. 1543] end of ten years the use of the bridges and the terminal connections in Manhattan was to be taken away.

IV. Terms of Operation—"Original Lines"

All "Original Lines" enumerated above to be operated by us on the following basis as to receipts and expenditures:

The gross receipts from the operation of all such lines to be pooled and from the total of such gross receipts the following deductions to be made:

Operating expenses, provision for depreciation, renewal and obsolescence.

The balance of receipts shall be applied as follows:

1. To be retained by the Company an amount equivalent to the net earnings of the existing lines operated by the Brooklyn Rapid Transit system in connection with the proposed new lines as of the year preceding the beginning of operation under the proposed contract with the City.

2. Interest and amortization upon the new capital supplied by the Company for construction.

3. Taxes, insurance and rentals of leased lines, if any.

4. Interest and amortization upon the cost to the City of the lines constructed by it.

The balance of receipts after making the foregoing deductions to be divided equally between the City and the Company.

The contract shall contain a separate provision as to terms of compensation for the use of the Centre street subway and connecting bridges to go into effect in case the City shall exercise its option to terminate the remaining franchises after ten years. Until such termination of course the general terms outlined above will include the operation of the Centre street subway and connecting bridges.

V. Terms of Operation—"Extensions"

Supplementing the memorandum filed with you on March 14, we will undertake to operate all "Extensions," including those specifically enumerated above under the division of "Extensions," on the following basis:

A. Extensions agreed upon by the City and the Company to be governed by and included in the general provisions of the contract as to receipts and deductions therefrom, applicable to "Original Lines."

B. Extensions required by the City and not concurred in by the Company to be operated as part of the entire plan, but the financial operations of such extensions to be kept in a special account and determined as follows:

Receipts—

(a) Tickets collected at stations on extensions.
(b) Miscellaneous earnings from stations on extensions.
(c) Pro rata of advertising.

Operating Expenses—

(a) All station expenses of stations on the extensions. [fol. 1544] (b) Maintenance of Way and Structure on the extensions.
(c) Damages for accidents happening on the extensions.
(d) Taxes, if any, specifically applicable to the extensions.
(e) Other expenses to be divided on a cost per passenger basis to be determined according to unit cost on the entire system covered by the contract, including such extensions, to wit:

1. Conducting transportation.

2. Maintenance of Equipment, Renewals and Depreciations.

3. Cost of Power.

4. General and Administration expenses.

5. Proportionate Taxes not specifically applicable to the extensions.

After the payment of the foregoing charges there shall be paid out of the earnings the actual annual charges for carrying the cost of equipment necessarily and properly allotted to the extensions and for providing a proper sinking fund.

From the balance then remaining shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction of the extensions.

If the income shall be insufficient to meet the foregoing charges, or any part thereof, the deficit shall be paid annually by the City.

All the remaining net proceeds after the above deductions shall be divided as follows:

Three-quarters thereof to the City and one-quarter to the company as compensation for its services and facilities in carrying on the operation of such extensions.

VI. Particular Suggestions as to South Brooklyn Lines

Our proposition of March 2 involved the elevation of existing steam railroad lines and the connection of those lines thus elevated with the Fourth Avenue Subway at 43d street. Inasmuch, however, as the City desires that any extensions (as in effect these would be) of the Fourth Avenue Subway should be operated on the indeterminate plan of franchise, revocable after ten years, it will be impossible for us to include such steam railroad lines thus reconstructed under such a contract on account of the leasehold and other interests involved, and on account of the fact that the rights of way of many of these lines are owned in fee and covered by mortgages, and could not thus be conveyed. Moreover, there seems to be a quite loudly expressed sentiment in that section of the City against this part of our plan and in favor of that feature of the

Tri-Borough plan which involved two extensions from the Fourth Avenue Subway to be constructed by the City, one to Fort Hamilton and the other to Coney Island. We think this a mistaken idea, for our plan gives four rapid transit lines from the terminus of the Fourth Avenue Subway through the same and greater territory, while the Tri-Borough plan gives only two. Nevertheless, in order to meet the objection created by the question of indeterminate franchise, and with the desire to acquiesce in the apparently prevailing opinion in South Brooklyn, we are prepared to suggest as a substitution for that part of our March 2 proposal, the following alternatives:

[fol. 1545] 1. Either that any or all of the so-called South Brooklyn extensions be regarded as extensions of existing lines and constructed under the provisions of the Rapid Transit Act, with such modifications in route as might be necessary and desirable—which would make the franchise revocable after ten years; or

2. That the original extensions of the Fourth Avenue Subway embodied in the plan of the Tri-Borough route be constructed by the City and included in the lines to be equipped and operated by us.

In the event that the first suggested alternative be adopted, the company will provide the necessary money for the construction as well as for the equipment of these lines.

In the event that alternative number two be adopted, we will contract for $5,000,000 of City money, to construct and equip the proposed subway line on Broadway (Manhattan) north of 9th street, on 7th avenue and on 59th street, the City assuming the cost of real estate, easements and damages.

Estimated Costs

We are advised by the City Comptroller that the available City capital for subway construction on July 1 next will be in the neighborhood of $80,000,000.

Our estimate of the amount of money required by the City to construct the additional subways included under the so-called "Original Lines" described above, would be $83,-

500,000. This is on the assumption that the size of section of subway called for in the so-called Tri-Borough specifications be adopted. If, however, the size of the tube should be reduced, the City's requirement of new capital would be reduced to $73,500,000.

Our own expenditures, if the equipment and operation of the additional East Side line from Chambers street or 9th street northwardly into The Bronx be included, will approximate $75,000,000.

If alternative number two in paragraph VI above be adopted by the City and the lines covered therein should be classified under the division of "Extensions," then, in view of the contribution by the company of the greater part of the cost of the Broadway-59th street subway, the immediate financial requirement of the City to undertake its part of the contract would be reduced to approximately $61,000,000—leaving $19,000,000 of available City funds immediately applicable to "Extensions."

General Observations

The adoption of the plan which we have outlined presents a comprehensive scheme of transportation reaching every borough of Greater New York and capable of indefinite expansion without unnecessary duplication of capital. It permits the realization within a few years, instead of within a generation, of a unified city transit system with through cars and a single fare. It is the only plan before the authorities which gives assurance of return on the $30,000,000 of city capital already invested or contracted [fol. 1546] for in the Centre street and 4th avenue subways. It is the only plan which assures the City interest and sinking fund requirements on municipal investments in subway construction, past, pending, and now proposed, with equal participation in additional profits which are not problematical but probable. It is the only plan which insures financial return to the City from the growth, not merely of lines embraced in new franchises now to be granted, but of sixty-seven miles of existing rapid transit routes doing a large volume of business. It is the only plan which guarantees to the City an operator of future extensions, whether offering promises of profit or not, under conditions which insure the most economical operation, create no additional

fares and offer the maximum facilities for public convenience. It is the only plan which furnishes a complete trunk system from which branches may be extended according to transportation needs symmetrically and efficiently. Each borough might by some local or less comprehensive plan get lines of rapid transit—but unless these be connected up and operated with such a widely extended trunk system as we have proposed their usefulness would be comparatively slight and the fares for transportation would be doubled or trebled. Equal advantages under any other plan could not be obtained with twice the expenditure of City or private capital.

Let it not be forgotten, either, that great projects of municipal improvements will require in the near future millions of additional funds—and the City's ability to raise these moneys will depend largely upon its wise decision now as to expenditures for transit, for to the extent that transit lines are intelligently laid out and the City's investment therein is self-supporting the sooner will there be great increases in taxable valuations and a wider and surer basis of City credit.

Respectfully submitted.

Brooklyn Rapid Transit Company, by T. S. Williams, President.

Brooklyn Rapid Transit Company, 85 Clinton Street, Brooklyn, N. Y., Office of the President

May 2, 1911.

Hon. George McAneny, Chairman Special Committee Board of Estimate and Apportionment; Hon. William R. Wilcox, Chairman Public Service Commission for the First District, New York City:

GENTLEMEN: Confirming our verbal communication to you at yesterday's meeting, we are willing that the operation of the following extensions may be included under the provisions of our communication of April 25, subdivision 4th, entitled Terms of Operation—Original Lines—construction thereof of course to be assumed by the City;

1. Jerome avenue extension, from Mott and River avenues to southern terminus of Jerome Park reservoir;

2. Southern boulevard extension, from 3d avenue to Bronx River;

3. Astoria extension, from Queensboro Bridge northwardly;

4. Woodside and Corona extension, from Queensboro Bridge to Junction avenue;

[fol. 1547] 5. Fourteenth street—Eastern District Brooklyn extension, from Broadway, Manhattan, to East New York (precise route in Brooklyn to be hereafter determined);

6. Livonia avenue extension, from Buffalo avenue to New Lots road;

7. Nostrand avenue extension, from Eastern parkway to Flatbush avenue.

As to the other preferred extensions enumerated in our communication of April 25, 1911, we prefer to postpone our decision as to whether these shall be included under "Original Lines," as to their terms of operation, until the City shall have determined to construct the same. Respectfully yours,

T. S. Williams, President.

V. Supplementary Proposal of the Interborough Company, Dated May 9, 1911

Interborough Rapid Transit Company, 165 Broadway

Theodore P. Shonts, President and Chairman of Executive Committee

New York, May 9, 1911.

Hon. William R. Willcox, Chairman Public Service Commission for the First District, New York City; Hon. George McAneny, Chairman Special Committee, Board of Estimate and Apportionment:

Gentlemen: In our letter of December 5, 1910, to the Public Service Commission, we submitted a comprehensive proposition for the construction of additional subway and elevated lines in four boroughs of The City of New York,

which was intended to place at the disposition of the City the entire resources of the Interborough Company, relieve the City from the undivided burden of subway construction, and correspondingly release its credit to other purposes. Notwithstanding that this offer gave up so much that it left the company litle margin for further concession, we have joined in a long series of conferences with the Public Service Commission and a Committee of the Board of Estimate and Apportionment, in which the entire subject of the Rapid Transit necessities of the City were again carefully considered. As the result certain modifications have been proposed, which, after grave hesitation, we have decided to accept. But with these concessions made we can offer nothing more, because we have nothing left to give.

It is manifest that if, after extending our lines largely at our own cost, through the main arteries of travel, we should be met immediately with an unnecessary duplication of lines by the City, the result would be our financial ruin. With this in view, and for the express purpose of avoiding the need of duplicated lines, we have decided to extend our offer to cover other additional routes, so as to afford a service and a capacity equal to the growing needs of the population of this City for many years to come.

A misapprehension has long existed as to the immensity of the future profits possible to the Interborough Company if our offer of December 5, 1910—to say nothing of the [fol. 1548] additions thereto we are now prepared to make—should be accepted by the City. The non-existence of excessive profits is absolutely demonstrated by all the statistics we have been able to collect, but in order to place a limit upon such profits should they develop, we propose, as hereinafter stated, certain contractual limitations upon future profits.

It has been pressed upon us that if our future service should be unsatisfactory or inadequate, the non-terminable leases under which our present lines are held will prevent the City from supplementing the deficiency save by an unnecessary expenditure of time and money. To meet this objection we propose, as hereinafter provided, when certain difficulties over which we have no control are elimi-

nated, to make any portion of the old subways subject to recapture by the City after a period of ten years.

It is objected that our proposed lay-out does not immediately reach the distant portions of all the boroughs. It is the only plan, however, which, while furnishing an operator at a single fare, makes feasible the construction in the near future of extensions to the undeveloped portions of the City, including the untouched territory of Staten Island, by releasing, to the extent of the $67,500,000 which we propose to contribute ourselves to subway construction, City credit which may hereafter be devoted to that purpose.

It has been objected that under the system of leases now in effect terminating at unequal periods, a virtual monopoly of subway construction and operation is conferred upon this company; because it is said the portion of the property which might be taken over under an earlier termination could not be efficiently operated without awaiting the falling in of some other essential part of the system. To meet this argument, we first proposed the synchronizing of all leases to a uniform term of fifty-five years from the date of placing the new extensions in operation. As the result of this conferences prior to December 5th ultimo we consented to reduce this period to forty-nine years.

It has been urged that the proposed elevated extensions in The Bronx should be built as extensions to the existing subway, thus reducing the term of the lease from eighty-five to forty-nine years and subjecting these lines to the profit-sharing provisions of our general proposal. We have decided to yield this point and consent that they be thrown into the proposed enlarged subway system as an integral part thereof.

It has also been urged that the third-tracking privileges on the elevated lines be likewise subjected to a profit-sharing arrangement. But inasmuch as the Interborough Company is already contributing 60.70 per centum of its profits from the elevated lines to the payment of taxes, there manifestly remains no just ground for a profit-sharing arrangement here.

It has been pressed upon us that if the leases be synchronized, and if the new extensions should be taken over under

the ten-year clause, some privilege should be extended to the City after thirty-five years to take over the present subways as well, upon payment of a fixed compensation for the unexpired portion of the proposed forty-nine year term. [fol. 1549] This demand requires a material concession upon the part of the Interborough Company, inasmuch as it is estimated that at that time, through the operation of the Sinking Fund, the City bonds issued for the original subway construction will be amortized and that the profits of the Interborough Company would be correspondingly enhanced. This option we have nevertheless decided to extend to the City upon terms much less favorable to the company than if it remained in the undistributed possession of the present subway lines until the expiration of the forty-nine-year period.

Before formulating these changes in our current offer, which will then fully express our ultimate ability in the matter of subway construction, equipment and operation, we will say, in response to an inquiry that has been made of us, that if the public authorities prefer an offer upon the basis of the terms recently proposed to the City by the Brooklyn Rapid Transit Company, the Interborough Company, upon those terms, will undertake to build any road in any of the five boroughs that the public authorities may designate, including one or more through lines to Coney Island and Staten Island, and operate them all in connection with its present subway system for a single five-cent fare.

Reverting now to our original offer, we propose the following modifications:

1. In our offer of December 5 we proposed the construction of a four-track subway upon the lower West Side of Manhattan and a four-track subway down the upper East Side, with a two and three-track extension to Pelham Bay Park, thus affording The City of New York two direct north and south lines, one upon either side of Manhattan Island. We also proposed the extension of the elevated lines upon one side of the Bronx to Woodlawn Cemetery and upon the other side to within four blocks of the City of Mount Vernon. In Brooklyn we proposed the construction of new subways through Lafayette avenue to Broadway and through Eastern parkway to Buffalo avenue—the Brook-

lyn system of subways to be connected with the Manhattan system by a new tunnel under the East River in the vicinity of Liberty street. In addition to these lines, to be paid for in the proportions stated in our offer, the Interborough Company now proposes to build, and at its own cost, equip and operate for a single five-cent fare in connection with its present subway, the following lines, one-half of the construction cost of which to be paid by the City and one-half by the Interborough Company.

(a) A two-track subway commencing at Lafayette avenue and Stuyvesant avenue, in Brooklyn; thence under Stuyvesant avenue, private property, Bushwick avenue, Metropolitan avenue, North 7th street, by tunnel under the East River and 14th street, Manhattan to Broadway; thence under Union square and Broadway to Times square; thence up Seventh avenue to 59th street and easterly on 59th street to a connection with the Queensboro Bridge, omitting the two easterly blocks on Lafayette avenue heretofore proposed as no longer necessary.

[fol. 1550] (b) A two-track elevated line in Queens, commencing at the Plaza of the Queensboro Bridge at Crescent street; thence via Bridge plaza, Jackson avenue to Debevoise avenue; thence northerly over Debevoise avenue to Ditmar avenue, Astoria; the northerly one mile of this structure to be three tracks.

(c) A two-track elevated line in Queens, commencing at the present terminal of the Belmont tunnel, Van Alst avenue and 4th street, northward under Hunter's Point avenue; thence over the yards of the Long Island Railroad northward curving into Davis street; thence via Davis street, Ely avenue, Williams street, such private property as may be necessary to the Queensboro Bridge plaza, and thence along the Queensboro Bridge plaza to Jackson avenue and via Diagonal street, Thomas avenue and Greenpoint avenue to Woodside.

2. We now propose to build the proposed Jerome avenue elevated extension of the 9th avenue line north of 162d street as an extension to the subway, the term of the franchise being thereby reduced from eighty-five years to forty-nine years, the proposed consolidated expiration period for the entire subway system, at the same time reserving track-

age rights to the elevated roads. It is understood, however, that the proposed line between 194th street and Woodlawn road, encompassed as it is by the Jerome Park reservoir upon the one side and the Woodlawn Cemetery upon the others, will be abandoned.

3. We also now propose to build the proposed White Plains elevated extension to the 3d avenue line north of Gun Hill road and White Plains road as an extension to the subway, reserivng trackage rights to the elevated road.

The modified additional routes herein proposed will increase the total cost of construction and equipment from $128,000,000, the original estimate, to $167,745,000, of which amount the cost of the equipment, to be wholly borne by the Interborough Company, will be $31,965,000. The construction cost will be $135,780,000, of which amount $67,559,500, will likewise be borne by the Interborough Company, a total of $99,524,500, this being contributed by this company.

4. In our original offer we proposed that for five years all of the net profits of the new extensions should go to the City, thereafter to be equally divided between the City and the Interborough Company. We now propose that all profits as therein defined ultimately distributable to the Interborough Company under this provision in excess of 3 per centum upon its investment in the construction and equipment of the proposed extensions shall first be applicable to meet any deficit that the City may be compelled to pay upon additional branch lines and extensions built under the omnibus clause of our original offer after applying to such deficit the profits received by the City from the original extensions.

5. Under the terms of our offer the periods of the termination of all subway franchises are to be synchronized at forty-nine years from the date of beginning complete operations of the new extensions. We propose, however, at any time after thirty-five years from that date, provided the City in the meantime shall have taken over the proposed extensions under the ten-year clause, to extend to [fol. 1551] the City the privilege of taking over the present subway upon tendering to the Interborough Company a sum

equal to the aggregate estimated profits of the Company for the unexpired portion of the lease, estimated upon the basis of the average annual net profits of the property for the five-year period immediately preceding the time at which the City may hereunder accept said option, and upon otherwise complying with the terms of the lease.

6. If it can be legally carried out, provided the lien of any duly authorized mortgage be not disturbed, we will consent to modify the present leases with the City so that either the present East Side subway, from 42d street south to the Battery, or the present West Side subway, from Times square north, shall be held by the lessee under the ten-year recaption clause, thus enabling the City to possess a through line upon either the east side or the west side, in exchange for an indeterminate lease of forty-nine years from the time of beginning complete operations upon, respectively, the proposed West Side subway extension from Times square to the Battery or the proposed east side extensions from 42d street north, reserving to those extensions trackage rights for the elevated lines over the White Plains and Jerome avenue lines and the right to connect the southerly end of Lenox avenue extension under the terms of Contract No. 1—the difference in value upon the exchange to be adjusted by agreement between the Interborough Company and the City, or, if they cannot agree, to be settled by arbitration upon terms and conditions to be agreed upon.

In conclusion, we invite your attention to the fact that we have long since made the necessary financial arrangements to carry out our several offers; that if they be accepted we are prepared to immediately and simultaneously begin construction upon all lines in all Boroughs; to complete the construction within five years; to open up lines for public use in sections as completed, in connection with the existing subways, and, when the entire system is completed, to operate it for the equal benefit of the inhabitants of all Boroughs, reached for a single five-cent fare. In advance of opening up the complete system we will construct and put in operation within two years the Jerome avenue line, the White Plains avenue line, the Astoria line, the Woodside line and that portion of the new subway from Times square to Pennsylvania station and complete the third-tracking

upon the elevated system, thus giving the earliest possible relief from the present aggravated condition of traffic congestion. Our proposition likewise carries with it an offer to operate all other extensions which the City may hereafter build for a five-cent fare. It is, moreover, the only offer which would at once release to the City, credit, which may be devoted to other public improvements, and leave available for similar purposes, as it hereafter accrues, all the additional debt margin of the City. Including the elevated improvements, and the Belmont tunnel, it represents a construction cost to the Interborough Company of $88,478,500, and an equipment cost of $45,346,000, or a total contribution by that Company of private capital in the amount of $133,824,500, or almost two dollars for each dollar invested by the City.

[fol. 1552] The necessity for additional legislation to render this offer fully effective indicates that, unless a year is to be lost, it must be acted upon before the Legislature adjourns.

Respectfully submitted.

Interborough Rapid Transit Company, by T. P. Shonts, President.

(L) Proposed for Operation by the Brooklyn Rapid Transit Company

	S. or L.	Miles	Tracks	Cost	Totals
(A) Lines to be Constructed by the City					
1. Broadway—Battery to 9th street	S		2-4	$17,200,000	
2. Broadway—Ninth to 42d, and 7th Avenue, 42d to 59th Street	S	4.9	4	13,500,000	
3. Fifty-ninth Street to Queensboro plaza	S	2.3	2	3,500,000	
4. Battery tunnel to 4th Avenue, Brooklyn	S	1.9	2	8,200,000	
5. Spring Street	S	.2	2	500,000	
6. Nassau Street	S	.8	2	3,500,000	
7. Union Square to Eastern District	S	4.5	2	13,000,000	
Total		14.6			$58,400,000
(B) Lines Under Construction by the City					
8. Fourth Avenue, Chambers to 40th Street, Brooklyn	S	5.7	4	$20,000,000	
9. Centre Street loop	S	1.5	2-4	7,800,000	
Total		7.2			$27,800,000
(C) Lines to be Constructed or Reconstructed by the Brooklyn Rapid Transit Company					
10. Flatbush Avenue connection	S	1.7	2	$3,200,000	
11. Reconstruction South Brooklyn lines	L	12.3	4	12,300,000	
12. 3d Avenue extension to Fort Hamilton	L	1.5	2	1,200,000	
13. Long Island City extension	L	4.5	2	3,300,000	
14. Jamaica extension	L	.4	2	3,100,000	
15. Extension Myrtle Avenue line to Lutheran Cemetery	L	1.	2	800,000	
16. Third tracking Fulton Street, Myrtle Avenue and Broadway lines	L	9.3	..	2,500,000	
17. Other existing lines	L	41.3	2	.....	
Total		75.6		.....	$26,400,000
Total mileage		97.4	Total cost	.....	$112,600,000

(fol. 1553) (II.) Proposed for Operation by the Interborough Company

	S. or L.	Miles	Tracks	Cost	Totals
(A) Upper Manhattan and Bronx Lines					
1. Lexington Avenue, 35th to 135th Streets	S	5.1	4	$27,700,000	
2. Westchester Avenue to Bronx River	S	3.1	3	8,000,000	
3. Jerome Avenue to Kingsbridge road	L	4.4	3	6,000,000	
					$41,700,000
4. Westchester Avenue, River to P. R. Park	L	4.2	2	2,700,000	
5. Jerome Avenue, Kingsbridge to Woodlawn	L	1.7	2	1,300,000	
					4,000,000
Total		18.4			$45,700,000
(B) Upper Bronx Lines					
1. White Plains Road and Gun Hill Road	L	4.8	2	$4,600,000	4,600,000
(C) Lower Manhattan and Brooklyn Extensions					
1. Seventh Avenue, from Times Square to the Battery	S	4.	4	21,000,000	
2. Whitehall tunnel, Borough Hall, Brooklyn	S	1.7	2	7,500,000	
3. Flatbush Avenue and Eastern Parkway to Buffalo Avenue	S	3.2	4	10,500,000	
4. Nostrand Avenue to Flatbush Avenue	S	2.4	2	3,700,000	
5. Livonia Avenue to New Lots	L	2.4	2	1,700,000	
Total		13.7			44,400,000
(D) Manhattan-Queens Lines					
1. Forty-second Street, Times Square to Steinway tunnel	S	.2	2	$1,800,000	
2. Steinway tunnel adjustment at Grand Central	S			2,500,000	
3. Steinway tunnel	S	1.6	2	(a) 3,000,000	
4. Tunnel to Queensboro plaza	S	.8	2	3,700,000	
5. Astoria line	L	2.4	2	1,700,000	
6. Corona and Woodside	L	3.	2	2,200,000	
Total		8.			14,900,000
Total mileage		44.9	Total cost		$109,600,000

Summary

Brooklyn Rapid Transit Company

Construction:			
New City lines		$58,400,000	
City lines under construction		27,800,000	
Lines to be constructed or reconstructed by the company		26,400,000	
			$112,600,000
Mileage (including present lines):			
Subway	23.5		
Elevated	73.9		
	97.4		

Interborough Company

Construction:			
By the City (one-half)		$54,800,000	
By the Company	$51,800,000		
Steinway tunnel	3,000,000		
		54,800,000	
			$109,600,000
Mileage:			
Subway	22.1		
Elevated	22.8		
	44.9		
			$227,200,000

[fol. 1554] VII.—Cost of Projected Lines to be Built by City Under the Proposal of the Brooklyn Rapid Transit Company

(Principally Estimates of the Company)

	"S" or "L"	Road miles	Number of tracks	Track miles Subway	Track miles Elevated	Cost
(I.) Inner lines:						
Battery—Broadway to 59th	S	4.9	2-6	20.0	.....	$30,700,000
59th Street to Queens plaza	S-L	2.3	2	1.7	2.9	2,500,000
Battery tunnel to 4th Avenue, Brooklyn	S	1.9	2	3.8	....	8,200,000
Canal Street	S	0.5	2	1.0	....	5,000,000
Spring Street	S	0.2	2	0.4	....	500,000
Nassau Street	S	0.8	2	1.6	....	3,500,000
Flatbush Avenue to Brighton Beach Railroad	S	1.7	2	3.4	....	3,200,000
Lexington, 9th to 135th	S	6.3	4	25.2	....	35,000,000
Eastern Parkway	S	2.2	2	4.4	....	5,000,000
Total		20.8	...	61.5	2.9	$93,600,000
(II.) Other lines to be operated as original lines:						
River and Jerome Avenues to Kingsbridge Road	S-L	4.4	3	3.0	10.2	$6,000,000
Southern Boulevard to Bronx River	S	3.1	3	8.4	0.9	8,000,000
Astoria	L	2.4	2	.....	4.8	1,700,000
Corona and Woodside	L	3.7	2	.....	7.4	2,800,000
Eastern District line	S-L	6.4	2	12.8	....	13,500,000
Nostrand Avenue, Eastern Parkway to Flatbush	S	2.4	2	4.8	....	3,700,000
Livonia Avenue and Buffalo Avenue to New Lots	L	2.4	2	.....	4.8	1,700,000
Total		24.8	...	29.0	28.1	$37,400,000

	Road miles	Cost
Immediate construction	20.8	$93,600,000
Extensions accepted as original lines	24.8	37,400,000
Grand total	45.6	$131,000,000

VIII.—Cost of Projected Lines Under the Proposal of the Interborough Company

Half to be Paid by the City, Half by the Company

(Principally Estimates of the Company)

	"S" or "L"	Road miles	Number of tracks	Track miles Subway	Track miles Elevated	Cost
Lexington Avenue, 41st to 135th St	S	4.8	4	19.2	....	$26,100,000
Westchester Avenue to Pelham Bay Park	S-L	7.2	2-3	6.6	10.5	10,700,000
River and Jerome Avenue to Kingsbridge Road	S-L	4.4	2-3-4	3.2	9.8	7,300,000
White Plains Road	L	4.8	2-3	....	11.1	4,600,000
7th Avenue, Times Square to Battery	S	4.0	2-4	14.8	....	21,000,000
Liberty Street tunnel to Brooklyn	S	2.3	2	4.6	....	9,000,000
Flatbush Avenue and Eastern Parkway	S	3.2	4-1	12.8	....	10,500,000
Broadway—59th Street	S	3.1	2	6.2	....	9,300,000
Eastern District to Lafayette Avenue, Brooklyn	S	4.5	2	9.	....	13,000,000
Lafayette Avenue	S	2.2	2	4.4	....	5,200,000
Steinway tunnel extension to Queens plaza	L	.8	2	1.6	....	800,000
Astoria	L	2.4	2-3	....	5.8	1,700,000
Corona and Woodside	L	2.	2	....	4.	1,500,000
Totals		45.7		80.8	44.3	$120,700,000

[fol. 1555] IX.—Comparative Mileage of Routes and Trackage to be Operated at a Five-Cent Fare with Universal Transfers within each System under Proposed Adjustment

Intertborough	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
Present subway	25.9	2-3-4	56.1	16.9	73.0
Lexington Avenue	5.1	4	20.4	....	20.4
Southern Boulevard and Westchester Avenue	7.2	2-3	9.3	8.2	17.5
River and Jerome Avenues to Woodlawn Cemetery	6.1	2-3	3.2	13.4	16.6
White Plains Road and Gun Hill Road	4.8	2	....	9.6	9.6
42d Street, Times Square and Steinway tunnel	.2	2	.4	....	.4
Steinway tunnel	1.6	2	3.2	....	3.2
Steinway tunnel extension to Queens plaza	.8	2	1.6	....	1.6
Astoria line	2.4	2	....	4.8	4.8
Woodside and Corona	3.0	2	....	6.0	6.0
7th Avenue; Times Square to Battery	4.0	4	14.8	....	14.8
Whitehall tunnel to Borough Hall, Brooklyn	1.7	2	3.4	....	3.4
Flatbush Avenue and Eastern Parkway to Buffalo Avenue	3.2	4	12.8	....	12.8
Nostrand Avenue—Flatbush Avenue	2.4	2	4.8	....	4.8
Livonia Avenue to New Lots Road	2.4	2	....	4.8	4.8
Total	70.8	2-3-4	130.0	63.7	193.7

Brooklyn Rapid Transit	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
Present B. R. T. lines*	40.4	2-4	....	98.6	98.6
Additional tracks on present B. R. T lines*	....	1-2	....	10.9	10.9
Extensions of present B. R. T. lines, including South Brooklyn lines, reconstructed*	17.9	2-4	....	39.8	39.8
Broadway—7th Avenue, Battery to 59th Street	4.9	4	19.6	....	19.6
59th Street to Queens plaza	2.3	2	1.7	2.9	4.6
Battery tunnel	1.9	2	3.8	....	3.8
Spring Street	.2	2	.4	....	.4
Nassau Street	.8	2	1.6	....	1.6
Union Square to Eastern District	4.5	2	9.0	....	9.0
4th Avenue subway; Chambers Street to 40th Street, Brooklyn	5.7	2-4	16.2	2.5	18.7
Centre Street loop	1.5	2-4	5.0	....	5.0
Flatbush Avenue connection	1.7	2	3.4	....	3.4
Total	81.8	2-4	60.7	154.7	215.4

*Note.—Mileage has been subtracted from Coney Island lines south of second-fare points.

[fol. 1556] X—Comparative Mileage of Routes and Trackage to be Operated at a Five-Cent Fare with Universal Transfers under Pending Proposal

Intertorough	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
Present subway	25 9	2-3-4	56 1	16 9	73 0
Fourth Avenue subway	5 7	2-4	16 2	2 5	18 7
Seventh Avenue	4 0	2-4	14 8	....	14 8
Lexington Avenue	4 8	4	19 2	....	19 2
River and Jerome Avenues	4 4	2-3	3 2	9 8	13 0
Westchester Avenue	7 2	2-3	6 6	10 5	17 1
East River tunnel	2 3	2	4 6	....	4 6
Queensboro Bridge	1 5	2	....	3 0	3 0
Steinway tunnel	1 6	2	3 2	....	3 2
Woodside (from Steinway tunnel)	2 0	2	....	4 0	4 0
Astoria	2 4	2-3	....	5 8	5 8
Broadway—59th Street	3 1	2	6 2	....	6 2
Eastern District	4 5	2	9 0	....	9 0
Lafayette Avenue	2 2	2	4 4	....	4 4
Eastern Parkway from Atlantic Avenue	3 2	2-4	12 0	....	12 0
White Plains Road	4 8	2-3	....	11 1	11 1
Total	79 6	2-3-4	155 5	63 6	219 1

Brooklyn Rapid Transit	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
Present B. R. T. lines*	40.4	2-4	....	98.6	98.6
Additional tracks on present B. R. T. lines*	....	1-2	....	10.9	10.9
Extensions of present B. R. T. lines, including reconstruction of South Brooklyn lines*	17.9	2-4	....	39.8	39.8
Battery tunnel	1.9	2	3.8	....	3.8
Broadway—Seventh Avenue	4.9	2-4-6	20.0	....	20.0
59th Street to Queens plaza	2.3	2	1.7	2.9	4.6
Centre Street, Nassau loop	2.3	2-4	6.6	....	6.6
Spring Street connection	0.2	2	0.4	....	0.4
Fourth Avenue subway with Canal Street connection	6.2	2-4	17.2	2.5	19.7
Flatbush Avenue connection	1.7	2	3.4	....	3.4
Lexington Avenue, 9th to 135th	6.3	4	25.2	....	25.2
River and Jerome Avenues to Kingsbridge Road	4.4	3	3.0	10.2	13.2
Southern Boulevard to Bronx River	3.1	3	8.4	0.9	9.3
Astoria line	2.4	2	....	4.8	4.8
Woodside-Corona line	3.7	2	....	7.4	7.4
Eastern Parkway line	2.2	2	4.4	....	4.4
Nostrand Avenue line	2.4	2	4.8	....	4.8
Livonia Avenue line	2.4	2	....	4.8	4.8
Eastern District line	6.4	2	12.8	....	12.8
Total	111.1	2-3-4-6	111.7	182.8	294.5

*Note.—Mileage has been subtracted from Coney Island lines south of second fare points.

*Every new line built in the future by the City to be operated on same terms as Fourth Avenue subway, except that after City has paid out all its profits to make good operating losses on future extensions the Company will contribute its profits on all extensions above 3 per cent on its investment.

[fol. 1557]

XI.—Proposed Division of Profits

Comparative Mileage of Routes and Trackage under Pending Subway Proposals in which the City Would Share the Profits

Interborough	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
(A) Extensions and new routes on which profits would be divided equally between Company and City, City to receive interest and sinking fund before profits are divided—all earnings pooled	48.0	2-3-4	83.2	44.2	127.4
(B) Fourth Avenue subway, on which City must guarantee Company against loss in operation, with even division of profits if there are any; no participation in pooled earnings	5.7	2-4	16.2	2.5	18.7
Total	54.4	....	99.4	46.7	146.1

Brooklyn Rapid Transit	Road Mileage	Number of Tracks	Track Mileage Subway	Track Mileage Elevated	Total Mileage
(A) Lines on which earnings to be pooled and profits divided equally between City and Company after Company has received its present net earnings—no guarantee by City against loss in operation.					
Present elevated lines	45.3	2-4	....	103.9	103.9
Additional trackage on present lines	....	1-2	....	11.5	11.5
Extensions of present elevated lines	21.5	2-3-4	....	47.0	47.0
Subway lines with their elevated extensions	52.8	2-3-4-6	111.7	33.5	145.2
Total	119.6	2-3-4-6	111.7	195.9	307.6

(B) All future extensions built by City will be operated by the Company on same terms as original lines if accepted by Company—if not accepted, then no participation in pooled earnings, and profits, if any, divided, three-fourths to City and one-fourth to Company. Extensions now mentioned by Company include the following:

Westchester avenue, from Bronx River to Pelham Bay Park.

Jerome avenue from Kingsbridge road to Woodlawn Cemetery.

Nostrand avenue, from Flatbush avenue to Sheepshead Bay.

Utica avenue, from Eastern Parkway to Flatbush avenue.

Tunnel to Staten Island.

XII. Legal Status of Proposed New Routes

The words "authorization needed" mean that a certificate must be obtained under consents—must be obtained before contracts can be let.

Definitions: The words "completely legalized" mean that the necessary constitutional consents have been obtained, and the way is clear for the letting of a contract.

The words "new route" or "legalized in part" mean that additional constitutional

[Col. 1558]

1. Proposed Operation by the Brooklyn Rapid Transit Co

Lines	Status
(a) Lines to be Constructed by the City—	
1. Broadway, Battery to 9th Street	Completely legalized.
2. Broadway, 9th Street to 42nd Street, and 7th Avenue, 42nd to 59th Streets	Completely legalized.
3. Fifty-ninth Street to Queensboro plaza	New route.
4. Battery tunnel to 4th Avenue, Brooklyn	Legalized in part. New route in part.
5. Canal Street	Completely legalized.
6. Spring Street	New route.
7. Nassau Street	Completely legalized.
8. Union Square to Eastern District	Legalized in part. New route in part. (See Note 1.)
(b) Lines Under Construction by the City—	
9. Fourth Avenue, Chambers to 40th Street, Brooklyn	Completely legalized and under construction.
10. Centre Street loop	Completely legalized and under construction.
(c) Lines to be Constructed by Brooklyn Rapid Transit—	
11. Flatbush Avenue connection	Partially legalized. (See Note 2.)
12. Third-tracking Fulton Street, Myrtle Avenue and Broadway lines	Authorization needed. (See Note 3.)
13. Reconstruction, South Brooklyn lines	Authorization needed. (See Note 3.)
14. Third Avenue extension to Fort Hamilton	Authorization needed. (See Note 3.)
15. Long Island City extension	Authorization needed. (See Note 3.)
16. Jamaica extension	Authorization needed. (See Note 3.)
17. Extension, Myrtle Avenue line to Lutheran Cemetery	Authorization needed. (See Note 3.)

Resume—Legalization so near completed that on all essential subway routes the way is clear for entering into contracts.

II.—Proposed Operation by the Interborough Co.

Lines	Status
(a) Upper Manhattan and Bronx Lines—	
1. Lexington Avenue, 35th Street to 135th Street	Legalized in the main. New route in part (connection).
2. Westchester Avenue to Bronx River	Completely legalized.
3. Jerome Avenue to Kingsbridge Road	Completely legalized.
4. Westchester Avenue to Pelham Bay park	Completely legalized.
5. Jerome Avenue, Kingsbridge to Woodlawn	Completely legalized.
(b) Upper Bronx Lines—	
1. White Plains Road and Gun Hill Road	Completely legalized.
(c) Manhattan-Queens Lines—	
1. Forty-second Street, Times Square to Steinway tunnel	New route.
2. Steinway tunnel adjustment at Grand Central	Partially legalized. (See Note 4.)
3. Steinway tunnel	
4. Tunnel to Queensboro plaza	New route.
5. Astoria line	New route.
6. Corona and Woodside	New route.
(d) Lower Manhattan and Brooklyn Extensions—	
1. Seventh Avenue, from Times Square to Battery	Legalized in part. New route in part. (See Note 5.)
2. Whitehall tunnel, Borough Hall, Brooklyn	New route.
3. Flatbush Avenue and Eastern Parkway to Buffalo Avenue	Partially legalized. (See Note 2.)
4. Nostrand Avenue to Flatbush Avenue	Partially legalized. (See Note 2.)
5. Livonia Avenue to New Lots Road	Partially legalized. (See Note 2.)

Resume—Important lines, e. g., Seventh Avenue and connection links, are not legalized. Even it other lines were constructed they could not be operated to advantage because trunk line would be unfinished.

[fol. 1559] Notes

Note 1. Precise route of new line not determined. If it deviates from 14th street route or Brooklyn, Manhattan and Long Island City route, heretofore adopted, consents will have to be obtained for the changed portion. Consent of Secretary of War to under-river crossing necessary in any event.

Note 2. Resolutions adopting route and general plan for this line had been adopted by the Public Service Commission and consented to by the Board of Estimate and Apportionment and are now awaiting action by the Mayor. If the Mayor's approval be secured, it will be necessary to obtain consents of abutting property owners, or, in lieu thereof, the consent of the Appellate Division in the Second Department.

Note 3. This work would be authorized by a certificate granted under the provisions of section 24 of the Rapid Transit Act. This involves the following procedure: The Public Service Commission prepares a certificate setting forth the terms and conditions upon which the authorization is given, in which certificate there is specified and determined a route or routes to be followed. This certificate, when granted by the Commission and accepted by the company, is submitted by the company to the Board of Estimate and Apportionment for its approval, and to the local authorities for their consents to the new routes so specified and determined. Upon obtaining such approval and consents, the company must obtain the consents of the owners of one-half in value of abutting property, or if such last-named consents cannot be obtained, then the consent of the Appellate Division of the Supreme Court in the Second Department.

Note 4. A new route, known as the Steinway Tunnel route, has been adopted by the Public Service Commission for a two-track tunnel, beginning at a point under 42d street, about three hundred feet west of Madison avenue, and extending thence under 42d street and the East River to a point in North 4th street, in the Borough of Queens, and thence under North 4th street to Van Alst avenue and under Van Alst avenue to Hunters Point road. The consent of

the local authorities have been secured and also those of a large number of property owners. Negotiations are pending to obtain the consent of the New York Central and Hudson River Railroad Company, which, with the approval of the Secretary of War to the under-river crossing, will probably complete the legalization of this route.

Note 5. As part of the 7th and 8th avenue routes, a four-track line has been legalized, beginning at 7th avenue and 42d street and extending under 7th avenue to Greenwich avenue, thence under Greenwich avenue to West Broadway, and thence under West Broadway and Greenwich street to the Battery. The latest discussions in regard to this route contemplate the extension of 7th avenue southerly and the building of the subway under that extension and under Varick street. No consents have been obtained for such a change, to legalize which the following procedure would probably be necessary: The City would have to lay [fol. 1560] out the extension of 7th avenue on the city map and actually vest title as a basis for the adoption by the Public Service Commission of a new route. After the adoption of such new route, the consent of the local authorities and of the owners of one-half in value of abutting property, or, in lieu of the latter, the consent of the Appellate Division in the First Department would have to be secured. The obtaining of these consent- would probably take several months, especially if court proceedings became necessary. If it were attempted to lay out the route in advance of vesting title to the extension for street purposes, consents would have to be obtained on all the cross streets, and it is probable that if those consents were obtained and thereafter title vested in the City, the constitutional provisions in respect of consents would then apply and new consents would also have to be obtained along the new street. Under the present City Charter, where there are buildings upon property to be acquired for street purposes, the City cannot vest title until after the expiration of six months. This would mean that there can be no foundation for route proceedings until after the expiration of that time. As already noted, those proceedings alone would probably take several months. It might be considered whether an amendment to the existing Charter could not now be obtained allowing the City, in opening the street, to vest title immediately, thus saving six months.

XIII.—Probable Period of Construction

(Time from the Signing of Construction Contracts to Completion of Work)

(1) Proposed for Operation by the Brooklyn Rapid Transit Co.

	Years
(A) Lines to be constructed by the City:	
1. Broadway—Battery to 9th Street	3½
2. Broadway—Ninth to 42d; and 7th Avenue, 42d to 59th Street	3½
3. Fifty-ninth Street to Queensboro Plaza	3½
4. Battery tunnel to 4th Avenue, Brooklyn	4
5. Canal Street	3½
6. Spring Street	3
7. Nassau Street	4
8. Union Square to Eastern District	4
(B) Lines under construction by the City:	
9. Fourth Avenue, Chambers to 40th Street, Brooklyn	Being built
10. Centre Street loop	Being built
(C) Lines to be constructed by Brooklyn Rapid Transit:	
11. Flatbush Avenue connection	3
12. Third tracking Fulton Street, Myrtle Avenue and Broadway lines	1½
13. Reconstruction South Brooklyn lines	1½
14. Third Avenue extension to Fort Hamilton	1½
15. Long Island City extension	1½
16. Jamaica extension	1½
17. Extension Myrtle Avenue line to Lutheran Cemetery	1½

Proposed for Operation by the Interborough Co.

(A) Upper Manhattan and Bronx Lines:	
1. Lexington Avenue, 35th Street to 135th Street	3½
2. Westchester Avenue to Bronx River	3½
3. Jerome Avenue to Kingsbridge road*	1½ to 3½
4. Westchester Avenue, River to Pelham Bay Park	1½
5. Jerome Avenue, Kingsbridge to Woodlawn	1½
(B) Upper Bronx Lines:	
1. White Plains Road and Gun Hill Road	1½
(fol. 1561) (C) Manhattan-Queens Lines:	
1. 42d Street, Times Square to Steinway tunnel	4
2. Steinway tunnel adjustment at Grand Central	3
3. Steinway tunnel	1½
4. Tunnel to Queensboro Plaza	3
5. Astoria Line	1½
6. Corona and Woodside	1½
(D) Lower Manhattan and Brooklyn extensions:	
1. Seventh avenue, from Times Square to Battery	3½
2. Whitehall tunnel, Borough Hall, Brooklyn	4
3. Flatbush Avenue and Eastern Parkway to Buffalo Avenue	3
4. Nostrand Avenue to Flatbush Avenue	3
5. Livonia Avenue to New Lots†	2

* Subway portion, 3½ years. Elevated portion, 1½ years.

† Including subway connection.

XIV.—Population and Density of Areas Tributary to Proposed Routes.

(1) Proposed for Operation by Brooklyn Rapid Transit Co.

	Route, Miles.	Population Served.	Area within ¼ Mile.	Density per Sq. Mile.
(a) Lines to be constructed by the City.				
1 & 2. Broadway-7th avenue line, Battery to 59th street	4.9	189,400	2.4	79,000
3. 59th street line, 7th avenue to Queens Plaza	2.3	36,800	.4	92,000
4. East River-Atlantic avenue tunnel, Battery to 4th avenue	1.9	71,700	.6	119,500
	Route, Miles.	Population Served.	Area within ¼ Mile.	Density per Sq. Mile.
5. Canal street, Manhattan Bridge to Broadway	.5	800	.1	8,000
6. Spring street, Centre street to Broadway	.2	3,400	.1	34,000
7. Nassau and Broad streets	.8	10,200	.4	20,500
8. Eastern District line, Union Square to Myrtle avenue	4.5	249,000	2.	124,500
	151.1	561,300	6.0	93,550
(b) Lines under construction by the City.				
9. Fourth avenue subway, 40th street, Brooklyn, to Chambers street	5.7	151,000	2.	75,500
10. Centre street, Williamsburg Bridge to Canal Street	1.5	202,000	.8	252,500
	7.2	353,000	2.8	126,200
(c) Lines to be constructed by Brooklyn Rapid Transit.				
11. Flatbush Avenue connection	1.7	34,900	.5	69,800
12. Reconstruction of South Brooklyn lines	12.3	84,000	6.	14,000
13. Third tracking Fulton Street, Broadway and Myrtle Avenue "L" lines	.....	.....	.....	.....
14. Third Avenue extension to Fort Hamilton	1.5	14,800	.7	21,000
15. Long Island City-Greenpoint extension, Queens Plaza to Williamsburg Bridge and Myrtle Avenue	4.5	251,400	2.3	109,300
16. Jamaica extension	4.	20,000	2.	10,300
17. Myrtle Avenue "L" extension to Lutheran Cemetery (reconstruction)	.....	.....	.....	.....
	24.0	405,100	11.5	58,000
Grand total, 1-17 inc	46.3	1,319,400	20.3	65,000

[fol. 1562] Proposed for Operation by Interborough Co.

	Route, Miles.	Population Served.	Area within ¼ Mile.	Density per Sq. Mile.
(a) Upper Manhattan and Bronx lines.				
1. Lexington Avenue, 35th Street to 135th Street	5.1	395,600	2.5	158,250
2. East 138th Street-Southern Boulevard line to Bronx River	3.1	83,600	1.6	52,250
3. River and Jerome Avenue line to Kingsbridge Road	4.4	41,300	2.2	18,750
4. Westchester Avenue line, Bronx River to Pelham Bay Park	4.1	12,100	2	6,050
5. Jerome Avenue extension, Kingsbridge Road to Woodlawn	1.7	8,900	.5	17,800
	18.4	541,500	8.8	61,500
(b) Upper Bronx lines.				
1. White Plains Road and Gun Hill Road, West Farms, to Becker Avenue	4.8	24,000	2.1	11,430
(c) Manhattan-Queens lines.				
1. 42d Street, Times Square to Steinway tunnel	.2	19,000	.2	95,000
2. Steinway tunnel adjustment at Grand Central				
3. Steinway tunnel, Park Avenue to Van Alst Avenue	1.6	19,100	2	95,500
4. Steinway tunnel extension to Queens Plaza	.8	1,700	.3	5,550
5. Astoria line, Queens Plaza to Ditmars Avenue by Debevoise Avenue	2.4	22,100	1.3	17,000
6. Woodside and Corona line	3.7	9,700	1.8	5,400
	8.7	71,600	3.8	18,840
(d) Lower Manhattan and Brooklyn extensions.				
1. Seventh Avenue, Times Square to Battery	4	215,200	2	107,600
2. Whitehall-Montague Street tunnel to Borough Hall, Brooklyn	1.7	45,300	.3	158,300
3. Flatbush Avenue-Eastern Parkway line, Atlantic Avenue to Buffalo Avenue	3.2	76,000	1.6	47,500
4. Nostrand Avenue line to Flatbush Avenue	2.4	28,600	1.2	23,800
5. Livonia Avenue line, Buffalo Avenue to New Lots Road	2.4	68,800	1.2	57,300
	13.7	433,900	6.3	68,900
Grand total of a to d, inc.	45.6	1,071,900	21.0	51,000
Grand total for all proposed extensions	91.9	2,300,400	41.3	57,900

Note. In this table the estimates of area and population served are limited to a distance of one-quarter mile on either side of each route, with the water and large park areas eliminated. No account is taken of territory and population that will receive improved service by the third tracking of existing lines.

Duplications of existing rapid transit service have not been eliminated, but duplications in the New service to be afforded within each system have been eliminated, except in Greenpoint, where about 30,000 people will have a choice between the Eastern District subway and the Long Island City and Greenpoint elevated lines, and in Manhattan south of Spring street, where about 80,000 people will have a choice between the Broadway subway and the Centre street loop as extended.

[fol. 1563] XV. Present and Prospective Street Railway Traffic in New York City

(Including Subway and Elevated Lines)

Data derived from a special study "of the relation of increased traffic to increased population in New York City and other American cities, to be published in the Annual Report of the Public Service Commission for 1910."

The statistics of the past fifty years show that street railway traffic has increased in New York City in the ratio of the square of the increase in population. The statisticians of the Public Service Commission have reached the conclusion that, while the traffic of the future cannot be expected to increase as it has in certain periods of the past at this rate, it will assuredly increase at a rate at least double the rate of increase of population, provided additional rapid transit facilities be made available.

The rate of increase of population in the decade 1910-1920 has been estimated variously from 38.7 per cent (the rate in 1900-1910), to 45 per cent; no one has estimated it at less than 35 per cent. Traffic, therefore, should increase not less than 70 per cent, which is equivalent to more than 1,000,000,000 additional five-cent fares. The experience of the Manhattan surface lines, as set forth in the following table, indicates that practically all of this increase is likely to accrue to new rapid transit lines.

The following table gives the statistics of recent years in detail:

Growth of Population and Traffic in New York City at Census Periods, 1860-1910

Year	Population	Passenger Traffic: Total Fares	Surface Roads	Elevated Railways: Manhattan	Elevated Railways: Brooklyn	Underground
1860	1,174,779	50,830,000	50,830,000			
1870	1,478,103	148,583,000	148,583,000			
1880	1,911,698	287,501,000	226,669,000	60,832,000		
(d) 1890	2,697,414	600,414,000	328,703,000	190,025,000	81,686,000	
1900	3,437,202	846,353,000	595,224,000	184,164,000	66,965,000	
1910	4,766,883	1,531,202,000	763,140,000	293,826,000	162,494,000	311,802,000

	Decennial Increases: Population	Decennial Increases: Traffic	Percentage Increases: Population	Percentage Increases: Traffic	Fares per Capita
1860–70	303,324	97,753,000	25 8	192 3	1860— 43
1870–80	433,595	138,918,000	29 3	94.5	1870—100
(a) 1880–90	695,716	312,913,000	36 4	108 8	1880—150
(b) 1890–00	829,788	245,939,000	31 8	40 9	1890—230
(c) 1900–10	1,329,681	684,909,000	38.7	80 9	1900—246
					1910—321

(a) Manhattan Elevated railways opened shortly before and Brooklyn Elevated railways shortly after 1880.
(b) Surface railways electrified in decade 1890–1900.
(c) Elevated railways electrified, subways opened in decade 1900–1910.
(d) The census figure has been increased by 100,000 for deficiency in enumeration.

(Here follows table marked side folio 1564)

[fol. 1564]

Growth of Street Railway Travel i

Consolidatio

Year Ended June 30	Hudson and Manhattan Railroad Co.	Interborough Rapid Transit Co., Subway	Interborough Rapid Transit Co., Elevated	Surface Railways in Manhattan	Surface Railways in The Bronx (a)
				A. Number of Fa	
1898			183,360,846	305,115,538	15,965,2
1899			174,324,575	343,559,120	17,295,7
1900			184,164,110	360,002,672	21,364,6
1901			190,045,741	373,569,677	26,992,9
1902			215,259,345	388,947,169	28,020,1
1903			246,587,022	396,570,432	30,714,7
1904			286,634,195	389,928,464	34,763,8
1905		72,722,890	266,381,930	374,554,075	37,124,8
1906		137,919,632	257,796,754	391,708,063	39,893,1
1907		166,363,611	282,924,273	377,017,192	42,186,5
1908	4,363,722	200,439,776	282,845,864	366,690,345	44,237,2
1909	14,192,352	238,430,146	276,250,196	362,077,665	50,671,7
1910	42,839,999	268,962,115	293,826,280	375,888,469	56,524,2
				B. Annual Increase in Fare	
1898-99			*9,036,271	38,443,582	1,330,4
1899-00			9,839,535	16,443,552	4,068,9
1900-01			5,881,631	13,567,005	5,628,3
1901-02			25,213,604	15,377,492	1,027,1
1902-03			31,327,677	7,623,263	2,694,5
1903-04			40,047,173	*6,641,968	4,049,0
1904-05		72,722,890	*20,252,265	*15,374,389	2,360,9
1905-06		65,196,742	*8,585,176	17,153,988	2,768,3
1906-07		28,443,979	25,127,519	*14,690,871	2,293,4
1907-08	4,363,722	34,076,165	*78,409	*10,326,847	2,050,6
1908-09	9,828,630	37,990,370	*6,595,668	*4,612,680	6,434,5
1909-10	28,647,627	30,531,969	17,576,084	13,810,804	5,852,4

NOTE.—The Records of the Public Service Commission as to travel over the East
New York and Brooklyn Bridge local railroad when operated by the bridge trustees. T
tinuous trip started or finished on some Brooklyn railway where they paid another fa
however, the Brooklyn Rapid Transit system took over the (elevated) railroad on the br
until 1908, when the local bridge traffic was transferred to the surface cars and divided a
railway companies (the Associated Trolley Companies). Surface cars began running ov
1907, owing to the fact that the Bridge Operating Company is not a railroad corporati
fares unrecorded (being at the rate of 2½ and 3 cents, as on the Brooklyn Bridge), was a
9, 1908, this traffic has been divided equally between the Metropolitan and the B. R. T.

(a) Includes Westchester Electric Railroad. (b) As now constituted.

Growth of Street Railway Travel in The City of New York Since Consolidation in 1898

Inter-borough Rapid ansit Co., Subway	Inter-borough Rapid Transit Co., Elevated	Surface Railways in Manhattan	Surface Railways in The Bronx (a)	Brooklyn Rapid Transit (b)	Other Brooklyn Companies	Street Railways in Queens	Street Railways in Richmond	Total for City
A. Number of Fares Collected								
.....	183,360,846	305,115,538	15,965,270	200,143,542	21,275,396	9,128,804	6,340,489	741,329,885
.....	174,324,575	343,559,120	17,295,761	197,076,745	24,781,586	9,472,460	6,840,985	773,351,232
.....	184,164,110	360,002,672	21,364,690	233,602,329	28,904,650	11,441,751	6,872,856	846,353,058
.....	190,045,741	373,569,677	26,992,990	241,015,977	31,403,938	11,564,062	6,752,416	881,344,801
.....	215,259,345	388,947,169	28,020,185	253,850,909	32,073,956	13,719,387	7,119,013	938,989,964
.....	246,587,022	396,570,432	30,714,781	269,093,155	34,677,748	15,689,210	7,435,135	1,000,767,483
.....	286,634,195	389,928,464	34,763,809	294,544,349	35,649,763	16,701,653	7,762,677	1,065,984,910
2,722,890	266,381,930	374,554,075	37,124,805	317,178,793	34,742,729	20,533,487	7,743,987	1,130,982,696
7,919,632	257,796,754	391,708,063	39,893,116	354,409,770	36,016,872	25,151,054	8,945,914	1,251,841,175
6,363,611	282,924,273	377,017,192	42,186,533	372,979,840	35,423,544	28,514,743	9,971,652	1,315,381,388
0,439,776	282,845,864	366,660,345	44,237,229	384,816,060	33,842,809	29,797,750	10,966,852	1,358,060,407
8,430,146	276,250,196	362,077,665	50,671,779	386,790,947	32,091,690	30,545,776	11,367,091	1,402,417,642
8,962,115	293,826,280	375,888,469	56,524,261	415,277,754	31,801,359	34,430,074	11,712,623	1,531,262,914
B. Annual Increase in Fare Passengers. (c)								
.....	*9,036,271	38,443,582	1,330,491	*3,066,797	3,506,190	343,656	500,496	32,021,347= 4.3%
.....	9,839,535	16,443,552	4,068,929	36,525,584	4,123,064	1,969,291	31,871	73,001,826= 9.4%
.....	5,881,631	13,567,005	5,628,300	7,413,648	2,499,288	122,311	*120,440	34,991,743= 4.1%
.....	25,213,604	15,377,492	1,027,195	12,834,932	670,018	2,155,325	306,597	57,645,163= 6.5%
.....	31,327,677	7,623,263	2,694,596	15,242,246	2,603,792	1,969,823	316,122	61,777,519= 6.6%
.....	40,047,173	*6,641,968	4,049,028	25,451,194	972,015	1,012,443	327,542	65,217,427= 6.5%
,722,890	*20,252,265	*15,374,380	2,360,996	22,634,444	*907,034	3,831,834	*18,690	64,997,786= 6.1%
,196,742	*8,585,176	17,153,988	2,768,311	37,230,977	1,274,143	4,617,567	1,201,927	120,858,479=10.7%
,443,979	25,127,519	*14,690,871	2,293,417	18,570,070	*593,328	3,363,689	1,025,738	63,540,213= 5.1%
,076,165	*78,409	*10,326,847	2,050,696	11,536,220	*1,580,735	1,283,007	995,200	42,619,019= 3.2%
,990,370	*6,595,668	*4,612,680	6,434,550	1,974,887	*1,751,119	748,026	400,239	44,417,235= 3.2%
,531,969	17,576,084	13,810,804	5,852,480	28,486,807	*290,331	3,884,298	345,532	128,845,272= 9.2%

lic Service Commission as to travel over the East River bridges are more or less incomplete, as they do not include the statistics of the railroad when operated by the bridge trustees. The vast majority of these passengers used the bridge cars merely to complete the connection Brooklyn railway where they paid another fare, but those whose journey was confined to the bridge escaped counting. In 1898, system took over the (elevated) railroad on the bridge and the local bridge fares were thereafter counted among the elevated passengers was transferred to the surface cars and divided among the Brooklyn Heights, the Nassau Electric and the Coney Island and Brooklyn ley Companies). Surface cars began running over the Williamsburgh Bridge in July, 1904, but the fares are not included until July 1, e Operating Company is not a railroad corporation and did not report to the former State Railroad Commission; the number of such ½ and 3 cents, as on the Brooklyn Bridge), was approximately 3,000,000 in 1905, 4,200,000 in 1906 and 6,000,000 in 1907. Since July ually between the Metropolitan and the B. R. T. systems; in 1909 it aggregated 8,600,000 fares.

r Railroad. (b) As now constituted. (c) The prefix * designates decreases.

[fol. 1565] XVI. The Operating Basis: Contribution from the Earnings of Profitable Inside Lines to Help Support Less Profitable or Outlying Lines

The per Passenger Method

The effort of the conferees has been to bring about a large extension of the five-cent fare zone and to safeguard the future growth of the City so that the increased and more profitable short haul traffic of the inside districts shall to a large extent be used to project the benefit of the five-cent fare into more distant localities. If the City adopted a zone fare of one cent per mile, it is apparent that the rider going from City Hall to the Battery would only pay one cent, but the rider going from City Hall to Jamaica or Bronx Park, a distance of ten miles, would pay ten cents. Zone fares prevail in European cities, but in New York and other American cities the flat rate of five cents seems to have obtained a permanent foothold. In this city, therefore, the short hauls support the long hauls. The inside short haul traffic, however, is highly lucrative, perhaps the most so of any city in the world. Every short rider pays an excessive sum, but he obtains a corresponding benefit when he takes a ten-mile ride for five cents. The future population of the City will increase the excessive earnings of the downtown districts, but if those excessive future earnings are used to project the five-cent fare into outside areas that will gradually be filled up with the future population, then the balance between short haul profits and long haul projection of the five-cent fare is maintained. If this is not done the City cannot tolerate the giving of short haul operating rights in the heart of the City for forty-nine years at a five-cent fare. It follows from this that the future increased short haul earnings must help to support outside lines, both those which are named in the report and future extensions that the growth of the City may demand.

The present effort to obtain a comprehensive rapid transit system for the future city will have been in vain if outlying lines and future extensions do not receive assistance from the future multiplying of five-cent fares on the inside lines. The rapid transit congestion that has been so long endured and which it is now hoped will be alleviated has

been largely caused because of the desire of the operating companies to keep the benefits of the short haul business and free themselves from the necessity of caring for outlying districts. They have wanted an increase of inside lines, but as a rule have either refused outside lines or have desired them on such terms that the traveling public would pay an increased fare. The present crisis has been largely caused because the City has not had the power to compel the rapid transit operators to project their five-cent fare into outlying districts even if the City paid the entire cost of construction of the new lines or even if the average profits of a five-cent fare in the old and new districts would have been a handsome return on the investment. If the solution that is now sought does not care for the future growth it will soon be followed by congestion and blocking and the City will again need to go through the turmoil and [fol. 1566] stress of the last few years. And in that case the City would not be in as fortunate a position as at present because today the City has many routes in downtown Manhattan and lower Brooklyn that can be used for independent subways, but in fifteen years from now it will have fewer left.

All depends on the arrangement made between the City and the forty-nine-year operator for the operation of future extensions. If the basis is one that assigns to the extensions the fares collected, and charges against the extension the pro rata of car miles operated, then the extension will be starved. For the substantial riding on the extensions will be mornings and evenings only and fares will be received at the stations on the extensions only in the morning. On such a basis a future extension standing by itself will produce a deficit indefinitely and if the City pays the deficit to the operater, the future drain on the City will be great. This, however, is the basis insisted upon by the Interborough and which the conferees reject.

If the operator does not contract that he will operate at a five-cent fare future extensions built at City expense, and contribute part of the short haul benefits so that the payment of deficits by the City will after a time come to an end, the City will become discouraged by paying deficits on extensions and will build no more. Then the demand will arise for the building of an independent trunk line

through the fertile part of the City so that extensions can be added to it and the benefits of the short haul be donated to the support of the desired extensions. If operating contracts are now drawn so that future extensions are starved, the present effort will be no solution of the problem, but only a temporary loosening up and in a few years another crisis will arise.

For instance, if extensions are made to stand on their own earnings, the City paying the deficit without aid of the short haul profits, and if the demand should arise for two more extensions in The Bronx and two more extensions to the Eastern parkway line in Brooklyn, the same old question would arise again. The City would be paying deficits and would not want to pay more. It would refuse to build. Then the demand would appear for a new trunk line so that the short hauls on it would support the two new extensions in The Bronx and the two new extensions in Brooklyn. If, however, the operating contracts are now so arranged that the increase of future short haul traffic will help support future extensions, then in all probability they could be built by the City, operated at a five-cent fare and within a reasonable time become self-sustaining.

The conferees have given a great deal of attention to this problem in an endeavor to find a method of financing the operation of extensions that would be both fair to the operator and fair to the future growth of the City. If the income credited to an extension is the fare collected at its stations, and if the amount charged against it is the proportionate expense of the car miles operated on the extension, then it is not fair because it leaves the company with the full benefits of the increase of short haul profits, and it leaves the City to the indefinite payment of deficits. The conferees have concluded that the income and expense of each segregated extension should be that proportion of the [fol. 1567] whole income and expense which the fares collected on the extension bear to the total fares collected on the system. This is the so-called per passenger method of estimating expense in contradistinction to the so-called per mileage method.

The per passenger method of estimating expense applies only to that part of the expense of an extension that cannot be localized. Every extension has to stand on its

own bottom as to the interest on the cost of its construction, manning stations, repairs to track and stationary equipment, and accidents on that extension. The per passenger method divides the general expenses of operating the system and moving its cars, so that these general expenses that cannot be localized are divided in the same ratio between the extension and the whole system as the fares are divided. This method brings to the aid of the extension part of the excess earnings of the short hauls. It has been worked out by application to many cases and shows that the outcome is not unfair to the operator or over generous to the extension. The extension always will have the smaller earnings power, yet will need to stand localized burdens of interest, manning and repairs. The per passenger basis does not put the extension on an equal footing with original lines, but simply divides the non-localized expense so that part of the profits of the short hauls help to support the extensions. The Brooklyn Rapid Transit Company has adopted this method in its last proposal.

The Broadway branch of the present subway north of 96th street is commonly looked upon as one of the important earning sections of the Interborough system, yet until within the last year if that branch had been operated on the car mileage method the City would under the plan proposed by the Interborough have been compelled to pay annual deficits to the Interborough, although the Interborough on its entire system would have been earning a handsome profit.

The Interborough reserves its present profits on its existing subways, which figured on its actual investment, are about 17 per cent. Part of this high rate of return is undoubtedly due to abnormal congestion, and when new lines are built it is expected that this abnormally high rate of return will not continue. If the Interborough operates the proposed new Lexington avenue line a passenger from the present West Farms branch who is going downtown in the morning will pay his fare on the present West Farms line and ride down the new Lexington avenue line to 42d street. The new line gives him a long ride, but collects no morning fare. In the evening he deposits his fare in some station of the present subway south of 42d street, rides home most of the way on the new line and again the new

line receives none of his fare. If now the Lexington avenue line between 149th street in The Bronx and 42d street in Manhattan is to receive neither morning nor evening fares from a large body of passengers, it will be adding to the earnings of the present Interborough lines with no corresponding benefit to itself. The application of the car mileage method proposed by the Interborough would mean that the unlocalized expense of operating cars through the new Lexington avenue line would be charged against the new line in proportion to the car miles now operated, but it would be deprived both morning and evening of the fares [fol. 1568] of those passengers for whom the trains will be mainly run. Such a method of starving the new line and adding to the profits of the old lines is unthinkable. The application of the per passenger method of estimating general expenses will serve to make a fairer division between the old and the new. Indeed, it will probably be found necessary to go even further in giving this portion of the Lexington avenue line a greater credit for carrying passengers who pay all their fares elsewhere.

If the Interborough becomes the operator of the Eastern parkway line to New Lots road a passenger boarding a train at Brownsville will be carried five miles to Atlantic avenue, whence he will proceed about two and one-half miles more through the present subway to City Hall, or four miles if he goes to 14th street. He will pay his morning fare on the new line and his evening fare on the old subway. The train he rides on will earn many more fares in the short haul in the subway than while it runs on the new line. In others words, the major mileage is on the new line and the major fare receipts are on the old line. If now the division of general operating expense is divided between old and new lines according to the proportion of car miles operated the new line is starved and the old line is fattened. Here again the application of the per passenger method becomes plainly necessary.

Illustrations of per Passenger Method

Broadway Branch Interborough Subway:

It is generally conceded that the least profitable part of the subway is the upper portion of the Broadway branch

where large areas of ground are still vacant and where traffic is not at all dense. On the basis of tickets sold the Broadway branch north of 137th street originates only 3.2 passengers per car mile. At five cents per passenger this would mean a revenue of only sixteen cents per car mile compared with an average of 28 cents per mile on all the street railway lines in New York City. On the trunk of the subway below the Grand Central Station the density is more than twice as great and reaches the ratio of 8.2 passengers per car miles for the Brooklyn line beyond Bowling Green, and 14.2 passengers per car miles from South Ferry to the Brooklyn Bridge. It may be remarked in passing that this contrast in density of traffic is essentially the result of short-distance riding, contributed to the subway to a large extent by passengers brought down town by the so-called unprofitable extensions.

Whether the Broadway subway north of 137th street is profitable or not has in effect been answered by the operating company which has made proposals for additional extensions in The Bronx to points even further distant from the City Hall than the terminus of the present Broadway branch. An engineer would advise this course without making any very extended analysis of earnings and expenses. Thus he would see from the records that the number of tickets collected at stations on the subway north of 137th street in the fiscal year ended June 30, 1910, was $16,435,932. Of these, approximately 800,000 were north bound, and it may [fol. 1569] be assumed that an equal number of persons made a return trip from the northern terminus to stations on this division. Subtracting these purely local passengers, there would remain approximately 15,000,000 who ended their journey on the main line of the subway and upon their return would pay fares at main line stations. The main line would also get the benefit of the short distance riding of the 15,000,000 passengers who travel down town. Such short distance riding would be estimated at from 10 to 30 per cent. of 15,000,000. The additional business brought to the subway by the division under consideration would, therefore, be represented by 33,000,000 fares as follows:

Fares paid on the division (local and through traffic)	16,435,932
Return fares paid on main line	15,000,000
Short-distance riding on main line (10 per cent.)	1,500,000

To handle this additional traffic the company would figure that it would not be obliged to increase its train service on the main line to any considerable extent and would have very slightly increased expenses for general administration. The average cost per passenger would in all probability remain about the same. This cost on the subway, including charges on the City's bonds issued for construction and at 6 per cent. return on the cost of equipment furnished by the company, is 3½ cents. On each of the 33,000,000 passengers, therefore, the company would make about 1½ cents, or a total of $495,000.

It is possible that a more detailed analysis of the various elements of expense might reduce this favorable balance somewhat, but no reasonable method of calculating the profits of the division would fail to show a substantial profit on its operations. If we reckoned the earnings of the division on the basis of length of line as provided in the standard form of franchise granted by the Board of Estimate and Apportionment, the division would receive 22 per cent. of the total revenues of the subway, or slightly more than $3,000,000, and if the expenses were charged against the division of the car-mileage basis proposed by the Interborough they would not exceed $1,000,000, leaving a net profit of $2,000,000.

If expenses were still charged to the division on the car-mileage basis and revenues were apportioned on the same basis on the theory that earnings accrue at the place where service (represented by car mileage) is performed, then the division would receive revenues of upwards of $1,400,000, and would show profits of nearly $500,000.

If, in the third place, the division be credited only with the passenger traffic that originates directly on the division, and expenses be charged against it in the same proportion that this traffic bears to the entire traffic of the subway, the division would receive 6.11 per cent. of the earn-

ings ($850,000) and would be charged with the same percentage of operating expenses, leaving a surplus over all charges of about $100,000.

If, however, the apportionment of earnings and expenses be made on the basis of the Interborough's offer, the division would receive only $820,000 revenue and would be charged with $960,000 expenses, leaving a deficit of $140,000. Such a result is obviously unfair to the extension. [fol. 1570] The method entirely fails to credit the extension with any portion of the short haul traffic that it brings to the main line, and it imposes upon the extension pro rata charges for general administration that are not perceptibly increased by the operation of the additional track, thus adding to the profits of the main line in two ways.

Proposed Lexington Avenue Subway

The defects of this plan of apportioning earnings and expenses appear even more glaringly when applied to the east side subway on Lexington avenue. In the calendar year 1910 there were 20,000,000 passenger tickets sold at stations of the West Farms branch of the subway north of Mott avenue. Almost all of these passengers travel to lower Manhattan and with the Lexington avenue subway built would take trains running down the east side. Making ample allowance for those traveling to the west side, there would remain at least 15,000,000 persons (and a still larger number in future years) who would pay their fares to existing uptown stations in the morning and at existing downtown stations at night, so that the existing lines could count upon the 30,000,000 fares ($1,500,000) to augment their revenues, while the larger part of the cost of transporting these passengers would be assessed against the new lines. The charge against the Lexington avenue subway including interest and amortization would approximate 3½ cents a passenger, as the distance from Mott avenue to 42d street is more than five miles and the average cost of carrying a passenger one mile is about ¾c., as shown in the statistical report of the Public Service Commission for 1909 (Vol. III, page 501.) On this basis the new lines would have the privilege of contributing upwards of $1,000,000 a year toward the expenses of the Interborough Rapid Transit Company in return for which they would not receive any revenue whatever.

(fol. 1571)

Two Methods of Calculating Profits of the Broadway Branch of the Subway North of 137th Street

	Entire subway	Division Total	Division Proportion
Revenue car miles	50,258,774	?	?
Active passenger car miles	49,877,018	5,077,348	10.18%
Passenger—tickets sold	268,962,115	16,435,932	6.11%

	Subway aggregates	Division results: Car mileage basis (10.18%)	Division results: Average passenger cost (6.11%)
Passenger revenue	$13,435,535 36	$821,796 60	$821,796 60
Deductions:			
Operating expenses	4,756,449 54	‡484,206 56	‡280,619 07
Taxes	225,279 95	22,933 50	13,764 60
Rent due City	2,181,204 01	*309,825 00	*309,825 00
6% on Company's investment in equipment	1,800,000 00	†142,189 00	†142,189 00
Total	$8,962,933 50	$959,154 06	$756,397 67
Surplus	$4,472,601 86		$65,398 93
Deficit		$137,357 46	
Add operating revenues other than passenger	496,720 21	30,349 60 (6.11%)	30,349 60
Final—			
Surplus	$4,969,572 07		95,748 53
Deficit		$107,007 86	

* The cost of construction of the road is estimated as follows: 2.53 miles of triple tracks and 3.09 miles of double track, total 13.77 miles at $500,000 a mile equals $6,885,000. Bonds were issued by The City of New York at 3½ per cent interest, which is paid by the lessee together with 1 per cent sinking fund instalment.

† The cost of additional equipment provided by the Company under Contract No. 2 was $1,150,000, representing cost of real estate, sub-station and electric lines from Ann Street to Atlantic Avenue (6 2/3 miles or $172,100 per mile of track). On this basis the equipment for this division (13.77 miles of track) would cost $2,369,817, on which a carrying charge of 6 per cent is figured to cover interest and obsolescence.

‡ All the proposed methods of ascertaining operating expenses of a division provide that such expenses as can be localized (for example, maintenance of track and stations, wages of station employees, etc.) shall be direct charges. The direct charges will ordinarily amount to about one-fourth of all operating expenses, and these would be the same on the car mileage basis as on the average passenger cost basis, and would to some extent diminish the difference between the two methods, reducing the deficit in the one case by a few thousand dollars and also reducing the surplus in the second case.

Short Distance Riding and its Relation to the Per Passenger Method

The existence of short-haul traffic of large dimensions is revealed by an analysis of the ticket sales, earnings and expenses of the subway. The Chief Statistician of the Public Service Commission has calculated the average cost of carrying a passenger one mile on the subway, including in such cost a 6 per cent. return on the Interborough Rapid

Transit Company's investment, and found it to be ¾c. (See Public Service Commission Annual Report, 1909, volume III, page 501.) If passengers rode seven miles on the average, the cost to the Company would exceed the 5 cents paid for the ride, and the Company would be losing money instead of making 17-18 per cent. on its investment. The [fol. 1572] difference between the 17-18 per cent of profits realized and the 6 per cent. assumed in the calculations of cost shows that the long-haul traffic represented by the passengers carried back and forth from The Bronx and upper Manhattan is counterbalanced by short-haul traffic of large dimensions. The fact is that the average length of ride on the subway as determined by the statisticians of the Commission is only five and one-half miles, and on the Manhattan elevated lines slightly more than six miles. Some idea of the dimensions of the short-haul traffic may be gained by referring to the table of subway ticket sales, which show that about 82,000,000 tickets are sold at stations above 96th street. Making allowance for local riders, it is clear that the larger part of these are carried to lower Manhattan and must also return from thence, thus accounting for more than one-half of the total subway traffic (268,762,000). The short-haul traffic is discovered in the 66,000,000 riders to and from Brooklyn and the 40,000,000 tickets sold at stations between 96th street and South Ferry, to other travelers than the two classes already mentioned.

The following statistics and interpretation are from the forthcoming report of the Public Service Commission for 1910:

The next table (numbered 4) contains ticket sales by sections for the fiscal years 1909 and 1910. The ticket sales of the stations to which the car mileage of a section is figured are divided between adjacent sections in a way to compare passengers (or ticket sales) with car mileage of the stretch of road where their journeys begin. Thus passengers entering the 137th street station are included in the Dyckman to 137th street section, if northbound, but in the 137th to 96th street section if southbound. This requires the use of estimation for the division of express station figures by direction. It happens also that the boundaries taken for the sections are usually express stations.

Table 5

Computed Car-miles and Tickets per Car-mile by Sections

	1909	Tickets sold per car-mile, 1909	1910	Tickets sold per car-mile, 1910
180th Street (Lenox) to 3d Ave. (south)	3,548,938 143,808	4 13	3,962,640 131,402	4 55
3d Avenue (south) to 135th street (north)	1,632,856	3 04	1,823,198	3 05
145th St. (Lenox) to 135th St. (not incl.)	312,858	4 50	324,226	4 69
135th St. (Lenox) (so.) to 96th St. (no.)	4,482,360	4 89	4,877,900	4 86
145th to 86th (Lenox)		4 86		4 85
242d Street to Dyckman Street (north)	1,403,686 85,090	2 05	1,610,782	2 41
Dyckman St. (south) to 137th St. (north)	3,241,394	3 28	3,466,566	3 69
137th Street (south) to 96th St. (north)	3,486,900	3 94	3,654,308	4 35
96th Street (south) to 72d Street (north)	4,147,132	2 76	4,432,878	2 81
72d St. (south) to Grand Central (north)	7,000,634	4 36	7,482,992	4 56
Atlantic Ave. to Bowling Green (south)	3,297,860	8 58	4,105,856	8 23
South Ferry to Bowling Green (not incl.)	240,308	7 65	208,988	8 99
Bowling Green (no.) to Brooklyn Borough (south)	1,722,510	13 90	1,879,056	14 78
South Ferry to Brooklyn Bridge		13 18		14 20
City Hall to Brooklyn Bridge (not incl.)	195,354	3 24	200,272	3 11
Brooklyn Bridge (no.) to 14th St. (so.)	5,891,318	6 16	6,297,242	6 11
City Hall to 14th Street		6 07		6 02
14th St. (no.) to Grand Central (south)	4,908,294	7 00	5,246,486	7 17
Total	45,741,300	5 21	49,714,792	5 41

[fol. 1573] Attending for the time being only to the ratios for 1910, we note the range between the minimum ratio of 2.41 for the 242d to Dyckman section and the maximum of 14.78 for the Bowling Green-Brooklyn Bridge section is 12.37 points, or over five times the minimum. The order of the sections, as it appears below, in respect of the size of this ratio is even more noteworthy. The single station stub or loop sections are, for this purpose, combined with the adjacent sections. They have in general, separately taken, even less individual significance than the others.

Section	Ratio in 1909	Ratio in 1910
242d-Dyckman	2 05	2 41
96th-72d	2 76	2 81
3d avenue-135th	3 04	3 05
Dyckman-137th	3 28	3 69
137th-96th	3 94	4 35
180th-3d	4 13	4 55
72d-Grand Central	4 36	4 56
145th-96th (Lenox)	4 86	4 85
City Hall-14th	6 07	6 02
14th-Grand Central	7 00	7 17
Atlantic Avenue-Bowling Green	8 58	8 23
South Ferry-Brooklyn Bridge	13 13	14 20

The order of the sections in 1909 was the same as in 1910. The minimum ratio pertains to the extreme end of the Broadway branch, the maximum to Manhattan south of Brooklyn Bridge. In general the downtown sections (including among them the Brooklyn extension) show the highest ratios, the outlying northerly sections the lowest. The 96th to 72d street section, ranking next to the lowest, is an exception, perhaps owing to its population being largely served by other means of transit than the subway, while it is at the same time a section through which the necessary car miles must be operated to provide for all the passengers from the north.

These ratios have, as such, very little positive significance. They do have a good deal of negative interest, however, as showing how not to compute the earnings of the different parts of the subway. It should be clear that the locus of earnings is where the service is performed. The performers and their aids at a theatre, not those who sell the tickets, are the ones who earn what is paid for admission. Similarly, it is the car miles operated to accommodate a particular class of passengers that earn what is paid for the service. The locus of the earnings is the place where the car miles are operated, not the station where the tickets are sold. The service is proportioned to passenger miles, or rather, to the car miles necessary to accommodate the passengers. This quantity will, in a general way, vary with passenger mileage, but not exactly so. The most important difference between the two in the present connec-

tion is that, in proportion to passenger mileage, car mileage at the outlying extremes of a line is likely to be large while in peak-load districts it is bound to be, by comparison, small. Passengers cannot be put out of a car, and the car turned back, as soon as there begin to be several empty seats. Passengers insist, perhaps to an unreasonable extent, on remaining in the same car to their destination. [fol. 1574] Even where they would be discommoded but little, e. g., by the dropping of single cars from a train as passengers riding become fewer, the managers do not, in fact, adjust mileage closely to volume of transit at the ends of the line. The difference between centre and extremes of road, even though susceptible of great reduction, is bound to remain of this nature. Car mileage and passenger mileage, moreover, may be assumed to be much farther apart on the outlying sections of a line than are car service and ticket sales, for the reason that a terminal is likely to be to some extent a delivery district, though nowhere near so important as downtown.

The bearing of these considerations upon what should be the proper form of an operating contract for subway extension is too obvious to require specific discussion. It is sufficient here to make available the fundamental figures necessary for the detailed reckoning of operating "costs" and "earnings" according to methods proposed by possible operators.

The column of differences (Table 5 and the summary following it) between the ratios for the two years gives the rather remarkable result of a maximum increase in the maximum ratio of ticket sales to car miles. In general, however, it is the stations at the northerly ends of the line which show increases in these ratios. The downtown sections, with the exception of the 14th to Grand Central and also the one above noted, show decreases in their ratios. The Brooklyn section also shows a slight decrease. Thus it appears that the stations that would naturally be entered by those taking the shorter rides are relatively at least not gaining ground. But the ratio could as well be changed through the car mileage factor as through the other. Hence it is of interest to consider the tendency of ticket sales at various parts of the subway as regards their absolute numbers, and also other data or computations throwing light on the tendency of the average length of ride.

XVII.—The Relation of Discounts to Recapture

What Is "Actual Cost"?

In every plan which involves the termination of the operating lease at the end of ten years or thereafter and the recapture of such rapid transit railroad by the City, the amount of which must be paid to the operating company is a most important factor. The Rapid Transit Act specifies the terms and conditions for such recapture. The provision concerning the amount to be paid to any company which has constructed or which has contributed to the construction of any road is that the City shall pay an amount not to exceed the "actual cost" of such construction plus 15 per cent. thereof. One of the companies wishing to make a contract with the City has urged that "actual cost" should be construed to include discount on bonds in addition to the 15 per cent., and thus far has refused to accept any limitation of the discount. The other has taken no such stand.

If this demand should be granted, the effect upon the amount paid in case of recapture might be very serious, and if no limitation were placed upon the amount of discounts, [fol. 1575] the lessee company could fix a price to be paid by the City in the case of recapture which would be so out of proportion to the money cost of the property as to reduce the value of such right of recapture.

To make clear what such a proposition means, let it be assumed that certain lines are to cost in cash $100,000,000 and that in order to attract sufficient capital to build these lines the company must pay in one form or another what is equivalent to an interest rate of 5.2 per cent. The following table shows under varying rates of interest the discount at which the bonds could be sold in order to net 5.2 per cent. interest, the par value of the bonds which would need to be issued in order to provide $100,000,000 to build the road, the amount which the City would have to pay if the 15 per cent. bonus at the end of ten years were computed upon the face value of the bonds and the per cent. of bonus upon the basis of actual money cost which such payment would mean:

Nominal Interest Rate.	Price of Bonds on 5.2% Basis	Bonds Necessary to Build $100,000,000 Road	115% of Bonds.	Bonus in %.
5.2	$100.00	$100,000,000	$115,000,000	15
5	96.45	103,680,664	119,232,764	19.2
4½	87.57	114,194,359	131,323,513	31.3
4	78.69	127,080,950	146,143,092	46.1
3½	69.82	143,225,436	164,709,251	64.7
3	60.94	164,095,832	188,710,207	88.7

For illustration: If the company should decide to issue 5 per cent. bonds and the City were to recapture the road at the end of ten years, it would have to pay a bonus of 19.2 per cent. instead of 15 per cent. compelled by the law. If the company were to issue 4½ per cent. bonds, the bonus would be 31.3 per cent.; and if a 4 per cent. bond were issued, the bonus would be nearly one-half the cash cost of the road.

The provisions of the Rapid Transit Act relating to recapture were drawn by the Public Service Commission and were enacted by the Legislature at its request. At the time the proposed amendments were under discussion within and without the Legislature, it was frankly stated by the Public Service Commission that some inducements in the form of a bonus should be allowed in case the City should recapture a road at the end of ten years, and that this bonus should decrease thereafter and within a reasonable period disappear. It was generally recognized that a maximum limit to the amount of bonus to be allowed should be prescribed by law, so that the City could not be mulcted to an unreasonable amount. After considerable discussion, the maximum was fixed at 15 per cent., with the idea in mind that in many instances it would not be necessary to pay the maximum.

It is evident that if discounts without limit may be added to cash cost, the limitation is meaningless, and that instead of a statutory maximum there is no maximum whatever, for discounts can be made sufficiently large virtually to provide for any bonus. If such were the intent of the framers of the law and of the Legislature, nothing was gained by inserting a maximum limit of 15 per cent., and those who considered such limit was a safeguard against improvident contracts were misled. When the amendments [fol. 1576] were drawn, the Public Service Commission

had in mind this very question of discounts, and one reason for placing the limit so high as 15 per cent. was that bonds might be sold at a discount and all of that discount might not be amortized within ten years.

It is not maintained that the part value of bonds may not exceed the amount of money which a company must raise. It is conceivable that it would be more advantageous to a company to issue a 4 per cent. bond and sell it at a discount than to issue a 5 per cent. bond and sell it at par. The natural interpretation of the Rapid Transit Law would not interfere with the former plan, but if such a course were followed, the City ought not to be compelled as a direct result to pay many millions more than it otherwise would. It is self evident that neither the cash investment nor the value of the property has been increased by the issuance of a 4 per cent. bond as compared with one bearing a higher rate of interest.

If the proposition is sound that discounts should be added to the money cost in order to determine actual cost, the converse must be true, viz., that if bonds are sold at a premium the amount of such premiums must be deducted from money cost to determine actual cost. It follows that the present subway has cost the City not $52,000,000, which was the amount of cash actually disbursed for construction up to a recent date, but $50,000,000, which represents the amount of bonds issued to provide $52,000,000 of cash, the City's bonds having been sold at a premium. It has been suggested that if the proposal is sound, the wise thing to do would be to compel the lessee company to issue 6 per cent. bonds, sell them at a premium, compute the 15 per cent. upon the face value of the bonds, which would be considerably less than the money cost of the road, and thereby reduce and possibly wholly eliminate any bonus whatever. But naturally this proposition has not been received with favor by the company.

The statement has been made that there is no precedent for the exclusion of discounts from "actual cost," and that discounts are and always have been included in cost. Regarding this assertion, it should be noted in the first place that this is a question as to the amount which the City should pay under an indeterminate franchise at the end of ten years or thereafter. There are, therefore, few cases that have been found that are similar to the one under dis-

cussion. The nearest approach is the provision in the franchises of the Hudson and Manhattan Railroad granted in 1905 and 1909. These franchises reserve to the City the right to purchase at any time after 1935 at an appraised valuation "not to exceed the actual cost in money of the construction of the railroad." It should be noted that these franchises not only fail to provide for any bonus whatever, but specifically limit the cost to cost in money, which eliminates discounts entirely.

The Chicago Street Railway franchises of 1907-1910 provide for municipal purchase at any time. When the settlement was made, the existing property was valued and this valuation includes a lump item of 10 per cent. to cover legal expenses, interest during construction, contingencies and brokerage. In case the City takes over the lines, there will be added to the above valuation the cost [fol. 1577] of all additions. To the actual cost of such additions, there is to be added 10 per cent. "as fair and proper allowance to the company for conducting the said work and furnishing the said equipment," and 5 per cent. "for its services in procuring funds therefor, including brokerage." Thus under the Chicago basis the bonus is limited to much less than 10 per cent. on the original lines and 15 per cent. upon additional expenditures, which removes the possibility of securing an additional bonus by including bond discounts. The freight subway franchise is even less generous, as only 5 per cent. is allowed for compulsory sale.

The Cleveland Street Railway settlement franchise of 1919 also contains a provision for municipal purchase at any time and contemplates additional expenditures by the company. The valuation upon which the settlement was based and which is to serve as the basis for municipal purchase of existing lines, contains no allowance for brokerage or bond discount, and the bonus is limited to 10 per cent. To the above original valuation will be added, in case of municipal purchase prior to the expiration of the franchise term, the part value of any stock or bonds issued to pay for the construction of additions to property plus a bonus of 10 per cent. Stocks may not be issued at less than par, and bonds may only be issued at less than par with the consent of the City. Furthermore, the City has the option of taking over the property subject to outstanding bonds, and

in such case the par value of the bonds is subtracted from the purchase price before the 10 per cent. bonus is added. It is evident that, in view of all of these limitations, and particularly of the limitation of the bonus to 10 per cent., that the terms are more rigid than those proposed in this report.

A case which very closely parallels the present question is a decision in City of Galveston v. Heard, 54 Texas, 420, 449. The City Charter provided that the cost of construction of sidewalks shall be defrayed by the owners of the land fronting thereon and that the cost might be collected by sale of lot, etc. The court held that where the sidewalks were paid for by bonds and the City's credit was such as to cause these bonds to be sold at a loss, that loss should not constitute a part of the legitimate cost of the work chargeable on the lot, but that the cash paid out represented the actual cost of the work.

The question of including discounts in actual cost has most frequently arisen in rate cases, and thus far no final judical decision has been found where discounts have been included in the fair value of the property. Certain decisions indicate that some consideration has been given to the amount of stocks and bonds issued, following the suggestions made in the celebrated case, Smyth v. Ames, but the decision in this case does not state that the par value of stocks and bonds is to be considered as a determining factor, but only to the extent that they may throw light upon actual cost or present value. Justice Harlan, who wrote the opinion, stated, 169 U. S., 466:

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the [fol. 1578] purpose of realizing profits upon such excessive valuation or fictitious capitalization." In the case of Steenerson v. Great Northern Railway, Justice Canty says, 69 Minn., 353:

"In determining what are reasonable rates, it is perfectly immaterial whether the railroad is mortgaged for two or three times what it would cost to reproduce it, or whether it is free from incumbrance * * *. It is immaterial how

the property has been split up into different rights, interests and claims."

In the recent opinion of Judge Otis, Special Master in Chancery, in the Minnesota rate cases, the admission of bond discount in determining cost is squarely denied. Judge Otis says:

"It cannot be said, however, that it is money which has actually gone into the road, but rather an expense which the company incurs for the purpose of procuring such money. If rate-making is to be based upon actual cost, it would seem that such cost must be measured by the money necessarily expended in producing the construction, without regard to whether those undertaking the enterprise have the same or must borrow for the purpose—a matter in which the public has no concern. If allowed interest during construction on the money invested, more should not be asked; otherwise the rate would be directly affected by the good credit or otherwise of those undertaking the work."

The findings of Judge Otis have been just recently approved by the Circuit Court of the United States (see Sheperd vs. Northern Pac. Ry. Co., 184 Fed. Rep., 764).

The attitude of the Interstate Commerce Commission and the New York Public Service Commissions of the First and Second District is shown in the systems of accounts now applicable to the corporations under their jurisdiction. Discount on bonds may no longer be included in construction cost. It must be charged to a separate account and amortized during a period not in excess of the life of the bonds. This practice is approved by the best writers on accountancy and has been adopted by many corporations upon their own initiative. Discount on bonds is practically interest in another form, and cannot properly be considered as part of the cost of the property.

XVIII. Communication from the President of the Borough of Richmond with Relation to the Projected Line to Staten Island

Borough Hall, New Brighton, New York City

June 5, 1911.

Hon. George McAneny, Chairman Board of Estimate Special Subway Committee; Hon. William R. Willcox, Chairman Public Service Commission, and Fellow Conferees:

GENTLEMEN: As you know, during our consideration of the almost countless phases of the transportation proposi- [fol. 1579] tion for New York City, I have consistently and persistently kept to the front the matter of including the Borough of Richmond as territory into which immediate subway construction should be carried, in connection with the main proposition rather than as an extension to be considered at some indeterminate later date.

New York City consists of two great parts: first, the area within its corporate limits; and second, a wide area surrounding it, whose population contributes to its prestige and power, therefore deserves consideration, but does not contribute directly to paying its bills or raising its taxes.

Throughout our conferences, I have endeavored to dissociate borough considerations, but always considered the City as a geographical whole. By common consent, the City Hall has been considered as the focus of civic life, the point in general to which the moving population wishes daily access and from which it must pass to its homes. There are other centres, and as the City grows in population, other centres will increase in importance, and in our studies of the transportation question, we must keep that fact in mind so that transportation will not only be provided for the great centre but freely between the other centres; for thus, only, can the terrific congestion which to-day prevails in certain portions of the City be relieved and other portions of the City be accommodated.

No one locality or borough can arrogate to itself the making of New York City; every locality has had its powerful influence. No one thinks of charging the bridges, with

their enormous cost of construction and maintenance, to any particular borough. No thinking man charges to any borough the cost of constructing terminals and ferry-boats and operating them. No thinking man should charge to any locality or borough the cost of constructing and operating municipal transit lines. The smallest taxpayer on the outskirts of The Bronx, Queens, Brooklyn or Richmond is entitled to the same consideration as is he who owns property near the City Hall in Manhattan.

As a matter of fact, he pays relatively higher taxes for what he gets in return and may be an even more valuable citizen.

The transit problem before The City of New York to-day is two-fold: first, and more important, to relieve the terrific crowding of the transportation lines at present in operation; second, and of vast importance, furnishing access to all parts of the City as yet undeveloped, so that they may become attractive places of residence for the workers in our office centres and for the establishment of factories and workshops to which operators can have ready access and from which they can reach the different business and recreation centres.

In considering, however, these most essential features of the case, it would be improper for me, as an elected representative of a borough, large in area and great in possibility, not to insist to the utmost that its special needs be cared for. If nature had placed it geographically so that it was only separated from the other boroughs by a narrow stream, or without such physical division, there is but little doubt that subways would have been cheerfully considered and planned for as a part of the main great system, but [fol. 1580] because nature has placed a magnificent body of water between Richmond and its nearest neighbor, Brooklyn, its position as an integral part of the great city is largely denied, and whatever is done towards its development seems to be considered by some as a charity instead of being its right.

The distance by water between the boroughs should, therefore, be entirely eliminated from the estimates as being chargeable to a specific locality, but should be charged as a part of the general cost of the whole transportation system.

The Borough of Richmond is to-day dependent upon ferry service for connection with the other portions of the City; yet, but a few months ago, a strike demoralized the service and practically cut off communication. The borough should not be dependent solely upon ferry service. If bridges were practicable, it should have bridge connection; as they are not, it should have the next best means of communication, tunnels.

Twice or thrice there has been a large increase in the assessed valuation of property in Richmond under the City's avowed policy of increasing assessments so as to increase the bonding capacity for the construction of subways; yet, for other than a some time possible extension, Richmond gets little but consideration.

Let me remind my associates that among the most powerful men who made the old City of New York, Richmond's taxpayers were the leaders, and to-day in that honor roll Richmond's residents name a proportionate number. We claim, therefore, our rightful share of the City's wealth to render accessible the homes of Manhattan business men. We also call attention to the constantly increasing army of office workers south of Chambers street; they are being rapidly driven to New Jersey for homes, for though they can reach parts of Brooklyn and The Bronx and upper Manhattan for a five-cent fare, the trip is so uncomfortable that they prefer a greater expense to get across the Hudson where the railroad companies at least try to furnish a seat for every passenger. Many of these thousands would be glad to come to Richmond, but they have a fear of the water, unjustifiable, perhaps, but nevertheless a fact. No amount of argument or reference to the small percentage of delays through fogs, ice or other causes in the years past can convince many people that there is actually equal safety and less average delay by boat than there is by train.

Richmond County is one of the healthiest counties in the State. For a great many years past, malaria even has been a practically unknown disease in Richmond, fewer cases having been observed than in the Riverside section of the Borough of Manhattan. Our water supply is reasonably satisfactory for present needs, and in quality is better than Croton, but the quantity must soon be augmented, and

full relief is soon to be given by the extension of the Catskill system.

The proposed extension of the Catskill water system will involve a large expenditure for the duplicate water mains under the Harbor from Brooklyn to Richmond, several millions of dollars having already been appropriated for that purpose. I have taken up with the engineers of the Board [fol. 1581] of Water Supply and other prominent engineers of the country the question of the saving that might be accomplished to the City by uniting the construction of these water mains with the proposed tunnel construction. I am advised that such construction is not only perfectly feasible, but desirable, and that the saving in cost to the City by such joint construction would be fully $1,000,000.

Practically every argument that has been or can be raised against a vast population settling in the Borough of Richmond, closely analyzed, comes down to the lack of suitable transportation connection between that borough and the other portions of New York City. For beauty, for healthfulness, for intra-borough access, for local markets, for churches, schools; every advantage is here. It has the best waterfront to-day within the City limits available for ocean-going vessels. It has factory sites innumerable, and it has what no other borough or portion of New York City possesses, direct connection by bridge with most of the trunk line railroads, the Central Railroad of New Jersey, the Delaware, Lackawanna and Western, the Erie, the Lehigh Valley, the West Shore, and the Baltimore and Ohio, making possible the reception and shipping of freight in bulk without lighterage, the rock that has pretty nearly wrecked the shipping prestige of New York. It would not only be quite possible, but relatively economical, to construct between Brooklyn and Richmond a four-track subway instead of a two-track that has been under consideration. Two tracks of such a system could be used for through freight. Continuing those tracks would bring to the Bush Terminal and to the proposed Jamaica Bay Terminal bulk freight from the west without trans-shipment. Continuing such tunnels from the Bush Terminal along the Brooklyn waterfront and by an additional twin tunnel to the lower end of West Street, Manhattan, would give phys-

ical connection to the great railroad waterfront development proposed for the west side of Manhattan. This would result in practically a complete elimination of lighterage in the Harbor of New York, and would give to all of the other trunk line railroads the advantages that are now proposed to be furnished to the New York Central Railroad. The Pennsylvania Railroad, through the expenditure of private capital, has secured for itself practically all of the facilities that it requires. The New York Central and the New York, New Haven and Hartford, also, at private expense, have secured very great advantages. The other great railroads which are of so much advantage to The City of New York also have little present opportunity of serving the City, and under plans heretofore proposed would be under perpetual handicap.

We have no means of learning whether these other railroad companies would, or would not, contribute to the cost of the passenger subways between Richmond and Brooklyn as a part consideration of securing franchises for freight business, but believe that such a proposal would meet favorable consideration. Aside from that possible factor, however, Richmond needs a passenger railroad connection with other parts of New York City, on the same basis in the transportation plan that is proposed to be accorded to other portions of the City, but we would not [fol. 1582] stop at stating Richmond's needs for facilities, but base the claim on the fact that the City, as a whole, needs the granting of these facilities for access to Richmond. It should be the City's policy to encourage its business men and women to reside within its own limits, but if there be no pride in securing that result, the financial gain could well be considered due to the increased taxpaying ability of the City to continue its great work of proper development.

I therefore suggest that we recommend to the Board of Estimate and Apportionment that, of the City's moneys to be set apart now for subway construction, at least $5,000,000 be for application to subways to Richmond, in addition to such sums already appropriated as can be saved by a joint construction of the proposed water mains with the proposed subways, the balance of the total cost of con-

struction to be provided by the operator in part consideration for his franchise.

Very truly, George Cromwell, President of the Borough of Richmond.

His Honor, the Mayor, then stated that consideration of the report would be deferred until June 21, 1911, as recommended by the Committee of the Whole.

There being no objection, it was so ordered.

O. At a meeting of the Board of Estimate and Apportionment held on June 21, 1911, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways; Extensions to the Existing System; Also Third Tracking and Constructing Additions to the Second, Third and Ninth Avenue Elevated Railroads, and the Completion and Putting in Operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District, submitting proposition of the Interborough Rapid Transit Company, to construct, maintain and operate certain extensions to the existing Rapid Transit Railway, conditional upon favorable action upon the proposition of said Company to third-track [fol. 1583] and build additions to its 2d, 3d and 9th avenue elevated roads, and to build and put in operation the Steinway tunnel and requesting a statement of the position of this Board on the subject.

At the meeting of June 13, 1911, a report was received from the Conference Committee and this day was fixed as the date for consideration of the report and the recommendation therein contained.

The President of the Borough of Manhattan, on behalf of the Conference Committee, offered the following:

Whereas, The Public Service Commission for the First District, under date of December 20, 1910, submitted to the Board of Estimate and Apportionment a proposition of the Interborough Rapid Transit Company, dated December 5, 1910, for the construction for the City and for the equipment and operation by that company of certain additions to the present subway system; and

Whereas, The Commission, in its letter of transmittal, stated that it would be pleased to receive a statement of the position of the Board of Estimate and Apportionment with relation to this proposition, and a statement in particular of any objections to the form of contract proposed that would, unless properly met, render impossible the consent of the Board to the forms of contract as finally submitted; and

Whereas, The Public Service Commission stated further that it would be pleased to confer with this Board, or with any Committee thereof, on the general subject; and

Whereas, The Board of Estimate and Apportionment, in pursuance of this invitation, under date of January 19 last, authorized the appointment by the Mayor of a Conference Committee, with power to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it," such Committee, as subsequently appointed, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond; and

Whereas, The aforesaid Committee of the Board, in conference with the Public Service Commission, has considered not only the original proposition of the Interborough Company, but certain propositions subsequently received from the Brooklyn Rapid Transit Company, as well as a modified proposition from the Interborough Company, all with relation to the construction, equipment and operation of new rapid transit railways; and

Whereas, The Committee of the Board, in a report dated June 5, 1911, in which the members of the Public Service

Commission join, has recommended a course of action on the part of the Board with relation to the several propositions from the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company now pending before the Commission, the adoption of which would serve as an answer to the inquiries of the Commission addressed to the Board in December last; and

Whereas, The recommendations in question offer to the Board an opportunity to lay down a policy under which it will in future consider and pass upon all matters with [fol. 1584] relation to the existing transit situation and the proposals of particular companies; therefore be it

Resolved, That the Board of Estimate and Apportionment hereby approves and accepts the recommendations of its Committee, and of the Public Service Commission, as submitted under date of June 5, 1911; and be it further

Resolved, That, in pursuance of the recommendations aforesaid, the Board of Estimate and apportionment requests the Public Service Commission for the First District to prepare contracts for the construction, equipment and operation of rapid transit lines upon the following basis:

With Relation to the Construction and Equipment of Particular Routes

1. That the City construct, at its own expense, a new subway connecting with the 4th avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occasion may require, and four tracks from 9th street northward;

(d) A two-track line from 59th street easterly to and over the Queensboro Bridge, there to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan Bridge by way of Canal street to Broadway.

II. That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III. That the City construct, also at its own expense, the following two-track extensions of the Bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg Bridge by way of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn Bridge to the Wall street district—by way of Nassau and Broad streets.

IV. That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the Bridge Loop lines with their proposed extensions, in such form as to link these lines with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

[fol. 1585] V. That the City construct, at its own expense, a new two-track subway, proceeding from Union square in Manhattan easterly under 14th street and the East River to the Eastern District of Brooklyn, and thence to a point to be later determined; and that, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI. That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that action upon the alternatives presented for routing and construction be withheld temporarily and referred back

to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII. That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of rapid transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th and Southern boulevard to Westchester avenue; and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times square under 7th avenue, as extended, Varick street, West Broadway and Greenwich street to the Battery, as far as possible as a four-track road;

(d) A two-track tunnel via Whitehall street to the Borough Hall in Brooklyn.

VIII. That if an agreement be reached upon terms, the City enter into a separate contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times Square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line.

(c) To Woodside and Corona; and

(d) To Astoria.

The lines converging at the Queensboro Plaza, if this contract be accepted, to be connected also by way of the Queensboro Bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the

construction cost of the continuous line proposed, the tun-
[fol. 1586] nel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX. That, if an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

(a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern Parkway to Buffalo avenue; also a two-track subway extension from the Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern Parkway by way of Buffalo and Livonia avenues through the Brownsville district to New Lots road.

X. That the cost of construction of all of the lines to be built and operated by the Interborough Company under these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI. That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII. That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII. That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union Square or 9th street; and that, if an agreement on terms be reached with the

Brooklyn Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV. That, if the Interborough Company fails to accept a lease for the operation of the proposed line from 42d street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro Bridge.

XV. That, if the Interborough fails to accept a lease for the operation of the Eastern Parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI. That, if a contract be made with the Brooklyn Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

[fol. 1587] XVII. That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union Square, Manhattan, and the projected Lafayette avenue line from Broadway to Flatbush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII. That, if neither the Interborough Company nor the Brooklyn Company accept leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so-called Tri-Borough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX. That the Public Service Commission, in any event, proceed to prepare and award contracts for the construc-

tion of the lines to be built and owned by the City, as rapidly as practicable, in order that the work may be started immediately.

XX. That the franchises sought by the Interborough and Manhattan Companies for the third tracking and extensions of their elevated line in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

With Relation to Operating Terms as Applied to Any Operator

I. Rate of Fare.—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II. Terms of Leases.—That all contracts for the operation of lines, title to which is vested in the City, whether such lines be constructed by the City or by the Company, or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company; may be leased for twenty years with the privilege of renewal, upon an adjustment of terms, for twenty years in addition.

III. Provision for Recapture.—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus fifteen per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

[fol. 1588] (b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

IV. Cost of Construction.—That the costs of construction, whether borne by the City or by the operator, or upon a basis of division between the City and the operator shall be the cost in money and shall include

(a) All contracts for original construction work, or

(b) For station finish;

(c) All carrying charges during construction;

(d) Engineering expense;

(e) Extras and damages;

(f) Real estate and easements; and

(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V. Division of Profits.—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of

(a) The value of the tickets collected at stations;

(b) Miscellaneous earnings from stations;

(c) A pro rata of advertising and other general receipts.

The fixed cost of operation shall include:

(a) Station expenses;

(b) Maintenance of way and structure;

(c) Damages for accidents; and

(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;

(f) Maintenance of equipment, renewals and depreciation;

(g) Cost of power;

(h) General and administration expenses; and

(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charge of the operator for carrying the cost of equipment; with provision for a sinking fund

not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent.) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs of construction or costs of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum; provided

4. That if the gross income in any year, after providing [fol. 1589] for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the deficit for such period shall be borne by the operator solely; and provided further

5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI. Operation of Extensions—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall be governed by and included in all of the general provisions

of the contract with relation to operation and the division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

(c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII. Supervision of Contracts and Accounting—That the right be retained, through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions or receipts and expenditures and the determination of the City's share in such profits are based.

VIII. Operation and Management—That clauses be inserted in the contract embodying the essential provisions of the Public Service Law with relation to both operation and management, and such added guarantees as to the character and sufficiency of the equipment to be furnished, and of the service to be given, as the City may require.

[fol. 1580] With Relation to Terms Applying Particularly to the Interborough Rapid Transit Company

I. Leveling of Leases—That, as part consideration for the lease of new lines for the fixed period of forty-nine years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases for its existing lines so that these shall expire coterminously, forty-nine years from the beginning of operation of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the Company, through its right of twenty-five years renewal, would remain in possession until 1979. The lease

of Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with the renewal period, in 1968. Under the leveling process, all of the leases, new and old, revert to the City in 1964.

II. Exchange of Lower Manhattan Lines—That, as further consideration for the lease of new lines, the Interborough Company consent to the modification of Contracts Nos. 1 and 2 so as to provide that the City at any time after ten years may, if it so elects,

(a) Take over that portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn; or

(b) That portion of the existing subway running northward from 42d street to 96th street, with its Van Cortlandt Park and West Farms extensions; the Company in such event to receive in exchange a lease upon either

(a) The 7th avenue line from 42d street south to Borough Hall, Brooklyn; or

(b) The Lexington avenue line from 41st street to The Bronx, with its projected extensions, for the balance of the term of forty-nine years from the beginning of operation as herein defined.

the purpose of this clause being to give the City the right to take over a continuous north and south line, if it so desires, at any time after ten years, giving the Company in exchange a continuous line under the conditions of its present lines, and to reserve to the City the option of taking whichever of the two lines may better suit its needs and purposes under the conditions that may exist when the exchange is effected; also

That in the event of an exchange the respective values of each extension affected shall be appraised on the basis of the earning capacities at the date of appraisal; the difference in value, if there be any as so determined, to be adjusted by the payment by the City to the Company of any excess found in favor of the lines taken over by the City, or payment by the Company to the City of any excess in value found in its favor; the Company, in any event, to reserve trackage rights for the elevated trains from White Plains and Jerome avenue lines and the right to connect

the southerly end of its Lenox avenue extensions, under the terms of Contract No. 1.

Provisons to be embodied in the contract that will enable the City to take either line subject to any mortgages now liens thereon, or to compel the Company to assign its rights to a third party designated by the City; the Company to co-operate with the City in procuring any legisla- [fol. 1591] tion that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract.

III. Purchase of Existing Lines.—That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall been taken, under the ten-year clause, upon payment of the Company of a sum equal to the Company's aggregate estimated profits for the unexpired portion of the lease, estimated upon the basis of the average annual net profits for the five year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization.

With Relation to Terms Applying Particularly to the Brooklyn Rapid Transit Company

I. Earnings of Existing Lines.—That, in lieu of all earnings on its existing lines, the Company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated to be pooled with the receipts of the City built lines, for distribution in accordance with the general terms agreed upon.

II. Leased Lines.—That the Company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now holds under lease, and that no allowance be made under the head of operating expenses for further rental of any of such leased lines.

III. Examination of Plant.—That the Company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or current earnings to cover such deferred maintenance as the Commission, upon the advice of the engineers, may require to be met before the lines pass into the proposed new system.

IV. Management.—That the entire system of subways and elevated lines shall be under the management of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commissions Law.

[fol. 1592] With Relation to Terms Applying Particularly to the Extension, Third Tracking and Subsequent Operation of the Manhattan Elevated Lines.

I. That the net profits upon all the elevated lines operated by the Interborough Company in excess of the average net profits for the two years from July 1, 1909, to June 30, 1911, proper deduction having been made for depreciation, shall be divided equally between the Company and the City.

II. That the City shall have the right to take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another operator; such operator to pay the amount specified in the certificates to the Interborough Company direct.

III. That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV. That the payment to be made for equipment, in the event of recapture shall be fixed with due regard for its

then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V. That the rate of fare shall not exceed five cents.

and be it further

Resolved, That the Special Committee of the Board be hereby continued, with authority to communicate, in conjunction with the Public Service Commission, to the Interborough Rapid Transit Company, to the Brooklyn Rapid Transit Company and to the Manhattan Elevated Railways Company the terms herein set forth upon which the City would be willing to enter into contracts for the construction, equipment or operation of the rapid transit lines for which the said Companies have severally applied; the said Committee to receive and communicate to the Board of Estimate and Apportionment the replies of the Companies aforesaid for the final consideration of the Board not later than Wednesday, June 28, 1911; and be it further

Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the Fourth avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of the same; and be it further

Resolved, That the Committee of the Board be hereby continued for the purpose of further conference with the Public Service Commission upon such matters as may render consultation desirable during the formulation of contracts for construction, equipment or operation, based upon the findings and recommendations of the joint report of June 5, 1911.

The President of the Board of Aldermen offered as an amendment to the resolution of the President of the Borough of Manhattan, the following:

[fol. 1593] Resolved, That the operating terms applying to the Interborough Company proposed by the conferees in their report at pages 36 and 37 be amended so that para-

graph II of the subdivision entitled "Terms Applying to the Interborough Company," and dealing with the exchange of leases, be stricken out and in its place the following be inserted:

II. That the Interborough Rapid Transit Company be required to consent to the immediate modification of contracts 1 and 2 so as to provide that the portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn, shall be held under an indeterminate lease, terminable at any time within 10 years from the opening of the proposed 7th avenue extension, receiving as consideration for such modification a lease upon the said 7th avenue extension from 42d street, south, to Borough Hall, Brooklyn, for 49 years from its completion and opening for operation.

The modification of the existing leases shall be simultaneous with the making of the proposed contract.

The new lease for the present subway south of 42d street shall provide that upon the exercise of the option of the City to terminate the same its value and the value of the lease of the 7th avenue extension shall be appraised on the basis of their respective earning capacities at the date of appraisal. The differences in value, if any, so determined, shall be adjusted by the payment by the City to the Company of any excess found in favor of the lease taken over by the City or by the payment by the Company to the City of any excess in value found in favor of the 7th avenue extension.

Provisions to be embodied in the contract that will enable the City to compel the Company to assign its rights to a third party designated by the City; the Company to co-operate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agreement in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

Which amendment was accepted by the President of the Borough of Manhattan.

The amendment was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn and Queens—14.

Negative—The Presidents of the Boroughs of the Bronx and Richmond—2.

The President of the Borough of Queens offered the following:

Resolved, That the proposed routing terms suggested by the conferees of the Interborough at page 29, under paragraph VIII., subdivision (b) which now read:

[fol. 1594] "(b) The Steinway tunnel continued as two-track road to Queensboro Plaza, and thence as a two-track elevated line; (c) to Woodside and Corona (d) to Astoria."

be amended to read as follows:

"(b) The Steinway tunnel continued as a two-track road to Queensboro Plaza, and thence (c) as a three-track elevated line to Woodside and Corona, and (d) as a two-track elevated line to Astoria."

and that the routing terms as thus amended be submitted as final to the companies for their acceptance.

Resolved, That the proposed operating terms offered to each company shall include a requirement that the Interborough Rapid Transit Company jointly operate the Woodside-Corona and Astoria extensions; that is, that each company be required to run its trains over each of these extensions, the Interborough to run the Second Avenue Elevated and Steinway tunnel trains, and the Brooklyn Rapid Transit Company to run its Broadway-59th street trains and its Eastern District loop trains over those extensions, and that the operating terms as thus amended be submitted as final to the companies for their acceptance.

Resolved, That the terms to be offered to the Brooklyn Rapid Transit Company shall require it to extend the elevated lines along Jamaica avenue from Crescent street at Cypress Hills to Grand street, Jamaica, and the extension of the elevated line along Liberty avenue to Lefferts ave-

nue and thence by two surface lines, one to Jamaica by the most direct route and the other along Lefferts avenue southerly to Jamaica South Plank road.

The President of the Borough of The Bronx offered the following:

On page 30, section 9, for subdivision A, substitute the following:

A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to the Gun Hill road, and a three-track elevated line along the White Plains road from the Gun Hill road to its projected terminus near the City Line.

Page 31, insert new section 18½ to read as follows:

That if the Interborough Company fails to accept a contract for the construction, equipment and operation of the extension of an elevated line as provided on page 30 of this report, section 9, subdivision A, from the West Farms division of the present subway via the White Plains road to its projected terminus near the City Line, then the extension for an elevated structure on the White Plains road from and along the Gun Hill road to and along the White Plains road to 241st street be offered to the Interborough Company as an elevated extension from the proposed Webster avenue line north of the Gun Hill road on the White Plains road on the same terms as other Interborough elevated extensions are offered, and to be included within the provisions of section 20, page 31, of this report. Trackage rights to the City for a subway extension from West Farms to be reserved.

The President of the Borough of Brooklyn offered the following:

Resolved, That the Allied Board, consisting of the Ridgewood Board of Trade, the Broadway Board of Trade, the Twenty-eighth Ward Taxpayers' Association, the Wyckoff Heights Taxpayers' Association, whose members [fol. 1595] are residents of the Eastern District of Brooklyn, and many other civic bodies from other sections of the Borough, emphatically protest against the adoption of the so-called McAneny report, unless the Lafayette avenue subway to Broadway, the Ridgewood and East New York sec-

tions is included therein; and that if the railroad companies bidding for the contracts are not willing to build and operate subways in said sections, that the City proceed immediately with the building of the so-called Tri-Borough route, the bids for which have long ago been advertised and received for; and be it further

Resolved, That we respectfully request a hearing before your honorable Board before you take final action upon the said report.

Which were severally referred to the Conference Committee by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Board of Aldermen offered the following:

Resolved, That the operating terms applying to the Interborough Company proposed by the conferees in their report at page 38, under subdivision III., relating to recapture of existing lines, be amended so as to read as follows:

"That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken under the ten-year clause, upon payment to the company of a sum equal to the then value of the unexpired portions of the Company's leases under contracts Nos. 1 and 2, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or, if the period of final amortization has been passed, then for the average of the five-year period immediately preceding the completion of amortization."

and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Bor-

oughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Manhattan offered the following:

Resolved, That the Board of Estimate and Apportionment hereby approves the following corrections in and modifications of the joint report of its Special Committee and of the Public Service Commission under date of June 5, 1911, with relation to the terms for the routing and operation of rapid transit lines to be offered respectively to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company.

[fol. 1596] 1. That it be stipulated with the Brooklyn Rapid Transit Company that if the City recapture the Fourth Avenue (Brooklyn) line at any time after ten years, the Brooklyn Company be given traffic rights over lines entering Manhattan for the operation of its Brighton Beach trains.

2. That the requirement that the Brooklyn Company subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its "existing surplus or current earnings" to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be made before these lines pass into the proposed new system, be modified so as to provide that the provision in question may be made from either surplus or current earnings, "at the option of the company."

3. That the Interborough Company and the Manhattan Elevated Railway Company be also required to subject their plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision either from existing surplus or current earnings, at the option of the companies, to cover such deferred maintenance as the Commission, upon the advice of the engineers, may require to be met before any basis of even division with the City of the future increase in net profits of the Manhattan elevated lines is accepted.

4. That the Interborough Company shall not be required to proceed with the construction of the proposed new

Whitehall tunnel under the East River until it has been determined by the Public Service Commission that such tunnel will be needed to carry the company's future Brooklyn traffic, and then to proceed on order from the Commission.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Brooklyn moved that the Fourth Avenue Subway be constructed to Fort Hamilton and Coney Island.

Which matter was referred to the Conference Committee by the following vote:

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

Hon. Seth Low, chairman of the Chamber of Commerce, Merchants' Association Committee, appeared on behalf of the Citizens' Committee on rapid transit, and presented a memorandum unanimously adopted at a meeting of said committee, approving the report of the Conference Committee as follows:

[fol. 1597] At a meeting of the Citizens' Committee on Rapid Transit, held at the Chamber of Commerce, Tuesday, June 30, 1911, Seth Low presiding, the following report, presented by Mr. Low, was unanimously approved, and made the report of the Committee:

Acting upon the authority which you conferred upon me when you last adjourned, I have asked you to meet this afternoon for the purpose of considering the report and recommendations on rapid transit, now pending before the Board of Estimate and Apportionment, submitted by the Joint Committee on Conference of the Board of Estimate and Apportionment and the Public Service Commission, under date of June 5, 1911.

Since this Citizens' Committee adjourned the situation has changed vitally. In December, 1910, we were passing upon a proposition made to the City on behalf of the Inter-

borough Rapid Transit Company. Today we are met to consider a proposal suggested to be made by the City to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, respectively. This change in the aspect of the question may properly be described as vital. Whatever may be said in regard to the details of the proposal, I think the City owes an infinite debt of gratitude to the Conferees for taking the position that the City is entitled, in the matter of rapid transit, to say what it wants, and that it is not shut up, and must not be shut up to accepting only what somebody is willing to do. In other words, the situation which confronts the Board of Estimate, and the situation which this Committee is asked to consider, is simply whether the report of the Conferees shall be accepted or rejected. Personally, I hope that this Committee will urge its acceptance without hesitation.

Two qualities stand out in the report that ought to command the enthusiastic approval of the citizens. The first is a most painstaking desire to secure for the City a comprehensive system of rapid transit, with an eye not only to the present but also to the future, upon terms which, in the long history of the City, will make its rapid transit system of the maximum value of a distributor of population.

The report recognizes that, whereas Manhattan is like a ruler, Brooklyn is like a fan; so that no possible service can be given to Brooklyn without destroying facilities that already exist, to compare with the results that may be obtained through co-operation with the Brooklyn Rapid Transit Company and the utilization of its facilities. The report recognizes, also, that the East River Bridges in which the City has invested $80,000,000, should be used as thoroughfares, and not for shuttle trains, and provides for this larger and better use. The second quality is the evident intention of the Conferees to be absolutely just in their recommendations as between the City and the private enterprises affected. There may be differences of opinion as to the propriety of some of the terms proposed to one company or the other, but I think there can be absolutely no difference of opinion as to the intention of the Conferees to make recommendations, the justice of which, in every instance, they are prepared to support.

[fol. 1598] One result, at least, has followed from the high quality of service thus given by the Conferees. There is

substantially no difference of opinion on the subject of routes. There may be differences of opinion as to whether a certain route should be given to one company or the other; and there may be differences of opinion as to the wisdom or the fairness of the terms proposed: but nobody disputes that the rapid transit development which the Conferees are endeavoring to make possible for the City is a comprehensive system and entirely worthy of The City of New York. No one disputes, or can dispute, that such a development if obtainable, would tend to distribute the present and future population of the City as fairly as possible through all the Boroughs of the City; for the plans not only make provision for immediate construction, but the provide for the construction of desirable additions from time to time as circumstances may require.

This being the case, the question before the Board of Estimate, and the question which this Committee must consider is, whether the realization of this broad scheme of rapid transit development for The City of New York can be best advanced by favorable action on the report of the Conferees, or by unfavorable action. I say, without the slightest hesitation, that a fortunate solution of the problem, in the interest of all concerned, requires now the prompt acceptance of the report of the Conferees by the Board of estimate and Apportionment.

It may be objected that such action carries with it:

First. Upon the face of the proposal, a five-cent fare over two separate systems, instead of a five-cent fare for a single system, thus possibly hazarding the ultimate acquirement of a five-cent fare, with universal transfers, over the whole City;

Second. That it may involve the City in the construction of the Tri-Borough Road, with suitable modifications, without the asurance in advance of commanding an operating Company; and

Third. That should the Interborough refuse to co-operate with the City on the terms proposed, it will involve the City in a policy of competition with its own subway instead of leading to the development of the City's subway.

Before discussing these propositions in detail, though I recognize that every one of them is important if not funda-

mental, let me point out that the effect of the refusal of the Board of Estimate to adopt the report of the Conferees will be to throw the whole situation into chaos.

The Conferees ask the City to take, now and once for all, the attitude that in solving its rapid transit problem it will ask private capital to cooperate with it to carry out the City's plans, and that the City will no longer be content with simply saying yes or no to what private capital wishes to do. If the Board of Estimate fails to support the conferees in this attitude, it will, in my judgment, entirely misinterpret the mind of the City, and it will do the City a grievous and enduring wrong. Upon this aspect of the question, The City of New York is in the Valley of Decision; and I earnestly hope that this Citizens' Committee will unanimously urge the Board of Estimate and Apportionment to accept the risks that are involved in acting upon this determintion, rather than now to embark, [fol. 1599] without a rudder, on another sea of negotiations.

With this preliminary observation, let me discuss for a moment the possible objections to this course which I have already indicated. The first relates to the effect upon the ultimate acquirement by the City of a universal five-cent fare, if the proposed of the Conferees be adopted, assuming that both the Interborough Company and the Brooklyn Company accept what they are offered. It will not be disputed that in such a case each company offers a notable addition to the single fare privileges at present enjoyed by the population of many parts of the City. In such a case, the City and the two companies become allies; and whenever the City is ready to bring about a universal five-cent fare, it will be in a position to do so by offering to the private capital concerned terms which such capital can afford to accept. In other words, in such a case the City becomes the dominant partner, in two enterprises covering the whole City having a common object. I cannot imagine any situation out of which a universal five-cent fare can more easily grow than such a relationship.

The second possible objection is this: That it may involve the City in the construction of the Tri-Borough Road, with suitable modifications, without the assurance in advance of commanding an operating company. If the City were to offer the Tri-Borough franchise on terms equivalent to those offered to the Brooklyn Rapid Transit

or the Interborough, bidders are not likely to be lacking. But whatever the risk may be, I believe that it is inevitable that the City shall now accept this risk. To decline to do so is to admit that the City is helpless; and that it can secure now, and at any other time in the future, only what companies controlled by private capital are willing to offer.

For one, I hope the City will never be deliberately placed in a position so undesirable. The time has fully come when the City, on its part, must decide whether it will develop its rapid transit system, if it cannot do so in co-operation with private capital, at its own expense and in accordance with its own judgment; and when private capital on its part must decide, whether in the matter of rapid transit, it prefers the City for an ally or a competitor. So far as the City is concerned, I am confident that public opinion, by an overwhelming majority, would sustain the proposal of the Conferees, if the City can command the co-operation of neither the Interborough Company nor the Brooklyn Company in the execution of a joint plan.

The third possible objection is that through the refusal of the Interborough to co-operate with the City on the terms proposed, the adoption of this report may involve the City in a policy of competition with its own subway instead of it in the development of the City's subway.

Every effort certainly should be made to avert this misfortune even now. The benefits to be derived from the plan as a whole through the co-operation of both companies, or either of them, are so great that no financial detail should be permitted to stand in the way of an agreement between the City and the two companies. As to one point, the [fol. 1600] report itself indicates that neither the "car mile" nor the "passenger mile" offers a wholly satisfactory basis on which to found operating relations. In the time at the command of the Committee, it has been impossible to form an opinion on the merits of this question. This illustrates the necessity of striving still to make the financial basis of the arrangement such that it will secure in each case the co-operation of the company concerned.

Let me sum up: I believe that this Committee should ask the Board of Estimate to adopt, without delay, the report of the Conferees as submitted. The situation calls for prompt action. Nothing whatever is to be gained by delay,

and nothing but disaster to the City and to the companies concerned can follow from hesitation now, on the part of the authorities. Shall the City be the ally or the competitor of its transportation companies in the matter of rapid transit! By the system of alliance and co-operation with private capital, the City has built up a wonderful Museum of Art, an incomparable Museum of Natural History, great Botanic and Zoological Gardens, an Aquarium, in which every citizen has pride, and a Public Library system without an equal. The same co-peration in the field of rapid transit will yield equally valuable results. It is harder to attain to this sort of cooperation in rapid transit, because this sort of joint service of the community in rapid transit involves the element of private profit; but the difficulty of the undertaking is a challenge to the public spirit of The City of New York and of its citizens, and that is a challenge which both citizens and City ought not to hesitate to accept.

Ira L. Ettinger appeared on behalf of the United Real Estate Owners' Association of New York in opposition to permitting the operation of a subway under Broadway by the Brooklyn Rapid Transit Company.

Andrew Colvin appeared on behalf of the Flatbush Taxpayers' Association in favor of the report of the Conference Committee.

The President of the Borough of Manhattan presented communications as follows:

From the Brooklyn Central Labor Union in favor of the report of the Conference Committee.

From Max Sondheim transmitting petitions signed by property owners of lower Broadway and others, in favor of the construction of a subway in that locality.

From Hon. Edward M. Grout on behalf of certain property owners in the Eastern District of Brooklyn, who protested against the portion of the report of the Conference Committee assigning the Fourteenth Street-Bushwick Avenue subway to the Brooklyn Rapid Transit system.

The resolution of the President of the Borough of Manhattan as amended by resolutions offered by himself and by the President of the Board of Aldermen, and which amended resolution is as follows, was then offered:

[fol. 1601] Whereas, the Public Service Commission for the First District, under date of December 20, 1910, sub-

mitted to the Board of Estimate and Apportionment a proposition of the Interborough Rapid Transit Company, dated December 5, 1910, for the construction for the City and for the equipment and operation by that company of certain additions to the present subway system; and

Whereas, The Commission, in its letter of transmittal, stated that it would be pleased to receive a statement of the position of the Board of Estimate and Apportionment with relation to this proposition, and a statement in particular of any objections to the form of contract proposed that would, unless properly met, render impossible the consent of the Board to the forms of contract as finally submitted; and

Whereas, The Public Service Commission stated further that it would be pleased to confer with this Board, or with any Committee thereof, on the general subject; and

Whereas, The Board of Estimate and Apportionment, in pursuance of this invitation, under date of January 19 last, authorized the appointment by the Mayor of a conference Committee, with power to confer with the Commission "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it," such Committee, as subsequently appointed, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond; and

Whereas, The aforesaid Committee of the Board, in conference with the Public Service Commission, has considered not only the original proposition of the Interborough Company, but certain propositions subsequently received from the Brooklyn Rapid Transit Company, as well as a modified proposition from the Interborough Company, all with relation to the construction, equipment and operation of a new rapid transit railways; and

Whereas, The Committee of the Board, in a report dated June 5, 1911, in which the members of the Public Service Commission join, has recommended a course of action on the part of the Board with relation to the several propositions from the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company now pending before

the Commission, the adoption of which would serve as an answer to the inquiries of the Commission, addressed to the Board in December last; and

Whereas, The recommendations in question offer to the Board an opportunity to lay down a policy under which it will in future consider and pass upon all matters with relation to the existing transit situation and the proposals of particular companies; therefore, be it

Resolved, That the Board of Estimate and Apportionment hereby approves and accepts the recommendations of its Committee, and of the Public Service Commission, as submitted under date of June 5, 1911; and be it further

[fol. 1602] Resolved, That, in pursuance of the recommendations aforesaid, the Board of Estimate and Apportionment requests the Public Service Commission for the First District to prepare contracts for the construction, equipment and operation of rapid transit lines upon the following basis:

With Relation to the Construction and Equipment of Particular Routes

I. That the City construct, at its own expense, a new subway connecting with the Fourth Avenue line in Brooklyn, now under construction, to include:

(a) A two-track line under the East River to the Battery in Manhattan;

(b) A two-track line from the Battery via Church street and Vesey street to Broadway;

(c) A line through Broadway to 42d street and 7th avenue, through 7th avenue to 59th street, carrying either four or six tracks from Vesey street to 9th, as the occasion may require, and four tracks from 9th street northward;

(d) A two-track line from 59th street easterly to and over the Queensboro Bridge, there to connect with the elevated lines of the Brooklyn Rapid Transit Company; and

(e) A two-track line, when needed, connecting the Manhattan terminus of the Manhattan Bridge by way of Canal street to Broadway.

II. That, if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit

Company for the equipment and operation of the aforesaid lines in conjunction with the 4th avenue line and its extensions, in such form as to link this system with the Company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

III. That the City construct, also at its own expense, the following two-track extensions of the Bridge lines in lower Manhattan, now under construction:

(a) An extension from the Williamsburg Bridge by way of Delancey street and Spring street to a point of connection with the new trunk line at Broadway; and

(b) An extension of the Centre street line from its present terminus at the Brooklyn Bridge to the Wall street district—by way of Nassau and Broad streets.

IV. That if an agreement be reached upon terms, the City enter into a contract with the Brooklyn Rapid Transit Company for the equipment and operation of the Bridge loop lines with their proposed extensions, in such form as to link these lines with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2, 1911, and April 25, 1911.

V. That the City construct, at its own expense, a new two-track subway, proceeding from Union Square in Manhattan easterly under the 14th street and the East River to the Eastern District of Brooklyn, and thence to a point to be later determined; and that, if an agreement be reached upon terms, the City enter into a contract with [fol. 1603] the Brooklyn Rapid Transit Company for the equipment and operation of this line, in such form as to link it with the company's existing and projected lines in Brooklyn and Queens, as set forth in its proposals of March 2 and April 25, 1911.

VI. That the new lines in South Brooklyn, including the Staten Island connection, be treated as part of the system to be operated by the Brooklyn Rapid Transit Company; but that action upon the alternative presented for the routing and construction be withheld temporarily and referred back to the conferees for treatment in a supplementary report, to be submitted not later than August 1, 1911.

VII. That if an agreement be reached upon terms, the City enter into a contract with the Interborough Company for the construction, equipment and operation of rapid transit lines connecting with its present system, as follows:

(a) A four-track subway line proceeding from about 35th street and Park avenue to Lexington avenue; thence under Lexington avenue and the Harlem River to The Bronx; thence extending, with a connection with the West Farms branch of the existing subway, via Mott avenue, River avenue and Jerome avenue as an elevated three-track line to Woodlawn Cemetery;

(b) A three-track subway line diverging from the proposed Lexington avenue line at or about 138th street, under 138th street and Southern boulevard to Westchester avenue; and thence as a three-track elevated line through Westchester avenue to Pelham Bay Park;

(c) A subway line proceeding southerly from Times Square under 7th avenue, as extended, Varick street, West Broadway and possibly as a four-track road;

(d) A two-track tunnel via Whitehall street, Greenwich street, to the Battery, as far as to the Borough Hall in Brooklyn.

VIII. That if an agreement be reached upon terms, the City enter into a separate contract with the Interborough Company for the construction, equipment and operation of a second group of lines, as follows:

(a) A two-track subway line running easterly under 42d street from Times Square to a point of conjunction with the Steinway tunnel;

(b) The Steinway tunnel continued as a two-track road to Queensboro plaza, and thence as a two-track elevated line;

(c) To Woodside and Corona; and

(d) To Astoria.

The lines converging at the Queensboro Plaza, if this contract be accepted, to be connected also by way of the Queensboro Bridge with the 2d avenue elevated line in Manhattan.

The cost of adapting the Steinway tunnel to the connection at Grand Central Station to be included as part of the construction cost of the continuous line proposed, the

tunnel itself, however, to be entered in the cost account at a valuation not to exceed $3,000,000.

IX. That, if an agreement be reached upon terms, the City enter into contracts with the Interborough Company for the construction, equipment and operation of the following extensions of its existing lines:

[fol. 1604] (a) A two-track elevated line proceeding from the West Farms division of the present subway via White Plains road to its projected terminus near the City line;

(b) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush avenue and the Eastern Parkway to Buffalo avenue; also a two-track subway extension from the Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from the Eastern Parkway by way of Buffalo and Livonia avenues through the Brownsville district to New Lots road.

X. That the cost of construction of all of the lines to be built and operated by the Interborough Company under these contracts be divided equally between the Company and the City, and that the cost of equipment be borne by the Company alone.

XI. That the leases for any of the new lines proposed be granted upon the condition that the Interborough Company construct and operate all of the lines proposed as part of its general system.

XII. That, if an agreement be reached upon other terms, the City require the Brooklyn Company to build, at its own expense and to operate as part of its system a two-track subway from the Malbone station of the Brighton Beach line to a point of conjunction with the 4th avenue and East River tunnel lines.

XIII. That, if the Interborough fails to accept a lease for the operation of the line proceeding through Lexington avenue north, with its Bronx extensions, upon the terms proposed, the Lexington avenue line be then extended southward as a four-track subway to a point of connection with the Broadway line at Union square or 9th Street; and that, if an agreement on terms be reached with the Brook-

lyn Company it be added to the system to be operated by that Company, in pursuance of its offer of April 25, 1911.

XIV. That, if the Interborough Company fails to accept a lease for the operation of the proposed line from Forty-second street easterly into Queens and the Astoria and Corona lines, the latter lines be offered to the Brooklyn Company as part of the system to be operated by it in pursuance of its offer of April 25, 1911; connection with the Manhattan lines, in that event, to be by way of the Queensboro Bridge.

XV. That, if the Interborough fails to accept a lease for the operation of the Eastern Parkway extension, with the Nostrand and Livonia avenue branches, these lines be offered to the Brooklyn Company to be operated as part of its system, in pursuance of its offer of April 25, 1911.

XVI. That, if a contract be made with the Brooklyn Company for the operation of the Bronx lines, joint traffic rights in the Jerome avenue line be reserved for use by the Interborough Company.

XVII. That, if the Interborough Company accepts leases for the operation of the lines herein proposed as parts of its system, and if the Brooklyn Rapid Transit Company fails to accept the lines proposed for it, the Eastern District line proceeding from Union square, Manhattan, and the projected Lafayette avenue line from Broadway to Flat-[fol. 1605] bush avenue in Brooklyn be also offered to the Interborough Company for construction and operation, in accordance with the general terms herein set forth.

XVIII. That, neither the Interborough Company nor the Brooklyn accept leases for the operation of the lines herein enumerated, the City proceed at once with the construction of the so called Tri-Borough route; and that the Public Service Commission proceed to advertise for bids for the equipment and operation, or for the partial construction as well as the equipment and operation of the so-called Tri-Borough route, with a view toward securing an independent operator for such route.

XIX. That the Public Service Commission, in any event, proceed to prepare and award contracts for the construction

of the lines to be built and owned by the City, as rapidly as practicable, in order that work may be started immediately.

XX. That the franchises sought by the Interborough and Manhattan Companies for the third tracking and extensions of their elevated lines in Manhattan and The Bronx be granted upon the general terms herein proposed, permitting this work to proceed immediately.

With Relation to Operating Terms as Applied to Any Operator

I. Rate of Fare.—That the rate of fare for one continuous ride over any part of the system operated by a single operator, including transfers, shall be five cents.

II. Terms of Leases.—That all contracts for the operation of lines title to which is vested in the City, whether such lines be constructed by the City or by the Company, or upon a basis of division of cost between the City and the operator, shall fix the term of the lease at forty-nine years from the date of beginning of operation; except that the so-called Bridge Loop lines in Manhattan, if the contract for their operation is given to the Brooklyn Company, may be leased for twenty years with the privilege of renewal, upon an adjustment of terms for twenty years in addition.

III. Provision for Recapture.—That the City retain its right to take over after ten years of operation, if it so elects, the line or lines covered by any forty-nine-year operating contract upon the payment by the City of

(a) The amount of the operator's money investment, if any, in construction, plus fifteen per centum—which total sum shall decrease as the term continues and the investment is amortized; and

(b) The then reasonable value of the equipment attaching to the line or lines.

That the City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Require a transfer of lines to a second operator upon the payment of the necessary amount directly by such other operator.

[fol. 1606] IV. Cost of Construction.—That the costs of construction, whether borne by the City or by the operator, or upon a basis of division between the City and the operator shall be the cost in money and shall include

(a) All contracts for original construction work, or
(b) For station finish;
(c) All carrying charges during construction;
(d) Engineering expense;
(e) Extras and damages;
(f) Real estate and easements; and
(g) Such other incidental charges as may be agreed upon; the cost of trackage and signal system to be charged to equipment.

V. Division of Profits.—That the receipts and operating expenses of all lines operated under the new contracts shall be ascertained as follows:

Receipts shall consist of

(a) The value of the tickets collected at stations;
(b) Miscellaneous earnings from stations;
(c) A pro-rata of advertising and other general receipts.

The fixed cost of operation shall include:

(a) Station expenses;
(b) Maintenance of way and structure;
(c) Damages for accidents; and
(d) Taxes, if any, attaching to the particular line.

All other operating expenses, divided on a cost-per-passenger basis—or other basis equally acceptable to the City—to be determined according to unit costs on the entire system for a single fare, as follows:

(e) Transportation costs;
(f) Maintenance of equipment, renewals and depreciation;
(g) Cost of power;
(h) General and administration expenses; and
(j) General taxes, if any.

That the net profits derived from the operation of all lines shall be divided equally between the City and the operator, after provision has been made for carrying charges in the following order:

1. The actual annual charges of the operator for carrying the cost of equipment; with provision for sinking fund not to exceed three-fourths of one per centum per annum to meet obsolescence;

2. The actual annual charges of the operator for carrying any portion of the cost of construction not met from the funds of the City; with provision for a sinking fund thereon (including brokerage charges, not to exceed three per cent.) of not more than one (1) per centum per annum.

3. Interest on bonds issued by the City to defray costs of construction or cost of real estate or easements, with provision for a sinking fund not to exceed one (1) per centum per annum; provided

4. That if the gross income in any year, after providing for operating charges, shall be insufficient to cover interest and sinking fund upon the operator's bonds, the deficit for such period shall be borne by the operator solely; and provided further

[fol. 1607] 5. That if the gross income in any year, after providing for all charges, including interest and sinking fund on the operator's bonds, shall be insufficient to meet the interest and sinking fund upon the City's bonds, the deficit sustained for any such period shall be treated as cumulative and be a charge in the City's favor against future profits, to be made good before any equal division of profit shall proceed between the City and the operator; and

6. All of the City's proportion of profits remaining after the payment of operating expenses and carrying charges, and all of the operator's proportion of such profit, over and above an additional allowance of three (3) per cent. annually upon his total investment in construction and equipment, shall be applied to the reduction of deficits arising from the operation of extensions, so long as such deficits exist, before the further division of profit proceeds.

VI. Operation of Extensions.—That each contract shall contain a clause under which the operator agrees to operate additional lines as part of the single fare system, whether built now or hereafter, upon the following conditions:

(a) That such new line, whenever accepted as part of the general system by both the City and the operator, shall be governed by and included in all of the general provisions of the contract with relation to operation and division of profit and loss;

(b) That where such new line is required by the City, but not accepted by the operator as an original line, it shall be operated as part of the general system, but carried on a separate financial basis with separate accounting of receipts and operating expenses; and

(c) That the deficits on extensions operated separately shall be treated as cumulative and discharged, so far as practicable, from the surplus receipts of the general system, as heretofore provided.

VII. Supervision of Contracts and Accounting.—That the right be retained through the properly constituted public authorities, to approve the form and the terms of all contracts to be let by any operator, either for equipment or for the construction of lines to be built by him, and to supervise the execution of such contracts.

That the right also be retained to supervise all accounts of the operator with relation either to construction or operation, and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in such profits are based.

VIII. Operation and Management.—That clauses be inserted in the contract embodying the essential provisions of the Public Service Law with relation to both operation and management, and such added guarantees as to the character and sufficiency of the equipment to be furnished, and of the service to be given, as the City may require.

With Relation to Terms Applying Particularly to the Interborough Rapid Transit Company

I. Leveling of Leases.—That, as part consideration for the lease of new lines for the fixed period of forty-nine

[fol. 1608] years from the date of the beginning of operation, the Interborough Company shall level the renewal periods of the leases for its existing lines so that these shall expire coterminously, forty-nine years from the beginning of operation of any portion of the new lines. The leases of the principal existing lines under Contract No. 1 expire in 1954, and the company, through its right of twenty-five years renewal, would remain in possession until 1979. The lease of Contract No. 2, covering the Brooklyn extension, expires in 1943, and, with the renewal period, in 1968. Under the leveling process, all of the leases, new and old, revert to the City in 1964.

II. Exchange of Lower Manhattan Lines.—That the Interborough Rapid Transit Company be required to consent to the immediate modification of Contracts 1 and 2 so as to provide that the portion of the existing subway running southward between 42d street and Atlantic avenue, Brooklyn, shall be held under an indeterminate lease, terminable at any time within 10 years from the opening of the proposed 7th avenue extension, receiving as consideration for such modifications a lease upon the said 7th avenue extension from 42d street, south, to Borough Hall, Brooklyn, for 49 years from its completion and opening for operation.

The modification of the existing leases shall be simultaneous with the making of the proposed contract.

The new lease for the present subway south of 42d street shall provide that upon the exercise of the option of the City to terminate the same its value and the value of the lease of the 7th avenue extension shall be appraised on the basis of their respective earning capacities at the date of appraisal. The difference in value, if any, so determined, shall be adjusted by the payment by the City to the Company of any excess found in favor of the lease taken over by the City or by the payment by the Company to the City of any excess in value found in favor of the 7th avenue extension.

Provisions to be embodied in the contract that will enable the City to compel the Company to assign its rights to a third party designated by the City; the Company to cooperate with the City in procuring any legislation that will be necessary to legalize or carry out any part of the agree-

ment in this particular, so that it may be carried out according to these terms, and that the Company when such provision is so legalized will perform such acts as may be necessary to make it part of a complete contract, and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

III. Purchase of Existing Lines.—That the City be given the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of the new lines, provided the new lines shall have been taken, under the ten-year clause, upon payment to the company of a sum equal to the then value of the unexpired portions of the company's leases under Contracts Nos. 1 and 2, estimated upon the basis of the average annual net profits for the five-year period immediately preceding, or if the period of final amortization has been passed, then for the average of the five-year period im- [fol. 1699] mediately preceding the completion of amortization, and that the operating terms as thus amended be submitted as final to the Interborough Rapid Transit Company for its acceptance.

With Relation to Terms Applying Particularly to the Brooklyn Rapid Transit Company

I. Earnings of Existing Lines.—That, in lieu of all earnings on its existing lines, the company reserves to itself annually, before the payment of interest and sinking fund charges either upon its own or the City's bonds for new construction and equipment, a sum representing its net profits from operation of the existing lines included in the agreement during the year ending June 30, 1911, proper deductions having been made for current depreciation; all receipts of the existing lines above the sum so stipulated to be pooled with the receipts of the City built lines, for distribution in accordance with the general terms agreed upon.

II. Leased Lines.—That the company incorporate with its existing lines, in such manner as the Public Service Commission may approve, such subsidiary lines as it now

holds under lease, and that no allowance be made under the head of operating expenses for further rental of any of such leased lines.

III. Examination of Plant.—That the company agree to subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its existing surplus or current earnings to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before the lines pass into the proposed new system.

IV. Management.—That the entire system of subways and elevated lines shall be under the management of one company, and that every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commission law.

With Relation to Terms Applying Particularly to the Extension, Third Tracking, and Subsequent Operation of the Manhattan Elevated Lines

I. That the net profits upon all the elevated lines operated by the Interborough Company, in excess of the average net profits for the two years from July 1, 1909, to June 30, 1911, proper deduction having been made for depreciation, shall be divided equally between the company and the City.

II. That the City shall have the r[illegible]o take over the extensions at any time after ten years from the beginning of operation, or to transfer them, if it so elects, to another operator; such operator to pay the amounts specified in the certificates to the Interborough Company direct.

III. That the cost of construction shall include the items mentioned under this general heading in subway terms.

IV. That the payments to be made for equipment, in the event of recapture, shall be fixed with due regard for [fol. 1610] its then condition and value for railroad purposes, allowance being made for wear and obsolescence.

V. That the rate of fare shall not exceed five cents.

—and be it further

Resolved, That the Special Committee of the Board be hereby continued, with authority to communicate, in conjunction with the Public Service Commission, to the Interborough Rapid Transit Company, to the Brooklyn Rapid Transit Company and to the Manhattan Elevated Railways Company the terms herein set forth, upon which the City would be willing to enter into contracts for the construction, equipment or operation of the rapid transit lines for which the said companies have severally applied; the said Committee to receive and communicate to the Board of Estimate and Apportionment the replies of the companies aforesaid for the final consideration of the Board not later than Wednesday, June 28, 1911; and be it further

Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Station Island, and a general plan for the operation of the same; and be it further

Resolved, That the Committee of the Board be hereby continued for the purpose of further conference with the Public Service Commission upon such matters as may render consultation desirable during the formulation of contracts for construction, equipment or operation, based upon the findings and recommendations of the joint report of June 5, 1911; and be it further

Resolved, That the Board of Estimate and Apportionment hereby approves the following corrections in and modifications of the joint report of its Special Committee and of the Public Service Commission under date of June 5, 1911, with relation to the terms for the routing and operation of rapid transit lines to be offered respectively to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company.

1. That it be stipulated with the Brooklyn Rapid Transit Company that if the City recapture the 4th avenue (Brooklyn) line at any time after ten years, the Brooklyn Com-

pany be given traffic rights over lines entering Manhattan for the operation of its Brighton Beach trains.

2. That the requirement that the Brooklyn Company subject its present plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision from its "existing surplus or current earnings" to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be made before these lines pass into the proposed new system, be modified so as to provide that the provision in question may be made from either the surplus or current earnings, "at the option of the company."

[fol. 1611] 3. That the Interborough Company and the Manhattan Elevated Railway Company be also required to subject their plant to the examination of a Board of Engineers to be named by the Public Service Commission, and to make provision either from existing surplus or current earnings, at the option of the companies, to cover such deferred maintenance as the Commission, upon the advice of the Engineers, may require to be met before any basis of even division with the City of the future increase in net profits of the Manhattan elevated lines is accepted.

4. That the Interborough Company shall not be required to proceed with the construction of the proposed new Whitehall tunnel under the East River until it has been determined by the Public Service Commission that such tunnel will be needed to carry the company's future Brooklyn traffic, and then to proceed on order from the Commission.

And which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

In voting in the affirmative, the President of the Borough of The Bronx stated he desired it to be understood he was opposed to the immediate exchange of existing leases as set forth in the first amendment offered by the President of the Board of Aldermen, for the reason that he did not believe it possible to accomplish the same.

On motion, the Board adjourned to meet Thursday, June 22, 1911, at 10:30 o'clock in the forenoon.

P. At a meeting of the Board of Estimate and Apportionment held on June 29, 1911, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: John Purroy Mitchel, President of the Board of Aldermen; William A. Prendergast, Comptroller; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The President of the Board of Aldermen, Hon. John Purroy Mitchel, presided.

Rapid Transit Railways; Extensions to the Existing System; Also Third Tracking and Constructing Additions to the 2d, 3d and 9th Avenue Elevated Railroads; and the Completion and Putting in Operation of the Steinway Tunnel

In the matter of the communication from the Public Service Commission for the First District submitting proposition of the Interborough Rapid Transit Company relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

[fol. 1612] At the meeting held this day by motion duly adopted the Board adjourned to meet at 4:30 p. m. to-day to receive the supplementary report of the conferees.

The president of the Borough of Manhattan presented the following:

City of New York, Office of the President of the Borough of Manhattan, City Hall, June 29, 1911.

To the Honorable Board of Estimate and Apportionment:

Gentlemen: Under resolutions adopted under date of June 21, 1911, the Board of Estimate and Apportionment stated the terms upon which it would approve contracts for

the construction, equipment and operation of rapid transit lines by the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, respectively. Under these resolutions, your Special Committee was continued with authority, in conjunction with the Public Service Commission, to communicate to the respective companies the terms upon which contracts might be let, and to receive their replies. Letters signed by the Chairman of the Public Service Commission and the Chairman of your Committee were addressed to the companies upon the same date, and replies have since been received, each under date of June 27, 1911. The letters comprising this correspondence, which are attached hereto, are submitted for the consideration of the Board.

The Interborough Company submits a general declination to enter into any contract with the City upon the terms proposed. It withdraws its specific propositions of December 5, 1910, and May 9, 1911, though leaving before the Public Service Commission its offer of June 10, 1910, with relation to the third tracking and extension of the Manhattan elevated lines, and the operation of the Belmont Tunnel.

The Brooklyn Rapid Transit Company states its willingness to accept the City's terms, if amended in certain specific particulars. Your Committee and the Public Service Commission, after further conference, have reached the conclusion that the modifications proposed by the Brooklyn Company, which involve considerations affecting the financial basis of the proposed contracts, and which do not involve considerations of principle, should, in the main, be granted.

The conferees are convinced, upon the Company's argument, that the concessions in question would be equitable and just, both to the Company and to the City. They have also considered certain modifications suggested by reference in the letter of the Interborough Company that might, in equity, be applied to either operator.

Having considered all aspects of the situation in which the transit matter now stands, the conferees recommend that the following action be taken:

1. That contracts be prepared for the construction, equipment and operation of the lines proposed for operation by

the Brooklyn Rapid Transit Company under the resolutions adopted by the Board on June 21, 1911, and upon the terms therein proposed, with the following exceptions: [fol. 1613] (a) That in the event of recapture of any of the lines operated by the Company after ten years, the City or any second operator taking over such lines shall pay to the Company, as provided in the Rapid Transit Act, the actual cost of the equipment attaching to such lines, less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund created for the amortization of the operator's investment in equipment, and plus fifteen per cent of the amount of the original cost, which percentage shall decrease at the rate of one per cent per year; provision to be made for deferred maintenance, if any;

(b) That the amount to be deducted annually as compensation to the Company for use of the existing lines and stations shall be computed by one of the following methods, the precise method to be determined by the conferees:

1. An amount equivalent to forty per cent of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

2. The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the Brooklyn and Williamsburg Bridges during the year prior to the beginning of operation in Manhattan beyond the present termini, less the operation expenses computed upon the per pasenger basis; such balance not to exceed in any year $3,500,000, nor to be less than the net earnings of the Brooklyn Union Elevated Company for the year ending June 30, 1911.

(c) That the duration of grants upon extensions of the existing elevated lines shall not exceed the term proposed for the extensions of the Manhattan elevated lines, namely, eighty-five years; and that such grants shall be subject to recapture by the City in the manner prescribed by the Rapid Transit Act at any time after ten years from the date of the beginning of operation;

(d) That the amortization of brokerage charges not to exceed three per cent be allowed on the cost of equipment as well as on the cost of construction;

(e) That where under any contract the gross profits from operation are insufficient in any year to cover the actual charges of the Company for carrying any portion of the cost of construction not met from the funds of the City, the deficits thereby sustained by the Company shall be treated as cumulative and be a charge in the Company's favor against future profits before payment of the carrying charges upon the bonds of the City proceeds;

(f) That although the cost of real estate and easements is to be treated as part of the cost of construction and amortized from the receipts of operation, any incidental fee damages for rights of way in acquiring streets allowed by the courts shall be paid by the City from its general fund and not from the subway construction fund;

(g) That the contract for the lines aforesaid shall be conditioned upon the Company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, as herein amended, the additional lines and extensions set forth in its proposition of [fol. 1614] April 25, 1911, and upon the Company's assurance to the Board of Estimate and Apportionment not later than July 6, 1911, that it will operate such additional lines if requested so to do;

(h) That if the Company operate the Jerome avenue line in The Bronx and the lines to Corona and Astoria in the Borough of Queens, it agree to the reservation of joint trackage rights in the operation of the City lines at any time that the City may so require; the line to Corona to carry three tracks instead of two, as originally proposed.

(j) That if the Company operate the Eastern parkway line in the Borough of Brooklyn, its obligation to bear the cost of construction of the proposed subway connecting the Brighton Beach and Flatbush avenue lines be limited to that section of the line lying between the Malbone station and the Prospect Park plaza.

The conferees also recommend that although the Interborough Company has failed to accept the terms proposed to it, the Company be informed that the Board and the

Public Service Commission desire, as a matter of record, to include in the terms originally proposed those modifications that should apply equally to either operator, to wit:

1. The adjustment of the basis for the payment of the cost of equipment under recapture proposed by the Brooklyn Company;

2. The extension of the allowance of three per cent for brokerage charges to the cost of equipment;

3. The treatment as cumulative of any deficiencies met by the Company in carrying its interest and sinking fund charges and the liquidation of such deficiencies before payment of the carrying charges upon the bonds of the City proceeds; and

4. The payment of all incidental fee damages for rights of way in acquiring streets from the City's general fund and not from the subway construction fund.

The conferees further recommend that the Interborough Company be informed that the aforesaid modifications of terms would, in its case, include also the following:

5. That if the Company agrees, as compensation for the additional franchises it seeks for its elevated lines, to pay to the City annually one-half of the increase above the average of the net profits of the two years ending June 30, 1911, and if it accepts the general proposition of the City as to the rapid transit lines, that the City agree also to treat such decreases of net profit below the amount of such annual average as cumulative and as a charge in the Company's favor to be met from future receipts before the division with the City proceeds.

6. That if forty-nine years be fixed as the term of the new subway leases and the Company's leases upon the existing lines are leveled so that they will expire coterminously, the City will agree to merge with the new leases upon the old lines such parts of the renewal periods of each contract as would remain under the leveling process. This upon condition that the legislation necessary to permit such a readjustment of the leases, as well as the pro-

posed exchange of the leases upon the east and west side legs of the existing subway, shall be promptly secured.

All of which is respectfully submitted.

[fol. 1615] For the Special Committee of the Board of Estimate and Apportionment: George McAneny, President Borough of Manhattan; Cyrus Miller, President Borough of The Bronx; George Cromwell, President Borough of Richmond. For the Public Service Commission for the First District: W. R. Willcox, Chairman.

June 21, 1911.

Interborough Rapid Transit Company, 165 Broadway, New York City:

GENTLEMEN: Under date of December 5, 1910, the Public Service Commission for the First District received from your company a communication relative to the construction, equipment and operation of new rapid transit lines, to be operated in connection with your present system, and, under date of June 10, 1910, a communication with relation to the construction of extensions to and additional tracks upon the present elevated system operated by you under lease from the Manhattan Railway Company.

On December 20, 1910, the Public Service Commission for the First District addressed a communication to the Board of Estimate and Apportionment, requesting a statement of the position that the Board would take upon the matters covered by your communications. On January 19, 1911, the Board of Estimate and Apportionment appointed a committee of three of its members to confer with the Public Service Commission for the First District "upon the pending proposition of the Interborough Rapid Transit Company, or upon any proposed modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

Since the appointment of the committee of the Board of Estimate and Apportionment, a number of conferences have been held between the representatives of your company, the committee of the Board of Estimate and Apportionment and the Public Service Commission for the First

District. While these conferences were proceeding, a further communication, embodying a supplemental proposition, was received from you by the conferees, under date of May 9, 1911.

After careful consideration of your several communications and of various other proposals before the Commission, the conferees united unanimously in a report addressed to the Board of Estimate and Apportionment, under date of June 5, 1911, submitting certain findings and recommendations, a copy of which report is presented to you herewith.

The report of the conferees was presented to the Board of Estimate and Apportionment at a special meeting held on June 13, 1911. At a further special meeting held today, the report was considered and a series of resolutions adopted, generally accepting and approving its findings. A copy of these resolutions and of certain amendments incorporated by the Board of Estimate and Apportionment is presented herewith.

[fol. 1616] Under the terms of the aforesaid resolutions, the committee of the Board of Estimate and Apportionment was continued, with authority, in conjunction with the Public Service Commission for the First District, to communicate to your company the terms and conditions, as set forth in the report and resolutions aforesaid, upon which the City would be willing to enter into contracts for the construction, equipment and operation of the rapid transit lines referred to in your communications. It is requested that you will, in further pursuance of the terms of the resolutions, submit your reply in time to allow of its consideration not later than Wednesday, June 28, 1911.

Respectfully, for the Public Service Commission for the First District: Wm. R. Willcox, Chairman. For the Committee of the Board of Estimate and Apportionment: Geo. McAneny, Chairman.

June 21, 1911.

Brooklyn Rapid Transit Company, 85 Clinton Street, Brooklyn, New York.

Gentlemen: Under date of March 2, 1911, the Public Service Commission for the First District received from you a communication in relation to the construction, equip-

ment and operation of new rapid transit lines to be operated in conjunction with your existing system, and under date of April 25 and May 2, certain supplementary communications with further relation to the same subject.

Prior to the receipt of the proposals of your company, the Public Service Commission, under date of December 20, 1910, had addressed a communication to the Board of Estimate and Apportionment requesting a statement of the general policy of the Board in relation to certain other proposals then pending. Upon January 19, 1911, the Board of Estimate and Apportionment had appointed a committee of three of its members to confer with the Public Service Commission upon the propositions then pending "or upon any proposed modification thereof or upon any alternative plan that the Public Service Commission may present or that may be presented to it."

In pursuance of the authority so given, the Committee of the Board of Estimate and Apportionment, in conjunction with the Public Service Commission, have held a number of conferences with the representatives of your company upon the matters contained in your successive proposals.

After careful consideration of your several communications and of various other proposals before the Commission, the conferees united unanimously in a report addressed to the Board of Estimate and Apportionment, under date of June 5, 1911, submitting certain findings and recommendations, a copy of which report is presented to you herewith.

The report of the conferees was presented to the Board of Estimate and Apportionment at a special meeting held on June 13, 1911. At a further special meeting held today, the report was considered and a series of resolutions adopted, generally accepting and approving its findings. [fol. 1617] A copy of these resolutions and of certain amendments incorporated by the Board of Estimate and Apportionment is presented herewith.

Under the terms of the aforesaid resolutions, the Committee of the Board of Estimate and Apportionment was continued, with authority, in conjunction with the Public Service Commission for the First District, to communicate to your company the terms and conditions, as set forth in

the report and resolutions aforesaid, upon which the City would be willing to enter into the contracts for the construction, equipment and operation of the rapid transit lines referred to in your communications. It is requested that you will, in further pursuance of the terms of the resolutions, submit your reply in time to allow of its consideration not later than Wednesday, June 28, 1911.

Respectfully, for the Public Service Commission for the First District: Wm. R. Willcox, Chairman. For the Committee of the Board of Estimate and Apportionment: Geo. McAneny, Chairman.

Interborough Rapid Transit Company, 165 Broadway, New York

June 27, 1911.

Hon. William R. Willcox, Chairman Public Service Commission for the First District, New York City; Hon. George McAneny, Chairman Special Committee, Board of Estimate and Apportionment:

Dear Sirs: We acknowledge the receipt of your letter of June 21 instant, inclosing a copy of the report of the Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District relative to the construction, equipment and operation of rapid transit lines in the City of New York, and of resolutions of the Board of Estimate and Apportionment, adopted at a meeting held June 21, setting forth the terms upon which the City proposes to enter into contract with the Interborough Rapid Transit Company for the construction, equipment and operation of certain rapid transit lines therein set forth. You request that we submit a reply to this proposal in time to allow for its consideration not later than June 28, 1911.

We regret, for the reasons set forth in the accompanying memorandum, that we are unable to accept the terms proposed; or, under the new conditions that have arisen, to continue in force our subway offer of December 5, 1910, and May 9, 1911.

We regret that we are forced to take a position which, together with the declared policy of the City authorities, necessarily leaves the City divided into two rapid transit

districts, requiring a double fare to travel from one to the other; renders impossible of fulfillment the wise policy of the old Rapid Transit Commission, repeatedly declared, of developing the present subway lines so as to afford at the least possible cost through trunk lines upon the east and west sides of Manhattan, with normal feeders to the outlying boroughs; deprives the Greater City as a whole of [fol. 1618] the benefit of a unified rapid transit system with a single five-cent fare; substitutes for a five-cent access to Coney Island from all parts of the City, a plan under which the greater portion of the citizens can reach the seaside only upon the payment of a double, and in many cases a triple, fare; cuts out the heart of the business centre of Manhattan, separates it from its own residential districts, attaches it as a terminal to the Brooklyn system alone, and necessarily unsettles and perhaps revolutionizes real estate values throughout the Boroughs of Manhattan and The Bronx; applies the credit released through the successful operation of the present subway system on the Island of Manhattan and a great portion of the additional credit hereafter available, to the development of the rapid transit system of one borough; entails upon the City, under the guarantee provision to the Brooklyn company above referred to, a large continuing deficit, of which Manhattan and The Bronx will bear the larger proportion, gives absolutely no rapid transit relief to the great residential district of the upper West Side of New York; furnishes no transit facilities to the public using the new Pennsylvania station, or to the lower West Side; leaves congestion upon the East Side for many years substantially where it stands today; only in the distant future, if the triborough route should be built, promises to extend a limited service to The Bronx; and postpones such relief as it does propose to confer upon a limited section of New York through a period of many years. In justice, however, to the holders of our stock and of our bonds—which, it must not be forgotten, were issued upon the faith of a public contract and subject to the approval of a public body—no other course is open to the company than to decline. If the City desires the co-operation of the Interborough Company, and through it the co-operation of private capital, in the execution of its general rapid transit plans, it will be necessary for the City

to propose terms which will justify this company, with respect to both its old and new investment, in embarking in the project.

We are likewise compelled to decline the terms tendered for third-tracking the elevated lines. We nevertheless stand prepared, within the reasonable limits of our resources, to relieve at an early date the unfortunate condition of travel congestion in this City. Our offer of June 10, 1910, with respect to elevated improvements and the operation of the Belmont Tunnel, connecting Queens with Manhattan, upon which an agreement had been almost reached with the Public Service Commission, we still leave open for your further consideration.

Rrespectfully submitted.

Interborough Rapid Transit Company, by T. P. Shonts, President.

[fol. 1619] Memorandum Stating the Reasons Why the Interborough Company Cannot Accept the City's Offer of June 21, 1911, for the Construction of Rapid Transit Improvements

On December 5, 1910, in response to the suggestion that the Interborough Company bring private capital to the City's aid in the solution of the transit problem, we offered to carry out the original plan with respect to the City's own subway, complete the natural "H," and, by the addition of logical extensions, afford the entire City the benefit of an unbroken service and a single fare. On May 9, 1911, for the expressed purpose of avoiding the need of duplicated lines, we offered to build other extensions indicated as desirable by the public authorities; and at the same time, upon the assumption that this principle might be accepted, proposed a plan for the limitation of profits, leveling leases, and, if it could be legally carried out, the privilege to exchange old legs for new. By a further public declaration, since formally confirmed by the directors, we announced our willingness, without guarantees, to equip and operate the 4th avenue subway in Brooklyn, provided Coney Island, Fort Hamilton and other extensions shown on our advertised maps, to cost the City not to exceed $40,000,000, were added to it; thus giving the citizens of all parts of the City access to the seaside for a single five-cent fare. In

the meantime, as the only possible plan by which quick relief could be brought to the prevailing conditions of travel congestion, we continued in effect our offer of June 10, 1910, to complete the third track upon the elevated system.

One-half of the subway and all of the elevated construction proposed by us in our offer of December 5 and May 9, together with the entire equipment, we offered to build with private funds at an estimated cost of $133,842,500, against a City investment of $69,720,500, thus correspondingly releasing City credit to other needed public works.

In making this offer, as we stated at the time, we reached the final point to which private capital could be induced to go. Indeed, in the most favorable aspect of the case the acceptance by the City of this offer would have involved a certain loss of earnings to the Company, to have been recouped, if ever, only in the uncertain future. Tables prepared by the Company's experts show that, upon the basis of the Committee's own estimate of travel increase for the next ten years, this loss must have amounted to not less than $17,500,000 for the first five years the new subways were in operation. Upon the basis, however, of the actual rate of travel increase upon the elevated and subway lines for the past year, which is substantially the same as the rate of increase for the decade from 1890 to 1900, or 40 per centum for the ten years, the net results to the Company might well be disastrous. Even these figures might have been largely increased by factors of which no account is taken in the calculations; a commercial crisis, an unexpected increase in the long haul travel due to the shifting further apart of residential and business centres, an unavoidable rise in the operating ratio above the very moderate ratio of 45 per centum assumed in our calculations or other causes. Indeed, the margin of safety in our offer of [fol. 1620] May 9 was so narrow that the introduction of the Broadway competitive route, reducing our estimated revenues by not less than $5,000,000 a year, would have made it impossible for us to carry that offer into effect.

If, therefore, our own offer went to the limits of conservatism, it must be manifest how utterly impossible for us it is to accept the City's present offer, which makes certain severe competition and imposes many additional hardships upon the Company. Our calculations show that for

the first five years of operation, assuming the costs of construction and equipment to be as stated in the Committee's report and the ratio of travel increase to be as stated above, the earnings of old and new subway lines combined would be less than the fixed charges against the combined properties for the five-year period of $1,553,000; or, if the estimate of construction and equipment cost furnished us by experienced engineers should be taken as a standard, the amount earned less than fixed charges would be $10,570,000. If, however, a more normal rate of increase, such as that shown for the decade between 1890 and 1900, or as indicated by both the elevated and subway lines in The City of New York for the current year, be taken as a forecast of the travel increase during the next ten years, the sum earned by the combined subway system as tendered in the conference report for the five years ending with 1920 would amount to $13,000,000 less than the fixed charges, upon the basis of the Committee's estimate of cost, and to $21,500,000 less than the fixed charges upon the basis of the Company's estimate of cost. This showing not only would defer forever the prospect of any dividend return whatsoever to the Interborough Company, but would involve it in an actual deficit upon the bonds which it must assume as a fixed obligation.

The intrinsic risk of the City's offer is indeed quite evident apart from statistical demonstration. If the old subways with their economical construction, dense travel and freedom from competition, can earn, as they are doing to-day, only 7.97 per centum on the actual cost of their construction and equipment, how can the new subways, costing, it is universally admitted, practically twice as much a mile to build, with their longer haul and traffic divided with the old subways, earn upon the actual cost of their construction and equipment more than a mere fraction of that percentage?

But even this is not all. Other conditions are imposed upon the Company in the City's counter offer which would still further add to our burden, and, indeed, make possible of acceptance the City's offer, were acceptance otherwise possible.

Real estate, easements and damages to abutting owners, which, under a decision of the Court of Appeals rendered

since the original subways were built, might run into unknown figures, are added to the construction cost, and the Company is compelled to assume one-half. The cost of real estate and easements alone upon the lines tendered the Interborough Company by the conference report, apportioning the Committee's estimate, will not be less than $10,000,000. The consequential damages collectible under the principle of the decision above referred to cannot, of course, be forecast, but might amount to many millions of [fol. 1621] dollars. Fixing them for the purpose of estimate at only $2,000,000, we find that, due to this provision alone, the fixed charges against the property would be increased by the sum of $675,000 a year, or $3,375,000 for the five-year period; which alone would increase the deficit above fixed charges for the combined system for the five-year period as shown above to $4,928,000 if the City's estimate of construction cost be adopted, or to $13,945,000 if the Company's estimate of construction cost be adopted.

The Company is compelled, notwithstanding existing contracts, to pro rate its receipts, other than passenger revenue. From this cause it is estimated that the net earnings of the present system will be diminished by a sum not less than $100,000 per annum.

We are even required to shoulder upon the present system, now exempt from taxation, by far the greater portion of the bulk of any general taxation that may be imposed upon the new lines. This follows because the taxation of the new lines is to be pro rated over the whole system upon a per passenger basis. As the new lines would carry a relatively small proportion of passengers compared with the old lines, it will readily be seen how the taxes upon those lines would be shifted to the present tax exempt property. The direct increase in charges against the revenues of the old lines from this cause may be estimated at a sum of approximately $200,000 a year.

The Company is required to operate the new lines on a per passenger basis; that is to say, there shall be charged to the new lines only such proportion of the operating expenses of the entire system as the passengers originating thereon bear to the passengers originating on the entire system. This method, it is frankly admitted, requires the Company to operate the new lines at less than actual cost, upon the theory that the operations of its old lines result

in a profit. The report of the Joint Committee admits the drain upon the old Company's revenues from this source. Our own experts estimate that it cannot be less than $200,000 a year. The car mileage basis, insisted upon by this Company, is the one universally adopted by railroad systems all over the country as the fairest method to determine the relative actual cost of operating one line in connection with another.

The total additional burden from the foregoing causes imposed directly upon the earnings of the old lines, if the City's offer should be accepted, will thus be seen to aggregate not less than $500,000 per year.

There are other conditions imposed upon the Company, the financial burden of which it is impossible to estimate, and still others incapable of performance for other than financial reasons.

We are asked, in effect, to waive the existing protection we have under the law, and to place upon a contractual basis the supervision by public authorities of our physical operation, including guaranties as to the character of the equipment and adequacy of service.

We are compelled to operate any extensions the City may build, provided the City may take up temporarily the operating deficit upon such extensions, notwithstanding the effect of adding such extensions to the old system might [fol. 1622] be to so cripple its income as to render it insufficient to support the Company's outstanding obligations.

With respect to our equipment, the City retains the right to approve the form and supervise the execution of contracts. Under this provision all our estimates with reference to the cost of equipping the new lines may be at fault, and the additional burden imposed upon the Company may exceed by many millions of dollars the cost of that equipment assumed in our calculations.

Without any compensating advantage whatsoever, we are required to cut off fifteen years from the renewal term of Contract No. 1, under which the main subway was constructed, and four years from the renewal term of Contract No. 2, under which the Brooklyn extension was constructed, terminating the renewal periods in the year 1964—a provision impossible of acceptance without a retirement of all outstanding bonds and perhaps a judicial contest of doubtful issue with dissenting stockholders.

Moreover, by an amendment adopted in the full Board, a further reduction in the terms of these leases of fourteen years is made possible. The City is given the absolute right to terminate all leases in the year 1950 upon the payment of a sum equal to the then present worth of the unexpired portion of the Company's leases, estimated upon the basis of the profits for the preceding five years. Inasmuch as by reason of amortization of bonds and other causes the profits for the final years of the leases will much exceed those for the five years in question, the Company would not receive an actual indemnity for the surrendered portion of its leases. The sum proposed to be paid for cutting off this valuable portion of the leases could not, indeed, under this amendment, exceed by much more than half the sum which this Company, by way of concession alone, was disposed to accept.

By another amendment adopted in the full Board, the Company is required forthwith, in the absence of a determination of the rights of the stockholders, to consent that the keystone of the present subway from 42d street south, under the river to Borough Hall in Brooklyn, shall be exchanged in the City for the proposed 7th avenue extension from Times Square to the Battery, to be held for a term of forty-nine years, subject in turn, it seems, to a ten-year recapture right.

The resolution is silent as to whether the lien of even existing mortgages is to be left undisturbed. The report of the Committee says that the lien of mortgages now upon the property may be assumed. But as these mortgages must be immediately retired under the plan submitted, this concession amounts to nothing. Accepting the terms of the report, and not of the resolution, it appears by implication that no new mortgage will be assumed, but that the new bondholder must transfer his lien to the 7th avenue leg, thus leaving him with a mutilated and perhaps unprofitable system to support his bonds. Furthermore, the Company may be compelled, at the option of the City, to assign its lease of the present subway from 42d street to Borough Hall to any third party the City may designate. These terms are widely different from those proposed by the Interborough Company as a part of its offer of May [fol. 1623] 9, and would bind the Company to conditions probably incapable of performance.

We are also required to consent that at the City's election any other portion of the new lines or extensions, upon payment of a contract sum, shall be directly transferred to a third party; thus enabling the City, after all the risk had been assumed by the Interborough Company, to transfer to a rival at cost any portion of the lines which may ultimately prove profitable and excite its cupidity.

All of these lines, including by reason of the foregoing provisions the present subway itself, we may be compelled at the end of ten years to surrender, and to take as compensation therefor a sum equal to the money actually invested in construction, plus a surcharge of fifteen per centum. We are allowed to deduct the amortization and perhaps brokerage charges not exceeding three per centum of the face of the bonds. This clause is inserted notwithstanding it has been the practice of Public Service Commissions in this and other States to include as an essential part of the cost of construction the cost of placing bonds to make construction possible. If the additional bonds necessary to finance the Company's share in the transit lines and improvements tendered it in the City's offer, amounting to more than $130,000,000, secured as they would be by a second lien upon old leases and a first lien upon new leases unprofitable in themselves and equipment which might have merely a scrap value, owing to the provision next referred to, could be sold at all, they must necessarily be sold at much less than par. If sold at even ninety cents on the dollar, at least seven per centum of the face amount thereof in event of redemption would be lost to the Company. This loss, together with the obsolescence and depreciation of equipment and other charges properly made against the bonus, would not bring the Company out whole in event of redemption. In other words, if the lines prove unprofitable they are left on hand to break the Company; if they are successful, they are taken from it at less than cost.

The equipment can be taken over at a price which would take into consideration its utility for railroad purposes and its obsolescent condition. With the very wisest foresight, electrical equipment or any equipment furnished for the system might become technically obsolete within a period of ten or fifteen years, although still available for practi-

cal operation, and the main security for our underlying bonds upon the elevated third tracking and extensions thus arbitrarily emasculated.

The proposition to third track the elevated—as to which we are left in doubt whether it is predicated upon an obligation to accept the new subways as well—is made upon the terms of dividing with the City all profits of the entire system in excess of the average profits prevailing during the last two years. If as a result of new competition traffic should be drawn from the elevated lines to such an extent as not to meet the new fixed charges for the work of installing and equipping the new third track—which are estimated at $1,500,000 a year—and to pay a sum equal to the present profits of that system, the loss must be absorbed by the [fol. 1624] Interborough Company. Under the competitive distribution of lines now proposed this loss might be very serious, whereas a division of profits might be indefinitely postponed. Moreover, third tracking terms will be granted only upon condition that such past depreciation of the Manhattan plant as the Public Service Commission may declare to exist shall be made up by the Interborough Company before it can draw any profits whatsoever from its elevated system in excess of those it draws to-day. Inasmuch as the Manhattan Elevated system is not to be amalgamated with City-built line, the importance of this provision to the City is not clearly seen. A technical decision upon depreciation under this provision might postpone forever any benefit to the Company from third tracking its elevated lines, while it would leave it to shoulder the great cost and certain risk of these improvements.

It may be said that many of the provisions above referred to are in terms equally applicable to the Brooklyn Rapid Transit Company. But this observation is without force, owing to the absolute inequality in the terms separately proposed to the Interborough Company and the Brooklyn Company with respect to the proposed construction. The Interborough Company is compelled to contribute one-half of the cost of the subway lines assigned to it, and must assume its own deficit; whereas, all the subway lines assigned to the Brooklyn Company, with the exception of the connection to the Brighton Beach Line, are paid for by the City, and the Brooklyn Company is given a continuing lien

upon the earnings of $122,000,000 of City money (taking the Committee's estimate), to secure to it not only the interest upon its bonds issued for elevated construction and for equipment, but a further sum equal to its current profits from its existing lines—estimated by the Committee at not less than $3,000,000 a year. As we stated in our letter of May 9, under a similar guarantee we would be willing to build anywhere in the five boroughs that the City might elect, and submit not only to these conditions affecting earnings, but to many others of a similar character that authority might choose to impose.

Brooklyn Rapid Transit Co., 85 Clinton Street, Brooklyn, N. Y., Office of the President

June 27, 1911.

Hon. George McAneny, Chairman Special Committee Board of Estimate and Apportionment; Hon. William R. Willcox, Chairman Public Service Commission for the First District, New York City:

Gentlemen: We acknowledge receipt of your communication of June 21, with accompanying report to the Board of Estimate and Apportionment in relation to pending transit proposals, together with copy of resolutions adopted by said Board on June 21 and copy of certain amendments incorporated in the report pursuant to the action of said Board. You request us, in pursuance of the terms of the resolutions, to submit our reply in time to allow of its consideration not later than Wednesday, June 28, 1911.

In response we beg to say that generally we are prepared to accept the recommendations of said report as applicable to the proposals made by this company and, upon [fol. 1625] the terms therein laid down, to pledge the entering into contracts for the carrying out of such recommendations, through the instrumentality of a new company to be organized for that purpose and of the existing railroad companies, the operation of whose lines is to be merged with that of new rapid transit lines.

In making this response, however, we ask, as a condition of our acceptance, that certain matters not explicitly or fully covered in the report be made clear according to our understanding of the intentions of the conferees, and

that certain modifications of the proposed operating terms be made in the light of a better appreciation of their effect or a fuller understanding of the facts upon which they were based. While there are several features of the report as applicable to us which we regard as unnecessarily severe and one in particular which we believe to be unwise from the point of view of the City, nevertheless our disposition has been from the beginning, and is now, to co-operate with the City to the extent of our ability for the solution of the transit problem. To accomplish this result we have in our conferences, as you well know, made concession after concession, until our proposition as finally shaped was almost as much the work of the City's representatives as that of the company. Notwithstanding this attitude and this result, we are asked now to make still further concessions as to important matters which were either not explicitly referred to in our conferences, or not seriously urged on behalf of the City, and which, if they had been adequately considered, would not, we believe, have formed a part of your recommendations. So much does our plan offer in the way of transit relief and for the best development of New York, that it would, in our judgment, be a public calamity if by insistence upon terms which are unreasonable either as against the City or as against the company the negotiations which have progressed during three months should now fail of accomplishment.

Animated still by the same spirit which has marked our preliminary negotiations and relying upon the City's sense of fairness and appreciation of broad public welfare, we are willing to waive many of our objections to the terms proposed, but we feel compelled in justice to our security holders, to point out certain changes which are essential to our acceptance. These are few in number, involve no question of principle, and are based upon equity and justice.

First: The report provides that, in the case of recapture by the City after ten years of any of the new lines covered by a forty-nine year contract, the City (or a second operator) shall pay "the then reasonable value of the equipment attaching to the line or lines." In another portion of the report the annual sinking fund allowance upon the

cost of equipment is limited to not more than three-fourths of one per cent. The company's investment for equipment will be upwards of $24,000,000. The rate of amortization allowed would yield something over $2,000,000 in ten years. If "the then reasonable value," in spite of adequate maintenance expenditures, should be determined by the City, by arbitration or by the courts, at less than $22,000,00-, the operator would be a loser by whatever was the differ- [fol. 1626] ence between $22,000,000 and the appraised value. It is readily conceivable that such loss might reach many millions of dollars. No operator would, of course, take that risk. The amendment of the Rapid Transit Act providing for the indeterminate franchise expressly recognized this fact by authorizing the City, in exercising the rights to terminate a contract after ten years, to purchase the equipment for an amount "which shall not be greater than the actual cost of the same plus 15 per cent. thereof." Commissioner Maltbie in his report to the Public Service Commission dated December 29, 1908, which is the standard authority preceding the action of the Commission in urging the indeterminate franchise amendment, said: "As profits may be small or non-existent during the first few years of a new enterprise, and as some time may be required to get under way and show what can be done, there ordinarily should be an initial period during which the purchase may be made only on payment of a prescribed bonus in addition to the actual value of the property taken." As we shall show later on, there will be no profits arising out of the carrying out of a contract with us on the terms proposed for at least nine years, and there is therefore all the more reason why the bonus authorized by the statute should be given. We cannot conceive that it was the intention of the framers of the report to impose upon the operator the risk of any loss, to say nothing of a possible loss of many millions in invested capital as a penalty for undertaking the public service compelled by the contract. We think rather it was their intention that in case of recapture the operator's investment should be made good to the extent that it had not been amortized. This might be possible in forty-nine years at the rate allowed for amortization, but not in any less time. It is essential, therefore, that this language

should be changed so as to provide that in case of recapture after ten years the City or a second operator should pay "the cost of the equipment attached to the line or lines plus 15 per cent. thereof, which amount shall decrease as the term continues and the investment is amortized."

Second: The report is silent upon the duration of lease in the case of elevated extensions of existing lines. We assume that this period will not be less than that prescribed for extensions of the Manhattan Elevated Railroad.

Third: The prescribed formula for determining receipts and expenditures is particularly applicable to the method of accounting embodied in the proposal of the Interborough Rapid Transit Company. It does not clearly or precisely reflect the method embodied in the Brooklyn Rapid Transit proposal, which calls for a pooling of all receipts and which in this respect is approved by the report. We have set forth our proposed substitute for this formula in Apendix A attached, which also presents more clearly than in the report, we think, the intentions of the City's representatives as to enumeration of lines, classification of contracts, accounting upon extensions, etc. In general, this substitute does not differ from the recommendations of the Committee. In three substantial respects, however, it does differ, and to these we call attention:

[fol. 1627] 1. Reservation of net earnings of existing lines.—The Committee has in its report conceded that the principle of this reservation "is perfectly proper and fair to the City." It thinks, however, that the allowance should be based upon the operation for the year ending June 30, 1911. The substitute insisted upon by us is that finally conceded by us after much discussion in our conferences with the Committee and was framed, not upon our initiative, but to embody a counter proposition suggested by the City's representatives. It prescribes a method whereby the net earnings shall be determined, eliminating all increase in revenue from operation beyond the present terminals of the bridges prior to the beginning of pooling or thereafter, as well as all revenue from new extensions. It applies the per passenger cost basis to the computation of

operating expenses. It fixes a maximum reservation of $3,500,000 and a minimum of the net earnings for the fiscal year now closing—approximately $3,000,000.

So much untruth has been uttered regarding the principle of this reservation that although the Committee, after more careful examination than was given to any other feature of our proposition, has been convinced of its fairness and has so publicly declared itself, we desire in this communication to record our reasons not only for urging the principle of the reservation, but for insisting that this principle should be more equitably recognized than is done in the Committee's report. Our proposals from the beginning have embodied the pooling of all revenue—from existing lines as well as from new. This method seemed to us the only straight, simple, and, from the City's point of view, satisfactory manner of financial accounting. It offered no opportunity for intricate mathematical manipulation of either receipts or expenditures. It made reasonably certain, by possible approximate calculation, what the City would get out of its bargain, if it made one. No other proposal has permitted such a calculation. Where new lines are operated with old lines over new joint routes and the division of receipts between old lines and new is proposed according to ticket collections upon the new lines only, no estimate of the result of such division can be made in advance within any approximate degree of accuracy. Under such arrangement the City's expectancy of return is largely guesswork.

In offering the City, therefore, the pooling of all receipts, we not only presented an open, simple method of accounting, but we have done more—we have given to the City the opportunity of sharing with us, on an equal basis, all the growth of existing lines—42 miles of existing rapid transit routes, and probably depending upon what the City decides to do in South Brooklyn, 15 miles additional. What the possibilities of this growth are is suggested vividly by some comparisons. The passenger receipts from these 57 miles for the year ending May 31 last averaged $144,000 per mile of route. The passenger receipts from the 37 miles of route of the Manhattan Railway Company for the year ending June 30, 1910, averaged $390,000 per mile of route. If the Manhattan elevated railroads have reached their capacity,

the Brooklyn elevated railroads have certainly not. The [fol. 1628] Brooklyn lines, carrying the same traffic as the Manhattan did last year per mile of route, would be earning over $22,000,000—a possible growth in all of which the City would participate equally, of over $14,000,000 annually.

No other proposition before the City involves a contribution of earnings now and hereafter from existing lines, and if it did none could offer such an opportunity of participation in tremendous possible growth.

In making this concession, therefore, and inviting the City into partnership with us, not as compensation for new privileges which we sought, but with the idea of creating thereby new and greatly improved facilities for public travel, we merely asked that when this partnership went into effect we should be allowed to retain the net earnings we would be then making—and that all increase and all gain from saving in operating cost by reason of better facilities and terminals should be shared with the partner. These net earnings are not large. They now represent about six per cent. on the present capitalization and much less on the invested capital—for with us acquisition and consolidation of elevated lines has meant many millions of decapitalization—not inflation of capital. The Manhattan elevated railroads are capitalized at $2,700,000 per mile of route; our elevated railroads at $1,250,000. Out of these net earnings we pay more than half for interest on obligations, funded and unfunded. An amount equal to five per cent. on Brooklyn Union Elevated Railroad Company's stock is paid in dividends—the first dividend on its common stock in the history of the company having been paid last year, although some of the company's railroads are twenty-five years old. The remainder is applied to reserve and to rentals of leased lines, or carried to surplus for such deductions as may hereafter seem wise. Hereafter, if contract is made with the City, there will be other calls upon this surplus revenue, as set forth in Appendix A, and it is essential that we should continue to get substantially the full measure for the net earnings which we are now enjoying and shall be enjoying when we begin partnership with the City.

The only difference on the subject between the City's Committee and the company is, as stated before, whether this reservation should be based on the current year's net earnings or upon those of the year before pooling. The substitute which we propose, and which we heretofore conceded at the City solicitation, is a compromise between the two extremes. It involves a comparatively small amount of additional reservation, but we feel that it is just we should have it and we shall need it to enable us to enter into the proposed contract. Certainly when it is considered that in the terms proposed by the Committee to be applicable to the Manhattan Railway Company the City is to participate only in increase of profits over 9 and a fraction per cent. on the stock of that company, and in the terms proposed for the Interborough Rapid Transit Company the City participates neither in the earnings of existing lines nor in any growth thereon, although that company is earning over 17 per cent. on its investment, there would not seem to be equity in asking the Brooklyn company to be content with [fol. 1629] a reservation of net earnings less than it will be earning when the pooling begins, representing a moderate return compared with the figures above cited, especially when that company is offering to the City what the other companies do not and cannot offer, namely, the opportunity of sharing equally a great measure of future growth.

2. Brokerage Charges on Cost of Equipment.—The conclusions of the report permit the amortization of brokerage charges of not exceeding 3 per cent on cost of construction, but not on cost of equipment. We see no reason for any distinction. The capital which goes into equipment is just as hard to raise as that which goes into construction, and bankers' commissions apply without discrimination.

3. Operation of Extensions.—The report provides that in the operation of extensions not accepted by the operator there shall be a seperate financial basis with separate accounting of receipts and operating expenses, but fails to prescribe such a basis. We present as such a basis the same method of accounting which the City asked us to accept in the conferences and which we finally agreed to accept, with the exception that deficits shall be cumulative and charged against the surplus receipts of the system as provided in

the accounting in the case of Original Lines, and that the profits shall be divided equally.

Fourth. The terms particularly applicable to the Brooklyn company provide that "every subsidiary company having to do with the supply of current, equipment or other property shall be subject to the provisions of the Public Service Commission's Law." The Legislature defines corporations which shall be subject to that law, and we think this definition should not be enlarged by contract. To the extent that the furnishing of current, equipment or other property enters into the cost of operation and financial arrangements under the contract, we recognize the propriety of the City's having reasonable power of supervision, but the language of the requirement is unnecessarily broad for the accomplishment of this object.

There are details of criticism and suggestion arising out of ambiguities or omissions of language which are not necessary to refer to here and which we are quite willing to leave to adjustment at the time of framing the contract.

In conclusion, and for the purpose of fortifying the reasons advanced above for the modifications requested, we beg to call attention to the fact in accepting the provisions of the report, as proposed by us to be modified, we can figure out no results whereby the combined new and old system can be operated so as to make divisible profits possible within a period of from nine to fourteen years from the beginning of full operation. The system will become self-supporting at an earlier date, but because of the requirement that deficits shall be cumulative until made good out of profits the operator will not get a dollar of compensation for many years. This is because of the inclusion in charges of a large amount of interest on capital invested in the Centre Street Loop and Fourth Avenue Subway, and in the Jamaica extension, the revenue from which will not be sufficient to make these lines self-supporting, and because [fol. 1630] of the insistence of a uniform fare of five cents, including Coney Island. Certainly any other use of these unprofitable lines except in combination with our system will produce still more adverse results. Your committee has estimated that City passenger traffic will increase during the next decade at the rate of 70 per cent. This is 5½ per cent annually, compounded. Assuming that this is a

conservative estimate, we submit herewith a tabulation (Appendix B attached) showing the effect of such rate of increase on the traffic of the lines affected, with additional allowances for new business by reason of the operation of new lines. This table shows that with this annual increase, and with these additional allowances, and applying the same rate of increase to the allowances, it will be 1923 before the system becomes self-supporting and 1929 before it yields divisible profits. The ratio of operating expense is figured at 50 per cent, including taxes. This it may be possible to reduce, but even if reduced to 45 per cent the time for profits would not be advanced more than three years. Including the allowances for new business from new lines, the total increase shown in Appendix B, is 142.2 per cent in ten years, showing an average annual increase of 9.25 per cent. Even if the ratio of increase as shown in that tabulation should be doubled the result would not advance the time for divisible profits more than three or four years.

The operator faces, therefore, a long wait before it may expect any compensation for carrying on the operations of a great system of transportation—yielding incalculable benefits to the territory served and to all New York, and saving millions of dollars annually in car fare to the people—and for the contribution of all increase in earning capacity of existing existing lines; and, in addition, by reason of the voluntary competition offered to its surface lines, the company must bear whatever loss for a few years at least is suffered by those lines. And by the time harvest comes, if it comes, the City may exercise its privilege under the contract and turn the then profitable lines over to a new operator.

The modifications which we have requested will not hasten the harvest time—they merely offer some protection against possible loss and assist in our financing of this great project. We do not ask that the City, because adopting the absolutely uneconomic proposition of a five-cent fare to Coney Island, should bear the burden of such a policy. We do not even ask that this unreasonable condition should be eliminated from the proposed terms, although we believe it should be, but we do suggest that the City, even more than the company, has a vital interest in this matter

and that before enforcing such a rate of fare for purely pleasure traffic, it should await for a reasonable period the result of operation under the present rate of fare.

We desire to say further that if the City should decide to permit substantial concessions from the terms laid down for the Interborough Company, we should expect, in fairness, and irrespective of our answer, that the same spirit of liberality should be manifested toward us. Respectfully submitted,

Brooklyn Rapid Transit Company, by T. S. Williams, President.

[fol. 1631] The President of the Borough of Manhattan moved that the report be received and Friday, June 30, 1911, at 10.30 a. m., be fixed for consideration.

Which motion was adopted by the following vote:

Affirmative: The Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The Board then adjourned to meet Friday, June 30, 1911, at 10.30 a. m.

Q. At a meeting of the Board of Estimate and Apportionment held on June 30, 1911, the following proceedings were had and taken:

The Board met in pursuance to an adjournment.

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchell, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

Extensions to the existing system, also third tracking and constructions additions to the Second, Third and Ninth avenue elevated railroads and the completion and putting in operation of the Steinway Tunnel.

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of June 29, 1911, a report was received from the Conference Committee and action was deferred until this day.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment on pending transit proposals and the Public Service Commission for the First District, in a joint report submitted under date of June 29, 1911, have recommended that the terms for the construction, equipment and operation of rapid transit lines proposed on behalf of the City to the Brooklyn Rapid Transit Company under the resolutions adopted June 21, 1911, be modified in certain particulars, and

Whereas, The Committee of the Board and the Public Service Commission have reported that the Brooklyn Rapid Transit Company is prepared to enter into contracts with the City for the construction, equipment and operation of the several lines and extensions proposed for operation by it upon the terms required by the City, as now modified, and [fol. 1632] Whereas, The Board concurs in the findings and recommendations of the report as aforesaid; therefore, be it

Resolved, 1. That contracts be prepared immediately for the construction, equipment and operation of the lines proposed for operation by the Brooklyn Rapid Transit Company under the resolutions adopted by the Board of June 21, 1911, and upon the terms to the Company therein proposed, with the following exceptions:

(a) That in the event of recapture of any of the lines operated by the Brooklyn Rapid Transit Company after ten years, the City or any second operator taking over such lines shall pay to the Company, as provided in the Rapid Transit Act, the actual cost of the equipment attaching to such lines, less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund

created for the amortization of the operator's investment in equipment, and plus fifteen per cent of the amount of the original cost, which percentage shall decrease at the rate of one per cent per year; provision to be made for deferred maintenance, if any.

(b) That the amount to be deducted annually as compensation to the Company for use of the existing lines and stations shall be computed by one of the following methods, the precise method to be determined by the conferees:

1. An amount equivalent to forty per cent of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

2. The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the Brooklyn and Williamsburg bridges during the year prior to the beginning of operations in Manhattan beyond the present terminal, less the operating expenses computed upon the per passenger basis; such balance not to exceed in any year $3,500,000 nor to be less than the net earnings of the Brooklyn Union Elevated Railroad Company for the year ending June 30, 1911.

(c) That the duration of grants upon extensions of the existing elevated lines shall not exceed the term proposed for the extensions of the Manhattan elevated lines; namely, eighty-five years and that such grants shall be subject to recaptured by the City in the manner prescribed by the Rapid Transit Act at any time after ten years from the date of beginning of operation.

(d) That the amortization of brokerage charges, not to exceed three per cent, be allowed on the cost of equipment as well as on the cost of construction.

(e) That where under any contract the gross profits from operation are insufficient in any year to cover the actual charges of the Company for carrying any portion of the cost of construction not met from the funds of the City, the deficits thereby sustained by the Company shall be treated as cumulative and be a charge in the Company's favor against future profits before payment of the carrying charges upon the bonds of the City proceeds.

[fol. 1633] (f) That although the cost of real estate and easements is to be treated as part of the cost of construction and amortized from the receipts of operations, any incidental fee damages for acquiring rights of way in streets allowed by the courts, shall be paid by the City from its General Fund and not from the Subway Construction Fund.

(g) That the contract for the lines aforesaid shall be conditioned upon the Company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board of June 21, 1911, as herein amended, the additional lines and extensions set forth in its propositions of April 25, 1911, and May 2, 1911; and upon the Company's assurance to the Board of Estimate and Apportionment, not later than July 6, 1911; that it will operate such additional lines if requested so to do.

(h) That if the Company operate the Jerome avenue line in The Bronx and the lines to Corona and Astoria in the Borough of Queens, it agree to the reservation of joint trackage rights in the operation of the said lines at any time that the City may so require; the lines to Corona to carry three tracks instead of two, as originally proposed.

(j) That if the Company operate the Eastern Parkway line in the Borough of Brooklyn, its obligation to bear the cost of construction of the proposed subway connecting the Brighton Beach and Flatbush avenue lines be limited to that section of the line lying between the Malbone station and the Prospect Park Plaza.

2. That although the Interborough Rapid Transit Company has failed to accept the terms for the construction, equalment and operation of the new rapid transit lines proposed by the City, the Company be informed that the Board and the Public Service Commission desire, as a matter of record, to include in the terms originally proposed to it those of the modifications aforesaid that should apply equally to either operator, to wit:

(a) The adjustment of the basis for the payment of the cost of equipment under recapture as proposed by the Brooklyn Company.

(b) The extension of the allowance of three per cent for brokerage charges to the cost of equipment.

(c) The treatment as cumulative of any deficiences met by the Company in carrying its interest and Sinking Fund charges and the liquidation of such deficiences before payment of the carrying charges upon the bonds of the City proceeds; and

(d) The payment of incidental fee damages, for rights of way in acquiring streets, from the City's General Fund and not from the Subway Construction Fund.

3. That the Interborough Rapid Transit Company be informed that the modification of terms herein proposed, as applied to it, would include also the following:

(e) That if the Company agrees, as compensation for the additional franchises it seeks for its elevated lines, to pay to the city annually one-half of the increase above the average of the net profits of the two years ending June 30, 1911, and if it accepts the general proposition of the City as to rapid transit lines, that the City agree also to treat de- [fol. 1634] creases of net profit below the amount of such annual average as cumulative in the Company's favor to be met from future receipts before any division with the City proceeds.

(f) That if forty-nine years be fixed as the term of the new subway leases and the Company's leases upon the existing lines are leveled so that they will expire co-terminously, the City will agree to merge with the new leases upon the old lines such parts of the renewal periods of each contract as would remain under the leveling process. This upon condition that the legislation necessary to permit such a readjustment of the leases, as well as to permit the proposed exchange of the leases upon the east and west side legs of the existing subway, shall be promptly secured.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Borough of Manhattan, Brooklyn, Bronx, Queens and Richmond—16.

The President of the Board of Aldermen, in explaining his vote in the affirmative, made the following statement:

"I am in favor of the proposition and will vote for the resolution as introduced, but in doing so I simply want to

call attention to the fact, as I have in conference, that the proposition of leveling the lease terms without readjustment, I do not believe in. I realize fully that it is going to make a difference of a great many millions of dollars to the City during the period of the renewal terms. According to calculations, based on the assumption that arbitration at that time would result in an equal division of profits between the City and the railroad company, above the rental now paid, it would amount to anywhere from forty to forty-six million dollars during that period. That, of course, is speculative. I have always felt the leveling should not be allowed without readjustment, but in view of the tremendous importance of having the question settled now and finally, I waive my judgment, which is still the same on this point, and I am prepared to vote for the resolutions introduced. I wish it noted that I do so without approving of this special provision."

On motion of the Comptroller, the Board adjourned to meet Thursday, July 6, 1911, at 10:30 a. m.

R. At a meeting of the Board of Estimate and Apportionment held on July 6, 1911, the following proceedings were had and taken:

The following matter not on the Calendar for this day was considered by unanimous consent:

[fol. 1635] Rapid Transit Railways

The President of the Borough of Manhattan presented a communication from the Brooklyn Rapid Transit Company in reply to resolution adopted by this Board at the special meeting on June 30, 1911, as follows:

Brooklyn Rapid Transit Co., 85 Clinton Street, Brooklyn, N. Y., Office of the President

July 5, 1911.

Hon. William R. Willcox, Chairman Public Service Commission for the First District; Hon. George McAneny, Chairman Special Committee of the Board of Estimate and Apportionment, Borough of Manhattan.

Gentlemen: We acknowledge receipt of your communication of the 30th ultimo transmitting copy of report made

by you to the Board of Estimate and Apportionment, the recommendations of which were adopted by that body at a special meeting on June 30 last.

Replying particularly to subdivision G of paragraph 1 of said report,

"That the contract for the lines aforesaid shall be conditioned upon the company's agreement to operate upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, as herein amended, the additional lines and extensions set forth in its proposition of April 25, 1911, and upon the company's assurance to the Board of Estimate and Apportionment not later than July 6, 1911, that it will operate such additional lines if requested so to do."

we hereby formally assure you and the Board of Estimate and Apportionment of our willingness to operate such additional lines upon the general terms set forth in the resolutions adopted by the Board on June 21, 1911, and as amended in the committee's report of June 29, 1911.

We call your attention to certain language of the report as embodied in the copy transmitted to us which we assume does not fully express the purpose of your committee.

In subdivision A of paragraph 1 referring to recapture, it is provided that there shall be paid to the company the actual cost of the equipment "less the amount of expenditures for depreciation and renewals, and the amount accrued in any sinking fund," etc. We assume that this is intended to mean any unexpended balance of depreciation and renewal charges.

In subdivision E of paragraph 1, we assume that the words "cost of construction" are intended to include also the cost of equipment.

In subdivision F of paragraph 1, we assume that the words "any incidental fee damages for rights of way in acquiring streets allowed by the courts" are not limited to damages for rights of way in the opening of new streets, but include generally damages for rights of way in streets already opened.

[fol. 1636] We stand ready to cooperate with the Public Service Commission and your Committee in the preparation of plans and specifications and the formulation of

contracts, to the end that there may promptly be secured for the public the fullest measure of transit benefits permitted under our proposals.

Respectfully submitted.

Brooklyn Rapid Transit Company, by T. S. Williams, President.

The President of the Borough of Manhattan then moved that the communication be laid on the table and taken up for consideration at the special meeting to be held Monday, July 10, 1911, at 10:30 o'clock a. m.

Which motion was agreed to.

S. At a meeting of the Board of Estimate and Apportionment held on July 17, 1911, the following proceedings were had and taken:

Financial and Franchise Matters

The Board met in pursuance of an adjournment.

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens, and George Cromwell, President Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways—Extension to the existing system; also third-tracking and constructing additions to the Second, Third, and Ninth Avenue Elevated Railroads, and the completion and putting in operation of the Steinway Tunnel

In the matter of the communication from the Public Service Commission for the First District, relative to the construction, maintenance and operation of additional rapid transit railways, and requesting a statement of the position of this Board on the subject.

The President of the Board of Aldermen served notice on the Board that unless a decision was reached in the matter on or before the next meeting of the Board, he

would at that time offer for adoption a resolution providing for the award of the extended rapid transit system pursuant to the recommendations of the conference committee.

[fol. 1637] T. At a meeting of the Board of Estimate and Apportionment held on July 20, 1911, the following proceedings were had and taken:

The Board met in pursuance of the following call:

City of New York, Office of the Mayor

July 19, 1911.

In pursuance of the provisions of Section 226 of the Greater New York Charter, the Board of Estimate and Apportionment requests the Mayor to call a meeting of said Board on Tuesday, July 20, 1911, at 10:30 a. m.

W. J. Gaynor, Mayor; Wm. A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens; George Cromwell, President Borough of Richmond.

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Lawrence Gresser, President Borough of Queens, and George Cromwell, President Borough of Richmond.

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Rapid Transit Railways—Extension to the existing system; also third-tracking and constructing additions to the Second, Third, and Ninth Avenue Elevated Railroads, and the completion and putting in operation of the Steinway Tunnel

In the matter of the communication from the Public Service Commission for the First District, relative to the

construction, maintenance and operation of additional rapid transit railways, and requesting a statement of the position of this Board on the subject.

The President of the Borough of Manhattan, Chairman of the Conference Committee, presented the following:

July 20, 1911.

To the Honorable Board of Estimate and Apportionment:

GENTLEMEN: The Public Service Commission for the First District and your Special Committee pending proposals for the construction, equipment and operation of new rapid transit lines submitted to your honorable body under date of June 13, 1911, a joint report embodying recommendations with relation to the terms upon which, in the judgment of the transit conferees, contracts for such construction, equipment and operation might properly be made between the City and the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company respectively.

These recommendations, together with certain modifications thereof, were approved by your honorable Board [fol. 1638] under the resolution adopted under date of June 21, 1911, and June 29, 1911, and the respective operating companies were subsequently advised of the action so taken.

The general plan upon which the Public Service Commission and the Board of Estimate and Apportionment agreed contemplated:

1. The laying out of a transit system that would serve as a basis for a logical and well-ordered future City plan.

2. Provision, as rapidly as the means at the City's command permitted, not only for the relief of congested area, but for the operation of lines through those sections that, though relatively undeveloped, offer promising opportunity for the better distribution of population.

3. Automatic provision for the inclusion in either operating system of such future extensions as the City may from time to time decide to build.

4. The utilization and extension, so far as possible, of the facilities offered by existing rapid transit lines already

at the service of the City, rather than to reduce the uses of such lines through competition of a wasteful nature.

5. The separation of particular routes or combinations of routes in such manner as to secure control on the part of the City of future transit development, and the right of the City to recapture a system of lines capable of independent operation, if it so elects, at any time after ten years.

6. The release of the moneys invested by the City in new transit lines at the earliest practicable time from the restrictions placed by the constitution upon municipal indebtedness; and

7. The subjection of the operating companies to strict public regulation as a condition precedent to the granting of the new franchises or other rights.

It is not necessary at this moment to rehearse in detail the terms of the Report of the Conferees, which have been carefully considered by your Board, and which have been the subject of much general discussion. The fact should be emphasized, however, that the primary purpose of the plan proposed by the Conferees was to secure the advantages of a transit system based upon the principles we have stated, and not to put the City in a position of sacrificing any part of its own logical development for the sake of securing the sort of returns that would accrue to a partner in a commercial railroading enterprise. The Interborough Company, which holds the City's subways under leases that secure it in possession for approximately seventy years, has informed the Conferees that it could not accept the terms proposed by the City for the operation of extensions of its system, for the reason that the private capital required to carry out its part of the plan could not be enlisted upon such terms. In order to examine the figures and data, and to hear the arguments upon which the Company's conclusion was based, the Conferees have held several further conferences with the representatives of the Company and their bankers. As a result of these conferences the Company now submits a supplementary offer to operate all of the routes laid down in the Conferees' re- [fol. 1639] port, and to accept all the terms and conditions

proposed by the report, with the exception of those establishing the basis of compensation to the Company. The recommendations of the Conferees under this head were:

1. That if a contract were made with the Interborough Company, the Company be permitted to retain all of the net earnings upon the lines it now operates, which for the year ending June 30, 1910, amounted to 17.3 per cent. upon its invested capital.

2. That the net profits of the new lines be estimated upon a separate accounting system based on a per passenger method of ascertaining the cost of operation.

3. That the receipts of the new lines above operation be proportioned as follows:

(a) The carrying charges upon the new capital invested by the Company and the City respectively;

(b) Each party be permitted thereafter to retain three per cent. in excess of such carrying charges;

(c) All receipts in excess of such three per cent. to be applied toward the carrying of deficits, if any, upon the cost of operating extensions; and

(d) That all profits remaining after the operation of such extensions be divided evenly between the two parties.

The Company now proposed that the gross receipts of all the lines, both new and old, be pooled, and that after the payment of operating expenses they be distributed as follows:

(a) The interest and sinking fund charges upon the bonds of the City issued for the construction of rapid transit lines under the present rapid transit contracts.

(b) An amount to be retained by the Company during the entire period of the contract equivalent to five per cent. interest and one per cent. sinking fund charges upon the capital contributed by the Company for either construction or equipment of the proposed and existing subways, with three per cent. additional as compensation to the Company for the pooling of the receipts of the existing lines with those of the new lines, the levelling of the leases upon the old and new lines, the exchange of leases upon the east and west side lines in Manhattan, and for services in connection with the operation of the property, it being understood that the amount of capital contributed by the Company to the

existing subway system for construction and equipment as of June 30, 1911, amounts to the sum of $48,029,688, the basis for the allowance in question to be, nevertheless, the exact sum expended upon construction and equipment. These allowances, which are not to exceed nine per cent, in all, to be upon all capital furnished by the Interborough Company during the period of the contract, and to be cumulative; the deficits, if any, to be adjusted on a yearly basis out of a fund to be provided therefor by the Company as part of its capital investment; the allowance made to the Company upon the bonds or notes issued for this purpose not to exceed interest charges thereon.

(c) A sum representing the interest and sinking fund charges upon the capital invested by the City in said new [fol. 1640] lines; deficiencies in the amount required to meet such charges from the date of the operation of said new lines to be treated as cumulative and to be met from the receipts of the system before further distribution of profit proceeds.

(d) A sum representing the difference between the interest and sinking fund charges of the City upon its investment in the said new lines, up to and including an aggregate of nine per cent. upon the investment of the City in the new lines, before the further distribution of profit proceeds; and

(e) An even distribution between the City and the Company of all profit after the foreg ing charges have been met; such division to proceed throughout the remainder of the term of the lease from the City to the Company.

The proposition of the Company, read in conjunction with the general terms of the report, which it has accepted, also covers the following points:

1. That, as set forth in the Report of the Conferees, dated June 5, 1911, the sinking fund set aside by the Company upon its investment in equipment shall meet and cover all charges for obsolescence incidental to the maintenance of such equipment.

2. That all future extensions agreed upon by the City and the Company shall be governed by and included in the general provisions herein set forth as to receipts and deductions therefrom, and that all extensions required by the City and not agreed to by the Company shall be equipped

and operated as part of the entire plan upon the general lines set forth in the offers of the Interborough Company of December 5, 1910 and May 9, 1911; the operating expenses of such extensions, in that case, to be upon the cost-per-passenger basis, to be determined according to unit costs on the entire system.

3. That upon the completion of any substantial portion of the new lines the receipts of the existing subways shall be immediately pooled therewith, and such pooled receipts divided in the manner hereinbefore provided, in the proportion which such new lines bear to the whole system, as the same may be placed in operation from time to time.

4. That the Company will commence at once the construction of all of the lines embraced in this plan that are contiguous to any of its existing lines, either subway or elevated, and that it will press the work upon all other lines with the greatest possible dispatch.

5. That the Interborough Company and the Manhattan Elevated Company will construct and operate the third track lines and extensions to the existing subway system of the Manhattan Company upon the terms proposed in the resolutions of ——— —, ———, as modified on ——— —, ———, with the exception that the City, in lieu of the proposed provision for examination of the lines to determine what deferred depreciation, if any, would be required to be met, will accept a clause prohibiting excessive renewal charges on the part of the Company during any one year following the new operation.

6. That the Company will accept in every other particular the terms and conditions for the construction, equipment and operation of the lines for which it has applied, or which have been assigned to it, as laid down in the resolutions of [fol. 1641] June 21, 1911, as amended on June 30, 1911.

The Conferees, having in view the pre-eminent desirability of extending under a logical plan the City lines now under lease to the Interborough Company as part of the more comprehensive system proposed in the report of June 13, 1911, and being convinced that the revised terms that they have negotiated with the Interborough Company offer the best practicable basis of settlement, do not hesitate to

recommend that the substitute proposition as to financial basis be accepted.

The advantages to the City would be manifold. The Company, in return for the pooling of its revenues, for the virtual merging of the new and old leases for the reduced period of forty-nine years, the exchange of leases upon its east and west side lines, and for its services as operator of the compounded system, would receive three per cent. above the carrying charges upon its investment. It is estimated that by the first year of operation of the new lines the Company's total investment upon the old lines for construction and equipment will be $50,000,000, and that its contribution for construction and equipment of the new lines will be $75,000,000—a total of $125,000,000. The three per cent. allowed upon this sum would amount to $3,750,000 annually. This would be the maximum sum allowed throughout the entire operation of the lease until the City also receives nine per cent. upon its investment. The Company's net profit from the subways for the year ending June 30, 1910 was $4,650,000. For the year ending June 30, 1911, figures for which are not yet in hand, the amount will be somewhat less. During this year, however, expenditures for equipment replacements have been abnormal and the net figures of the year are not to be taken as typical. It is estimated that the increase of traffic between now and the year 1915, the last year preceding the operation of the new lines, will bring the profit for that year to approximately $7,000,000. The present proposition is, therefore, in a word, that the Company will operate an expanded system, doubling the mileage of its present lines, for a profit of $1,000,000 less than it is receiving today upon its smaller system, and more than $3,000,000 less than the profit it would receive in the last year of the present operation.

It may be said that when the settlement of terms upon this principle was first proposed the Company suggested that it be given a reservation of ten per cent. upon its investment, old and new; a figure that would have more nearly approximated its present receipts, and that, although provision for the City's carrying charges should come next in order, all profit earned over City's carrying charges should be divided evenly. This proposition the Conferees declined to accept. It was then proposed that

the basis be made nine per cent., the even division to proceed immediately following the payment of the City's carrying charges. This, also, the Conferees declined to accept. As a counter proposition, they proposed that the City receive an amount above its carrying charges up to nine per cent., and upon this basis a final agreement was reached. [fol. 1642] The Company figures, upon estimates that are considered by the Conferees to be very conservative, that any cumulative deficits in its preferred allowance would be discharged within eight years from the beginning of operation, and that the cumulative deficiencies in the City's carrying account would be discharged in five years more, thus bringing the City within thirteen years to the point at which it would derive an annual profit.

It would be difficult to indicate accurately the exact year at which this point would be reached; but it could hardly be more than one or two years beyond the date the company anticipates. If it is assumed that the new and old lines, at such a date, would have reached the maximum of their carrying capacity—estimated at 800,000,000 passengers per year—the following operating results would have been secured:

Gross operating revenue (on the basis of 800,000,000 passengers per year)	$40,000,000
Less 45 per cent. allowance for operating expenses	18,000,000
	$22,000,000
Less carrying charges upon the City's present bonds	2,700,000
	19,300,000
Less taxes (city, state and federal)	600,000
	18,700,000
Add non-operating revenues	300,000
Gross income	$19,000,000

If there be deducted from this sum the proposed preferred allowance of $11,250,000 on the old and new invest-

ment of the company, plus an additional allowance of $1,000,000 on new equipment the company will be obliged to purchase in order to meet the expected growth of travel, and plus $4,950,000 representing nine per cent. to go to the City upon its new investment of $55,000,000, there would still remain a balance of $1,800,000 available for equal division between the parties within fifteen or sixteen years from the beginning of operation.

The release of the City's investment from the restrictions of the debt limit would occur as soon as its carrying charges have been met. It is to be considered, further, that the allowance to the Company of $3,750,000 annually as a preferred profit, is to be treated as preferential only during the thirteen or fourteen years prior to the payment of the City's full nine per cent. The City can borrow money more cheaply than the Company. Its bonds are apt to be sold at a rate of 4¼. It would be entitled, therefore, to 3¾ per cent. upon its proposed investment of $55,000,000, which would amount to $2,100,000 annually. From the first year of the realization of this full sum, the preferred allowance to the Company would be reduced, therefore, to $1,650,000. Throughout the remaining years of the lease, this reduced amount would stand for all that the [fol. 1643] Company surrenders in the way of its present earnings and the readjustment of its existing leases.

At the end of the leases, it would, moreover, turn over to the City a property valued at $125,000,000 and would have paid to the City during the same period an increase in taxes aggregating $20,000,000.

The Conferees, in recommending that the proposed revised basis for settlement with the Interborough Company be accepted, have in mind also the fact that the indirect benefits to the City would be vastly in excess of the direct return from its share in the revenues of operation. The President of the Department of Taxes and Assessments informs the Committee that within five or ten years following the opening of the new transit lines to operation, taxable values will increase fully $500,000,000 beyond the estimates the department has previously furnished. At the rate of the present annual tax, this would net more than $8,000,000 annually in taxation. This consideration alone, in the judgment of the Conferees, justifies any risk that

the City proposes to take in its part of the construction of any of the lines embraced in the comprehensive plan the Conferees' report proposed.

The Conferees recommend, also, that the franchises sought by the Interborough and Manhattan companies for the third tracking and extension of the Manhattan elevated lines be also granted upon the terms set forth in the report, as subsequently amended. Under this plan, the City will receive half of the increase in net operation of the elevated roads, above an average of the profits of the two years ending June 30, 1911, instead of two per cent of the increase in the gross receipts at express stations, as the Company had first proposed. The City will also undertake to treat as cumulative any losses of income on the part of the Company below the average aforesaid, and to discharge this before the even division of profits proceeds. There can be no doubt, however, that any loss of income due to the opening of the new subways will be quickly overcome, and the advantages of an even division in all of the increase of the future, estimated roughly at forty per cent of the present traffic, is manifest.

The resolutions herewith submitted by the Special Committee of the Board of Estimate, if adopted, will not only determine the disposition of the several routes to be embraced within the system to be operated by the Interborough Company; but will reaffirm the action previously taken by the Board with relation to the award to the Brooklyn Company of the routes assigned to it in the Conferees' report of June 5, 1911.

The Public Service Commission is already proceeding with the preparation of formal contracts upon which the operation of the new system of the Brooklyn Company will be based. The Commission is processing, also, with all steps necessary to the legalization of routes embraced in any part of the City's plan that have not yet been established. The Commission will proceed with actual construction of the lines embraced in the plan to be built wholly by the City, for which bids are in hand, and with the advertisement of bids for the construcion of all other such lines [fol. 1644] that have been legalized, as soon as the final

action of the Board of Estimate and Apportionment is taken.

All of which is respectfully submitted.

Special Committee of the Board of Estimate and Apportionment: George McAneny, President Borough of Manhattan; Cyrus C. Miller, President Borough of The Bronx; George Cromwell, President Borough of Richmond. For the Public Service Commission for the First District: W. R. Willcox, Chairman; Wm. McCarroll, J. E. Eustis.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment appointed to consider pending transit proposals, and the Public Service Commission for the First District, made a joint report to this Board bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railway within The City of New York; and

Whereas, This Board, at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The Interborough Company, through informal communication to the Board, has represented that it would be unable to secure the investment of private capital in the lines assigned to it upon the terms proposed by the Board and the Public Service Commission unless the said terms and conditions be modified; and

Whereas, As a result of further conferences between the representatives of the company and the Special Committee of the Board and the Public Service Commission, the Conferees have been informed by the company, in a letter dated July 19, 1911, that it will accept the part allotted to it by the Board subject to the terms and conditions contained in the report of the Conferees dated June 5, 1911,

as amended June 21, 1911, if certain modifications with relation to the financial terms be made therein; and

Whereas, The Board is convinced, for the reasons submitted by the Conferees, that the said modifications may properly be accepted; therefore be it

Resolved, That the Board hereby approves the recommendations of its Special Committee and the Public Service Commission that the Commission prepare and submit to the Board contracts for the construction, equipment and operation of the lines assigned to the Interborough Company, as set forth in the Conferees' report dated June 5, 1911, as amended June 21, 1911, and upon the general and specific terms prescribed by said report, excepting in the following particulars:

I. That the Interborough Company, in consideration of the grant of the new franchises and operating rights for the new lines it seeks, and for the new lines assigned to it [fol. 1645] under the said report of June 5, 1911, be required to pool the gross receipts of all the said lines, old and new; and that its revenues from such gross receipts, after the payment of operating expenses upon the basis set forth in the said report of June 5, 1911, shall be apportioned in the following order:

(a) The interest and sinking fund charges upon the bonds of the City issued for the construction of rapid transit lines under the present rapid transit contracts;

(b) An amount to be retained by the company during the entire period of the contract equivalent to five per cent interest and one per cent sinking fund charges upon the capital contributed by the company for either construction or equipment of the proposed and existing subways, with three per cent additional as compensation to the company for the pooling of the receipts of the existing lines with those of the new lines, the leveling of the leases upon the old and new lines, the exchange of leases upon the east and west side lines in Manhattan, and for services in connection with the operation of the property; it being understood that the amount of capital contributed by the company to the existing subway system for construction and equipment as of June 30, 1911, amounts to the sum of $48,629,668; the basis for the allowance in question to be, never-

theless, the exact sum expended upon construction and equipment. These allowances, which are not to exceed nine per cent in all, to be upon all capital furnished by the Interborough Company during the period of the contract, and to be cumulative; the deficits, if any, to be adjusted on a yearly basis out of a fund to be provided therefor by the company as part of its capital investment; the allowance made to the company upon the bonds or notes issued for this purpose not to exceed interest charges thereon.

(c) A sum representing the interest and sinking fund charges upon the capital invested by the City in the said new lines; deficiencies in the amount required to meet such charges from the date of the operation of said new lines to be treated as cumulative and to be met from the receipts of the system before further distribution of profit proceeds.

(d) A sum representing the difference between the interest and sinking fund charges of the City upon its investment in the said new lines, up to and including an aggregate of nine per cent upon the investment of the City in the new lines, before the further distribution of profit proceeds; and

(e) An even distribution between the City and the company of all profit after the foregoing charges have been met; such divisions to proceed throughout the remainder of the term of the leases from the City to the company.

II. That, as set forth in the report of the Conferees dated June 5, 1911, the sinking fund set aside by the company upon its investment in equipment shall meet and cover all charges for obsolescence incidental to the maintenance of such equipment.

III. That all future extensions agreed upon by the City and the company shall be governed by and included in the general provisions herein set forth as to receipts and deductions therefrom, and that all extensions required by the [fol. 1646] City and not agreed to by the company shall be equipped and operated as part of the entire plan upon the general lines set forth in the offers of the Interborough Company of December 5, 1910, and May 9, 1911; the operating expenses of such extensions, in that case, to be upon the cost per passenger basis, to be determined according to unit costs on the entire system.

IV. That upon the completion of any substantial portion of the new lines, the receipts of the existing subway shall be immediately pooled therewith, and such pooled receipts provided in the manner hereinbefore provided, in the proportion which such new lines shall bear to the whole system as the same may be placed in operation from time to time.

V. That the company will commence at once the construction of all the lines embraced in this plan that are contiguous to any of its existing lines, either subway or elevated, and that it will press the work upon all other lines with the greatest possible dispatch.

VI. That the Interborough Company and the Manhattan Elevated Company will construct and operate the third track lines and extensions to the existing system of the Manhattan Company, upon the terms proposed in the resolutions of June 21, 1911, as modified on June 30, 1911, with the exception that the City, in lieu of the proposed provision for examination of the lines to determine what deferred depreciation, if any, would be required to be met, will accept a clause prohibiting excessive renewal charges on the part of the company during any one year following the new operation.

VII. That the company will accept in every other particular the terms and conditions for the construction, equipment and operation of the lines for which it has applied, or which have been assigned to it, as laid down in the resolutions of June 21, 1911, as amended on June 30, 1911; and be it further

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board and the Public Service Commission, as heretofore ratified and confirmed, the Board approves the proposed immediate preparation of contracts, under the general provisions of the Rapid Transit Act, for the construction, equipment and operation of the lines assigned to the Brooklyn Rapid Transit Company—through the instrumentality of such new railroad company as may be organized for the purpose, or through the Brooklyn Union Elevated Railway Company, or through both such companies, as may be deemed advisable—

along the lines proposed to the Brooklyn Company in the resolutions of June 21, 1911, with the modifications and exceptions further provided in the resolutions adopted on June 30, 1911; and be it further

Resolved, That the Public Service Commission be respectfully requested to submit to this Board at the earliest date practicable the form of the contracts to be entered into for the equipment, operation and maintenance of the lines of rapid transit railway proposed for operation aforesaid, either by the Interborough Company or by the Brooklyn Company, in order that all of the rapid transit lines proposed for construction, either by the City or by the respective companies, or now under construction by the City, may be promptly utilized; and be it further

[fol. 1647] Resolved, That the Public Service Commission be and it is hereby respectfully requested, at the earliest date or dates practicable, to submit from time to time for the further approval of this Board the contract or contracts to be entered into for the construction, at the expense of the City, of such portions of the said lines as are intended for operation by either of the contracting companies, or by any company, and to acquaint the Board, so far as practicable, in anticipation of such submission with the necessary plans, specifications and estimates for such construction, in order that the Board may proceed to appropriate the City funds to be expended in accordance therewith; and be it further

Resolved, That the Special Committee of this Board, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond, be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in carrying out these recommendations and in the determination of such questions of detail with relation to contracts to be entered into with either company as were left undetermined in the joint report of the conferees, as modified by the resolution subsequently adopted, including the resolutions of this date.

The following discussion ensued:

President Mitchell: Mr. Mayor, this matter is now officially before the Board for action. I have waited during

the past four days—that is, since the matter was first outlined, to express my full views concerning it and now, in expressing those views and stating the reasons why I vote as I shall upon this proposition, I ask that what I say be made a part of the record of the Board.

While I am keenly alive to the advantages of the Interborough operation of the lines allotted to that Company in the report of the conferees, and would be glad to vote for a contract of operation by that Company on any terms equitable to the City, I regret to find myself in a position where I must vote against the proposition which is now put forth.

I do so only because I believe it would work most disadvantageously to the City and would be almost as unfavorable in its operation as are the terms of the present contract No. 1, under which the Interborough now operates the present subway. My reasons for objecting to the present proposal are as follows:

(1) The preferential payment to the Company of 9 per cent on old and 9 per cent on new capital is tantamount to insuring the Company throughout the life of the proposed contract, the full amount of the net profits which the Company is now receiving from the present subway.

The Company claims an investment of $48,029,668; 9 per cent on $48,029,668 equals $4,322,670. The Company proposes to invest $76,970,332 of new capital, on which the carrying charges will be 6 per cent. The difference between the carrying charges 6 per cent and 9 per cent is 3 per cent. This 3 per cent represents net profits. Three per cent on $76,970,332 equal $2,309,110. The $4,322,670 being the 9 per [fol. 1648] cent on old capital, and the $2,309,110 being the 3 per cent net profit on new capital, together amount to $6,631,780. This sum equals 13.81 per cent on $48,029,668.

Last year the Company's net profit from the subway was $6,769,572. This equals 14.09 per cent on the Company's alleged investment of $48,029,668. Therefore, the proposed plan of making a preferential payment to the Company of 9 per cent on old and 9 per cent on new capital is tantamount to paying to the Company all of its present net profits, and assuring to it carrying charges and sinking fund on the new capital invested, and this before the City gets one cent either in the way of carrying charges or

profits upon the capital which it invests in the enterprise.

It is stated that the Company is constrained to make this demand for a perferential payment of $11,250,000, namely, 9 per cent on old and 9 per cent on new capital, because of its obligations, and I believe this to be, in a sense, quite true. In fact, in discussing this matter with the representative of the Company, I have been informed that the Company is not in a position to discuss with the City the equitable or inequitable character of the demand, or the adequacy of the compensation proposed for the Company, but must ask this whole amount because of the obligations which it is compelled to carry. These obligations are represented by the 9 per cent dividend which the Company is now paying on its stock.

As we all know, that stock is owned by the Interborough-Metropolitan Company, and the proceeds of this dividend, when put into the treasury of the Interborough-Metropolitan Company, are immediately paid out again by that Company as a 4½ per cent interest payment on the $70,000,000 of collaterial trust bonds which the Interborough-Metropolitan Company has issued and outstanding.

The plea of the Interborough is that unless it continues to pay the 9 per cent on its capital stock, and thus enable the Interborough-Metropolitan Company to continue to pay the interest on its bonds, the latter Company will go into bankruptcy. Perhaps this is true, but it offers no good reason to my mind why the City should be asked to finance, for the period of the next forty-nine years, the Interborough-Metropolitan bond and stock operations.

I am fully in accord with Mr. McAneny when he says that it makes no difference to him what the Company does with the money once the City has paid it over, and that he is concerned only with the adequacy of the amount paid by the City. I am not in accord as to the fairness to the City of the price proposed. Nor do I believe that adequate relief can be had only from the Interborough Company.

(2) The Company's offer in Subdivision A, last sentence, reads:

"This return not exceeding 9 per cent is to be upon all capital furnished by the Interborough during the entire period of the contract and is to be cumulative and the

deficits, if any, shall be adjusted on a yearly basis out of a fund to be provided therefor by the Company as a part of its capital investment."

[fol. 1649] This can mean only one thing, that the Company is to provide a fund through the issue of its bonds out of which it will meet the cumulative deficit occasioned by this preferential payment of $11,250,000 annually, as such deficit may occur. The City will then pay 9 per cent. for interest and sinking fund, plus 3 per cent. profits upon a fund which is created and used for the purpose of making good to the Company—that same interest, sinking fund and 3 per cent. profit upon the bonds issued in part to create this very fund. In other words, the City will be paying interest and profit upon interest and profit to the Interborough Company. This, it seems to me, is an unconscionable compounding of profit on profit.

I understand from the report read that it is proposed by the Committee that the offer of the Interborough Company will be modified so that only interest will be paid and not interest and profit upon the bonds issued to create this fund. That will change the situation only to this extent, that the City would then be paying compound interest on interest and profit.

President McAneny: That is to be accomplished through modification. It is already in the proposition, and is covered in the resolutions submitted to the Board. That is for short term notes and bonds, to cover these contingencies if they occur, the interest only on such notes shall be paid.

President Mitchel: The offer as now offered by the Committee contemplates only compound interest.

President McAneny: Not the proposition of the Committee.

President Mitchel: But it does not read so in the offer.

President McAneny: I have explained that; it does in the resolutions.

President Mitchel: (3) The Company's alleged investment of $48,629,668 includes $11,000,000 for the construction cost of the present Brooklyn division south of City Hall. As everybody recollects, the Company was merely a constructing contractor in building that section, and bid $3,000,000 as the price of construction. The fact that it spent

$11,000,000 in building the tunnel is no justification for a demand that the City now carry that investment for it. This arrangement will be tantamount to making the Brooklyn section cost the City $14,000,000 in place of $3,000,000, the price that it was supposed to cost. The Company is now asking the City to give up the advantages of that contract.

(4) On the Company's statement of its expectations of traffic, the cumulative deficit of the Company which must be discharged before the City gets a cent in the way of carrying charges and interest, will not be wiped out until the year 1924. The City's cumulative deficit for interest and carrying charges on its bonds will not be wiped out until the year 1929. It would not be until that year that the City would begin to get the 3¾ per cent. net profit, and it would not be until the year 1930 that the City and the Company would divide any surplus between them.

All of this is predicated upon the assumption that from 1924 on traffic will increase at the rate of 5½ per cent a [fol. 1650] year, but, in point of fact, in the year 1924, in order to produce the gross income upon which these calculations have been based, the subway must be carrying 707,000,000, and in 1930 it would have to carry 974,600,000. The present subway, according to the figures of the Public Service Commission, is carrying 3,315,360 passengers per mile of single track per year. The present subway has 81 miles of single track. The proposed subway to be operated by the Interborough, old and new, would contain 212.8 miles of single track.

To produce the same congestion of traffic in the amalgamated subway which is now experienced in the present subway, it would have to carry only 705,508,608 passengers. In other words, in the year 1924, long before the City's cumulative deficit had been wiped out, and, in fact, while it still remained at $20,015,000, the new amalgamated subway system would have reached a point of congestion greater than that experienced in the present subway. The Public Service Commission estimates that the present subway will have reached a point of complete saturation beyond which it cannot expand, when it is carrying 25 per

cent. more passengers than it is carrying at the present time. Assuming that the new amalgamated system be expanded by the same 25 per cent., this point of saturation would be reached in carrying 881,885,760 passengers. That is to say, the point of saturation would be reached in the year 1928, or one year before the cumulative deficit of the City had been wiped out. In other words, the new subways will have reached a condition of congestion far worse than the present crowding in the present subway before the City gets a cent of profit on its investment.

The first thing we have to consider is whether we want our new subway to be crowded as is the present subway. If that question be answered in the negative, then we would not wish the traffic of the new subway to increase in volume over the year 1924 before building new subways to relieve it. If that question be answered in the negative, we certainly reach the conclusion that we would not wish the traffic of the new subway to expand to the point of 881,000,000, the number necessary to carry the net return calculated for the year 1928. In other words, to produce the results on which these calculations have been based and under which the cumulative deficit of the City upon its $50,000,000 expended in construction could be wiped out in the year 1929, the new subways would have to carry more passengers than they will be physically capable of carrying, and certainly far more passengers than they could be expected decently to carry.

(5) The Company's offer at page 4, under the title of "Extensions," reads:

"Extensions required by the City and not agreed to by the Company are to be equipped and operated as part of the entire plan upon the general line set forth in the offer of the Interborough Company of December 5, 1910, and May 9, 1911."

So we are not to have a real pooling of the entire system after all! The City is required by this offer to consent to a [fol. 1651] separate accounting basis for such future extensions and a separate method of determining revenue and operating expenses and also to guarantee the Company against loss in the operation of those extensions. The

guaranty is illegal. We have, first, a guaranty against loss in the operation of these extensions and then a preferential payment of $11,250,000 on the rest of the system. In short, a guaranty piled upon a preferential payment.

It is pertinent to point out that all the Company would have to do in order to bring an extension under these terms of its offer would be to refuse to operate that extension.

To sum up, I am opposed to the present offer:

Because it guarantees to the Company 100 per cent. of its present net earnings throughout the term of the contract, which is more than the Company's present lease is reasonably worth today, in view of the competition which the Company would have to face provided that it did not obtain a franchise for any of the new subways;

Because it guarantees to the Company a compound interest—that is to say, interest on a fund created to make good interest and profit under the plan for preferential payment;

Because even that excessive net profit of the Company, assued under this plan, will be reckoned upon an inflated statement of the Company's investment in construction, due to the inclusion of $11,000,000 for the Brooklyn extension and other lesser items;

Because under the plan proposed it would require congestion greater than that in the present subway in order that the City might ever get a profit upon its share of the investment, and even then would not receive such profit until a remote period of time, 1934, if we assume a congestion only slightly greater than that in the present subway, and 1929, if we assume complete saturation, which would represent crowding 25 per cent. greater than exists today;

Because this offer requires a separate accounting basis and separate method of determining revenue and operating expenses, together with a separate guaranty by the City against loss in the case of all future extensions constructed by the City, but not accepted by the Company. The Company will be able to bring all future extensions within the operation of this guaranty by the simple expedient of refusing to operate them;

Because the City has the opportunity to get transit relief without making so improvident a contract, either by awarding an operating contract to the Brooklyn Rapid Transit

Company or by proceeding with the construction of the modified Tri-borough system.

President McAneny: May I say, speaking to the point, that the proposition that is now submitted to the Board was framed essentially in pursuance of an agreement reached by a majority of this Board in executive conference, and, although I am more than willing to allow for changes of opinion, it must be kept in mind that the committee would not have submitted an alternative plan, dealing with these points in the Interborough Company's case, had it not proceeded upon the understanding that it was acting in accord [fol. 1652] with the wishes of the majority of the Board of Estimate; nor, do I believe, would the Interborough Company have submitted a further proposition except upon such an understanding. The company was prepared to present a second proposition wholly rejecting the offer of the City up to the time that these later negotiations commenced. Now, as to its merits——

Comptroller Prendergast: Mr. McAneny has just made a statement and I think he has only done himself and his associates upon the Conference Committee full justice in making it. It is true, and I wish to publicly acknowledge it, that, in the deliberations of the Board of Estimate, in its executive sessions, it was the feeling of a majority of the members of that Board expressed at that time that an arrangement somewhat in accordance with the lines of the proposal submitted yesterday would be satisfactory to that majority; but I do not wish (because I have never run away from an issue yet) to relinquish one iota of my responsibility for having led the committee to believe that a proposition such as this would be approved, and if any embarrassment which my action has caused the committee, if it has been placed in a position that it does not relish, I certainly am very sorry, not only because I do not want them to be placed in that position officially, but because I have a very warm personal regard for the members of the committee and especially for Mr. McAneny.

President McAneny: I did not wish to *imitate* that the committee would not have agreed upon the merits of this plan, because they are agreed. I meant merely to say that they would not have presented such a plan, taking further

time and occupying further discussion here, had it not been with the feeling, the understanding, in fact, that it was to meet the express view of the majority. I appreciate, of course, what Mr. Prendergast says, and let it stand so upon the record.

When we come to the merits of the case, let me say this, that the special committee of the Board, acting in conjunction with the Public Service Commission, has for some four or five months been at work upon this problem. I may say also that this has not been an usurpation of the functions of the Public Service Commission to any degree, but an acceptance of an invitation from the Commission that your committee should meet with it and talk these matters over with the object of avoiding the hitherto endless chain of reports, letters and public discussions, and actually get together upon a solution of this tremendous problem upon which the future development of the city might be based. In a sense, it may be said that the plan presented here is the plan of both bodies, sitting side by side, and just as original to one as to the other. The Public Service Commission appreciated, of course, that without concurrent action, when it came to the approval of contract and the appropriation of money, it would itself be powerless. I regard Chairman Willcox's action in inviting this conference as a very great public service, and the conduct of the Public Service Commission to have been such as to merit the approval of the entire community. I believe, also, that when the joint report was submitted that for the first time a substantial agreement upon which contracts might be made had been arrived at.

[fol. 1653] The report proposes that certain lines to be so constructed that they will incidentally extend the area of the present service of the Brooklyn company, with additions in Manhattan. I won't rehearse these, of course. That other lines be reserved as logical extensions and expansions for the Interborough system. This being concluded, the members of the two bodies having placed these two systems in conjunction, partly in competition, through the short haul through the heart of the city, with existing lines, and through their various branches but with the intention of extending a five-cent fare to perhaps 98 or 99 per cent. of the traveling public; that is to say, the plan

would take the passenger for a five-cent fare to districts that are now absolutely inaccessible, and incidentally open Brooklyn to the heart of Manhattan as no other method possibly could.

Let it be said, also, that we did not present merely a proposition from the Interborough Company, or from the Brooklyn Rapid Transit Company, in our report. We presented a proposition that had been worked up in a conference between the two bodies having official authority and the two applicant companies, to which the companies originally had been strenuously opposed, and in the development of which concession after concession had been made; and we reached the point where we had finally brought both to what we considered bargain terms.

The Brooklyn Rapid Transit Company after certain modifications accepted the terms imposed by the city and it is prepared to proceed when the Public Service Commission can draw the contracts. There remains the signing of these formal contracts, the negotiations of subsidiary terms, but I have regarded and still regard the action of this Board as constituting a moral contract by which the Brooklyn plan should and must be consummated.

The Interborough Company notified us that they could not except our terms and at the same time enlist private capital to the degree we proposed.

In laying out the Brooklyn plan, we virtually created, first, a new city subway along the lines in large part of the old Triborough route. We propose to build that with city money and to link that with existing lines of the Brooklyn system under contracts that would give access to those lines and would compel them to reserve for even distribution with the city all profits of joint operation over those they are earning today.

In the case of the Interborough Company, having provided for the strategic disposition of the moneys of the city between the two systems in the way we believe would do the greatest good, we allowed $55,000,000 to $60,000,000 of city money for construction against a like sum to be provided by the company; $21,000,000 to $25,000,000 for equipment by the Interborough alone in order that this comprehensive plan, reaching everywhere, might be carried out, and in order that the city in aiding itself would not be compelled to starve itself at every other point and be compelled to

deny to every neighborhood advantages which such neighborhoods require and to every locality the benefits that [fol. 1654] should flow to such localities through school buildings, the development of territory generally and all those other expenses that must come within our Corporate Stock Budget. In order to secure this benefit we have agreed to certain modified terms in connection with the Interborough Company. The Interborough Company informed us at the conference the other day, in considering their case that they could not get private capital on the terms originally proposed. Their officers were invited in, not by us, but by common agreement, I forget just where. We went over with them these conditions, and a great deal of data, and were satisfied that in order to allow that margin of safety that they required that some altered plan should be adopted.

In the plan on June 5 we proposed that the Interborough should keep unto itself all earnings of its present lines, whatever they might be, and they earned 17 per cent. last year, and they will be earning 23 in 1915. There will be some drop, of course, when the new lines are opened. But whatever was earned under the present system was to be theirs and a new and involved system of accounting was to be provided to take care of our share in the operation of the new lines. They argued that beyond the border lines they could not figure out to the satisfaction of their bankers a sufficient margin of profit in the first three or four years of operation to bring the bankers in. Then we reached this plan by which nothing is reserved in the income of the old lines but all the income of the old lines and all the income of the new lines is merged in the new; the old leases virtually merged in the new leases.

For the moment, brushing aside the question of relative percentages, and just what that means, it seems to me that a phrase of the report just read sums up the whole situation, that the Interborough Company undertakes to operate a system comprehending more than double the mileage of the present line, for an assured income of $1,000,000 less than it is receiving today for its operation of the present contracted system, and that it cannot get one cent more than that allowance until the city has reached the point where it earns more than $2,000,000 above its carrying charges.

But I submit, gentlemen, that in this issue it is not directly a matter of dollars and cents. I believe, and my committee believes and the Public Service Commission believes, that we have adequately cared for that, that no possible plan could be reached, acceptable to the two parties, that would better this. Beyond all that, however, the importance to the City of New York of a logical and comprehensive plan of transportation upon which not only will all the people be enabled to ride, and to ride with greater comfort and at less cost, but by reason of which the taxable values of the entire city will be developed enormously and by reason of which the city itself will develop along lines proper to the city to develop along—this I consider to be of paramount importance to The City of New York and to overweigh all other considerations and that is what will be the result of the comprehensive scheme we give you.

Why, Mr. Mitchel, every principle you have professed to favor and for which you have striven in this Board is recognized in this plan—every principle. Short term leases—the right of the city to take over anything after ten years [fol. 1655] upon satisfactory, equitable payment; the swapping of leases upon the east and west legs of the present Manhattan lines. The right of the city to transfer to a second operator—the substitution of the passenger basis for car mileage basis, in the operation of extensions, which sounds technical but means a great deal in computing operating expense. Every principle you have contended for is contained in the report of this committee. The only issue left is the question of dollars and cents, whether or not we are allowing the Interborough more than it is entitled to earn as a reward for the operation of this line. Upon that point alone, pitched against all other consideration for the natural development of this city, we are at issue here this morning; and upon that point alone it appear to be clear that the company is to make less than it is making today upon a system twice as great.

Mr. Mitchel has gone deeply into an analysis of what the company would do with the money that it would earn under this plan. I repeat, as I have previously said, that that is not the direct concern of the city. It may spend the money it earns for dividends, and if it does spend it for dividends it is entitled to spend it for dividends. It does

not matter whether this proceeds through the indirection of a holding company or directly from the company to its stockholders. If they are entitled to it, they are entitled to it. And that is the whole question before this Board.

As to the basis of the plans that we propose, it is suggested that the amount of money we reserve out of the first income for the protection of the operator would create a profit of between 13 and 14 per cent. upon money invested. Gentlemen, it is not a fair proposition to apply all of that reservation to the present money of the operator. That reservation represents not only what he is earning today, but it represents his services in getting in new capital, it represents his services in handling this road for years to come, it represents, in short, a return upon actual investment, new and old, in the aggregate and a return for services rendered that in an ordinary business enterprise would be considered modest. And upon such terms the city is able to proceed with the building of the comprehensive system of subways we have proposed.

When it comes to the question of the ability of these lines to carry the citizens of this city in the future I stick confidently to the figures provided by the statisticians of the Public Service Commission. I do not understand Mr. Mitchel's 950,000,000 passengers. I am willing to take the 800,000,000 passengers which the Public Service Commission has estimated will be the carrying power of these roads and the requirement placed upon them.

You cannot say that that capacity will be the exact number reached by merely multiplying the present basis of mileage, because as the development of the roads continues and as the city's population develops there will be developed many new short haul districts, there will be many new short haul districts in The Bronx, in Queens, in Brooklyn, in Manhattan. The new short haul traffic cannot be based on a limited system, but that it will be enormous must be [fol. 1656] conceded. It is conceded that 800,000,000 is a fair allowance for comfortable traffic, as New York understands comfortable traffic, in the years of the future, so that we would not only take care of our own carrying charges, and realize our own investment but, from the added margin, we would cover over into our treasury more than $2,000,000 a year and still leave a profit to be divided between the two parties.

Now, gentlemen, as I have said, the conferees, when they presented that report, proposed a programme they intended should be carried out and that they believed this Board of Estimate desired should be carried out in the way they had presented it, and they were obliged in the course of that procedure to carefully examine into the facts with relation to the questions presented by the Interborough Company. They have presented a report and subscribed to their own belief that this is not only eminently fair to the city as a business proposition but that its rejection at this time would be little short of calamitous. They are perfectly willing to stand on that report.

And I urge the adoption of the resolutions supporting it.

President Mitchel: Mr. McAneny has said that every principle that I have contended for is satisfied by this plan proposed. There is one principle, I think, that he has overlooked which I understand we were all in favor of, and that is that the city should be assured at least of a moderate return upon its own investment. I cannot perceive that this city is assured of even that moderate return by the proposed plan.

I agree with Mr. McAneny that it makes not the slightest difference what the company does with the money, once it gets it, but in considering the reasons for the company's demand for a certain sum of money it is in point to know what are the company's necessities and what prompts the company to make a demand for more than what I consider, at least, to be a just allowance, and I wish to remind Mr. McAneny in this connection of one thing—I wish first to say that Mr. McAneny first stated that this 9 and 9 per cent. on old and new capital is necessary in order to permit the company to enlist new capital.

President McAneny: Not all of it.

President Mitchel (continuing): Now, I wish to remind him that in the course of these conferences I asked the representatives of the company, believing as I do that the City is financially able to carry this on for itself if it so elects, whether, if the City invested all of the construction money necessary to build the subway and thereby reduced the contribution of the Interborough Company from $75,000,000 to $25,000,000, whether that company would then be satisfied to take 9 per cent. on its old capital and 9 per cent. on its new capital. I was informed, no; that in that event

the company would find it necessary to demand more than 9 per cent. upon its old capital in order to bring the total amount up to $11,250,000, because that sum it must have, and must have it simply because it has got to meet the overhead obligations of the Interborough-Metropolitan Company.

Now, when we come to that point where one of the parties to the negotiations insists he must have a certain sum of money, whether adequate and fair or not, then I think we have come to a point where negotiations must end, be- [fol. 1657] cause there is nothing more to negotiate when it is a demand which cannot be waived, and for that reason I think the statement that this so-called compromise was necessary to enlist private capital is not quite accurate, since even if we relieved the company of the necessity of subscribing private capital for construction it still must stand upon its demand for $11,250,000.

President McAneny: One further word, Mr. Mayor. The point I made was not that this advance was necessary in its entirety to enlist private capital, but partly to enlist private capital. The sum that would be reserved to the company would represent the value of its existing leases, or at least about three-quarters of the value of its existing leases, and incidentally would take care of that margin of safety upon new investment that private capital demands, and that the company demands as a reward for services. I repeat, that so long as conditions are as they are, many other considerations enter, than those mentioned by Mr. Mitchel.

President Miller: Mr. Mayor, perhaps I look at this matter from a different point of view. The direct profit which the City get from the subways out of the rentals is its smallest profit. To me it is of very little importance whether the City gets one half of one per cent. more or whether the City gets less or whether the company does likewise. It is, in my mind, the duty of the City to build the best subways, to give the people the best transit. No plan for the whole City, in my judgment, will be adequate unless it includes the present Interborough system. Whether the City has to meet a deficit or whether it has not to meet a deficit, the subways are essential. If the proposition as submitted by the Interborough Railroad is one that should be accepted,

the best course for the City would be to take it. The only question is one of price, so that from my point of view throughout this whole transaction the only question has been whether the City could afford to pay the price. I think that the proposition we advocate in the report is a fair one. I think the City will gain in increased benefits a thousand times more than it ever could hope to gain by any other plan or direct income from the leases. Therefore, I think that we should adopt the report as suggested.

The resolution was then lost by the following vote:

Affirmative—The Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx and Richmond—6.

Negative—The Mayor, the Comptroller, President of the Board of Aldermen and the President of the Borough of Queens—10.

The President of the Borough of Manhattan offered the following:

Whereas, The Special Committee of the Board of Estimate and Apportionment appointed to consider pending transit proposals and the Public Service Commission for the First District made a joint report to this Board bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railway within the City of New York; and

[fol. 1658] Whereas, This Board at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The recommendations of the Special Committee of the Board and the Public Service Commission, which were approved by the Board, provided that if the Interborough Company failed to accept the terms and conditions prescribed for the operation of the new lines of rapid transit railway allotted to it, certain said lines to be added to the system to be operated by the Brooklyn Company upon

the general terms prescribed for the operation of the lines originally allotted to the said Company; and

Whereas, The Brooklyn Company, in a communication to the Conferees dated July 5, 1911, expressed its willingness to operate the additional lines upon the terms proposed, if so requested by the City; and

Whereas, The Interborough Company has failed to accept the terms originally proposed to it, and the Board has rejected the proposition of the Conferees to amend the said terms upon a basis that the Interborough Company has stated would be acceptable to it; therefore, be it

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District as subsequently amended, the Board will approve contracts to be prepared by Public Service Commission under the general provisions of the Rapid Transit Act for the construction, equipment and operation of rapid transit railways along the lines now proposed for operation by the Brooklyn Rapid Transit Company—either through instrumentality of such new railroad company as may be organized for the purpose, or through its present agencies—and for the extension and third tracking of the existing elevated lines of the Brooklyn Rapid Transit Company; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit to this Board at the earliest date practicable the forms of the contracts to be entered into for the equipment, operation and maintenance of the lines of rapid transit railway proposed for operation as aforesaid; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit at the earliest date or dates practicable, for the furthur approval of the Board, the contract or contracts to be entered into for such portions of the said lines as are to be constructed at the expense of the City, and to acquaint the Board so far as practicable in advance of such submission with the incidental plans, specifications and estimates for such construction, in order that the Board may properly allow the appropriation of City funds to be expended in accordance therewith; and be it further

[fol. 1659] Resolved, That the Special Committee of the Board, consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond, be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in the carrying out of these recommendations, and in the determination of such questions of detail as were left undetermined in the joint report of the Conferees, including the resolutions of this date.

The following discussion ensued:

President McAneny: As I have said, the adoption of the Committee's plan involved automatically the adoption of a definite line of procedure. It was laid down that if the Interborough Company failed to accept the offer of the City on the lines laid down in the Committee's report, that the Public Service Commission should then be placed in such a position that the proposition might go to the Brooklyn Rapid Transit or to its successor in operation. We have proposed what in our judgment is a proper plan for bringing in the Interborough Company upon terms fair to the City and to the Comapny alike, and that plan is rejected. I do not believe that this matter should be left in the air for one day longer. The conferees have worked long and hard to bring about the result that is now before you for your determination. I believe that inasmuch as a majority of the Board has rejected the pending plan, that the only course for the conferees is now to proceed to take up the alternative, whether or not it incidentally does injury to the City, to The Bronx, Queens, or the west side of Manhattan.

I move the adoption of that part of the resolution now before the Board that relates to the contracts to be granted to the Brooklyn Rapid Transit Company or, as I have said, its successor in the public bidding. It is the purpose of that Company to organize a new company to take over the lines that are under discussion. In so doing, I also move that we approve the offer of the Brooklyn Rapid Transit Company to operate these lines upon the basis the conferees have proposed. I so move.

Comptroller Prendergast: I second the motion.

President Mitchel: This is what we voted that we would do in case the Interborough Rapid Transit Company did not meet the City's demands. We are now called upon to do it. I believe that we should do it for practically the same reasons that I believe we should not have done the other thing.

The routes which will be operated by this Company, under the contract proposed, will be to all intents and purposes the same trunk lines and extensions as the Triborough route which I for one have always believed in, modified by the Broadway loop.

The outlined system will be practically the same. It means digging subways; it means action; it means the settlement of this difficulty. It differs in every essential from the proposition that we have just rejected. In distinction from the preferential of $11,250,000, a preferential is allowed here of only $3,500,000, and that upon an investment [fol. 1660] in the Company's own plant, built with its own money upon its own initiative, and not upon a plant built with City money and upon the City's initiative. That preferential represents about 8¾ per cent. upon the old capital stock of the old Brooklyn Company and 6 per cent. on the new, as against 9 per cent. on the old capital stock and 9 per cent. on the new capital stock of the Interborough. For these reasons I think that these resolutions offered by the Committee should be adopted.

President Miller: I voted for the plan to give the Brooklyn Rapid Transit the entire contract on the theory that we would do it if we could not get a reasonable ocntract from the Interborough Rapid Transit Company. I think we have a reasonable proposal from the Interborough Rapid Transit Company and, therefore, I am opposed to this proposition.

The Mayor: May I inquire with what corporation this contract is to be made?

President McAneny: The lines now under operation by the Brooklyn Rapid Transit Railway Company are owned by the Brooklyn Union Elevated Railroad Company. Some of them are leased from the Canarsie Company, which would be merged with the other under that corporate con-

trol. The new lines should be advertised at public letting under terms which would permit the City, if the authorities so decide, to link them with the old lines.

There would be three separate contracts at least, possibly four. One for operation of the Broadway, Manhattan, and Fourth Avenue, Brooklyn, system with their extensions; one for the proposed line from Union square to the Eastern District of Brooklyn, each of these two to be wholly separable and recapturable; and one for the operation of the existing Brooklyn elevated lines with the Centre street loop as their connecting link.

The contracts will be so drawn, if this plan is to be carried out——

The Mayor: Contracts with whom?

President McAneny: Contracts with the successful bidder; contracts as advertised. They will be so drawn that they will link these systems.

There are, of course, items of legal procedure, items that belong to the requirements of the Rapid Transit Act, that remain to be worked out.

The conferees who proposed this plan have no doubt of the legal ability of the City to enter into it and no doubt whatever of its economic desirability; nor have they any doubt of the fitness of the present plant of the Brooklyn Rapid Transit Company, nor any doubt of the financial ability of the Brooklyn Company to carry out what it undertakes. I trust this resolution will be adopted and that the City will proceed with actual construction as fast as it can.

The Mayor: The so-called offer of the Brooklyn Rapid Transit Company says that the contract is to be made with some corporation hereafter to be formed. I cannot vote to make a contract with any corporation that does not exist and may never exist, and when it does exist, may be some stock jobbing corporation that we would not have anything [fol. 1661] to do with whatever. This is a very grave matter. In my judgment, we will get into a law suit that may tie up this matter for a year or two or three years, and I suggest that this matter lie over until we can think it over. Until we can think it over for twenty four hours or even for

a few days. I did not know that any such resolution as this was going to be offered.

President McAneny: It was proposed in a report some weeks ago.

The Mayor: I have very often expressed my views to the Board, and while I always am willing to submit my judgment to better judgments, I give it to you as my opinion that such a resolution, if now passed, would lead to nothing but a lawsuit. The form also of the substance that you want to put into that contract would lead to another lawsuit under the Constitution of this State. I do most sincerely hope that we avoid a lawsuit that will tie us up for two or three years. I think we may well take two or three days to consider this matter. I hope we will do so today—at least without taking action one way or another at this time.

President McAneny: May I say one word in regard to your suggestion? In the first place, as to your query as to how we can make a contract with a company not named. We are not proposing to make a contract but to co-operate with the Public Service Commission in enabling that Commission to prepare the forms of contracts for public advertisement, along such lines as we permit. A company, to do this work, must bid for it successfully, and it must be assumed that that company, whether now in existence or hereafter organized, will be organized under circumstances that will vouch for its reliability. If it is not a proper company, it will not make a contract with The City of New York.

Also, that if there be danger of a lawsuit based on any terms now proposed, that the lawsuit could not possibly restrain the City from building its own lines so to be built by City money.

President Mitchel: By separate contracts for construction.

President McAneny: There are to be three separate operating contracts. The lines that are to be built by the City may proceed at any moment and might have been commenced a year ago if we had seen our way clear at that time. By the time that those lines are completed and ready for operation in conjunction with the Brooklyn system, any

questions of law, in my judgment, may readily be threshed out in the courts, upon agreed cases, and I have no doubt that the courts will gladly co-operate with the City in hurrying those cases, as they will readily recognize that they are matters of great public emergency.

I wish we could meet your Honor's suggestion for further delay, even if for a few days, but it seems to me this is the moment to act. In view of the long delay that has already been occasioned, by reason of the numerous conferences necessary to bring about this plan, I feel that, even if I violate courtesy to you, that it is my duty to move the adoption of this resolution.

[fol. 1662] President Miller: I voted for the Brooklyn Rapid Transit proposition to come up to 59th street because I thought it proper. I still stand by that. The main reason I advocated the Interborough plan was because I thought it had the best present physical layout and it cannot be exceeded in efficiency by any other plan. It should be taken not for the benefit of the Company but for the benefit of the City.

The Mayor: We will regret it very much, and I predict now that it is a very easy prediction to make, that it will come absolutely to naught. I wanted to say that my understanding is—of course, I have not given as much attention to this, for many reasons, as the Committee has given it—but my understanding is that no investor will invest one dollar in any bonds issued by this company or any company until the question of this guaranty is passed upon by the highest court in this State, and at the same time, I am advised further, that bankers would hesitate to buy City bonds issued for that purpose until the question has been passed upon by the highest courts in this State.

I therefore say, let us get our bearings, now that the matter has assumed a new aspect, before we do anything else. That has been my attitude from the beginning, and though I well know that my judgment may be inferior to that of other members of the Board who know more about it than I do, I still adhere to my opinion that the matter should not be passed upon at the present moment.

President McAneny: I feel bound, Mr. Mayor, to press my motion for the adoption of this resolution.

The Mayor: Of course, I have delicacy about voting on that question at all. It seems to me overlooked that these routes which are made up for the Brooklyn Rapid Transit Railway Company can never be established until approved by the Mayor, acting independently. The City has seen fit to place that safeguard over such matters as that. It is a power which I do not seek to exercise, and I would be very glad if I did not have it to exercise. Nevertheless, if that be put up to me I will exercise it as Mayor according to my best judgment for the whole City. I therefore ask that this thing stand until we confer together and with wise men of the City and with our neighbors; until we see just what we are about to do. That is all now that I wish to say on the subject.

Comptroller Prendergast: I think the members of the Board are prepared to assume their responsibility for whatever action they may take this mo-ning. I wish to say that I am. I assume, Mr. Mayor, that when the time or your responsibility to be exercised comes that you will be prepared to exercise it. It is simply a question of each man standing up to his own responsibility when the time comes and assuming it. I hope the resolution will now be put to the Board so that we will have a chance to vote on it.

Mr. Charles L. Craig, representing the West End Association, addressed the Board in opposition to the proposed resolution. The resolution was then lost by the following vote:

Affirmative—The Comptroller, President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn and Richmond—11.

[fol. 1663] Negative—The Mayor and the Presidents of the Boroughs of The Bronx and Queens—5.

NOTE.—Under section 226 of the Greater New York Charter no resolution or amendment of any resolution shall be passed at the same meeting at which it is originally presented unless twelve votes shall be cast for its adoption.)

The President of the Borough of Manhattan moved that when the Board adjourns it adjourn to meet Friday, July 21, 1911, at 10.30 o'clock a. m., and the resolution which

had just failed of adoption be ordered on the calendar for said date.

Which motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

U. At a meeting of the Board of Estimate and Apportionment held on July 21, 1911, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: Hon. John Purroy Mitchel, Acting Mayor; William A. Prendergast, Comptroller; Francis P. Bent, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Lawrence Gresser, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Acting Mayor, Hon. John Purroy Mitchel, presided.

Rapid Transit Railways—Extensions to the existing system, also third tracking and constructing additions to the Second, Third, and Ninth Avenue Elevated Railroads, and the completion and putting in operation of the Steinway Tunnel

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of July 20, 1911, by motion duly adopted, this day was fixed for consideration of a resolution offered by the President of the Borough of Manhattan relative to additional rapid transit railways which failed of adoption on that date, not having received twelve votes on its original presentation, as required by section 226 of the Greater New York Charter.

The President of the Borough of Manhattan again offered the resolution, which is as follows:

Whereas, The Special Committee of the Board of Estimate and Apportionment, appointed to consider pending [fol. 1664] transit proposals, and the Public Service Commission for the First District, made a joint report to this Board, bearing date of June 5, 1911, and transmitted under date of June 13, 1911, with relation to the construction, equipment and operation of additional lines of rapid transit railways within The City of New York; and

Whereas, This Board, at a meeting held on June 21, 1911, concurred unanimously in the findings and recommendations of said joint report, with certain modifications set forth in the resolutions adopted upon such date applying to the respective proposals of the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company; and

Whereas, The recommendations of the Special Committee of the Board and the Public Service Commission, which were approved by the Board, provided that if the Interborough Company failed to accept the terms and conditions prescribed for the operation of the new lines of rapid transit railway allotted to it, certain said lines be added to the system to be operated by the Brooklyn Company upon the general terms prescribed for the operation of the lines originally allotted to the said Company; and

Whereas, The Brooklyn Company, in a communication to the conferees dated July, 1911, expressed its willingness to operate the additional lines upon the terms proposed, if so requested by the City; and

Whereas, The Interborough Company has failed to accept the terms originally proposed to it, and the Board has rejected the proposition of the conferees to amend the said terms upon a basis that the Interborough Company has stated would be accepted to it; therefore be it

Resolved, That, in pursuance of the joint recommendations of the Special Committee of the Board of Estimate and Apportionment and the Public Service Commission for the First District, as subsequently amended, the Board will approve contracts to be prepared by the Public Service Commission under the general provisions of the Rapid Transit Act for the construction, equipment and operation of rapid transit railways along the lines now proposed for operation by the Brooklyn Rapid Transit Company,

either through the instrumentality of such new railroad company as may be organized for the purpose, or through its present agencies, and for the extension and third tracking of the existing elevated lines of the Brooklyn Rapid Transit Company; and be it further

Resolved, That the Public Service Commission be and it hereby is respectfully requested to submit to this Board at the earliest date practicable the forms of the contracts to be entered into for the equipment, operation and maintenance of the lines of rapid transit railway proposed for operation as aforesaid; and be it further

Resolved, That the Public Service Commision be and it hereby is respectfully requested to submit at the earliest date or dates practicable, for the further approval of the Board, the contract or contracts to be entered into for such portions of the said lines as are to be constructed at the expense of the City, and to acquaint the Board, so far as [fol. 1665] practicable, in advance of such submission with the incidental plans, specifications and estimates for such construction, in order that the Board may properly allow the appropriation of City funds to be expended in accordance therewith; and be it further

Resolved, That the Special Committee of the Board consisting of the President of the Borough of Manhattan, the President of the Borough of The Bronx and the President of the Borough of Richmond be hereby continued for the purpose of conferring and co-operating with the Public Service Commission in the carrying out of these recommendations, and in the determination of such questions of detail as were left undetermined in the joint report of the conferees, including the resolutions of this date.

Which was adopted by the following vote:

Affirmative: The Acting Mayor, the Comptroller, the Acting President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn and Richmond—14.

Negative: The Presidents of the Boroughs of The Bronx and Queens—2.

V. At a meeting of the Board of Estimate and Apportionment held on February 15, 1912, the following proceedings were had and taken:

Rapid Transit Railways

At the meeting of June 13, 1911, a report was received from the Conference Committee consisting of the Presidents of the Boroughs of Manhattan, The Bronx and Richmond, and the Public Service Commission for the First District, relative to the construction, maintenance and operation of additions and extensions to the existing rapid transit railway and the construction and operation of additional rapid transit railways.

By resolution adopted June 21, 1911, the Committee of this Board in conjunction with the Public Service Commission, was requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn to Fort Hamilton, Coney Island and Staten Island, and a general plan for the operation of the same.

The President of the Borough of Manhattan, as Chairman of the Committee, presented the following:

February 13, 1912.

To the Honorable Board of Estimate and Apportionment:

SIRS: In the report submitted to your Board by the members of the Public Service Commission for the First District, and by your Special Committee on transit proposals, dated June 5, 1911, it was suggested that the determination of projected lines in South Brooklyn be deferred in order [fol. 1666] to enable the conferees to consider with more care the various alternatives presented for the disposition of these lines. In accepting generally the recommendations of the report, your Board accordingly adopted the following resolutions:

"Resolved, That the Committee of the Board, in conjunction with the Public Service Commission, be requested to submit at the earliest date practicable, a supplementary report upon the elevation, depression or extension of lines in South Brooklyn, the routing and general layout of the lines radiating from the present terminus of the 4th avenue subway in South Brooklyn, to Fort Hamilton, Coney Island

and Staten Island, and a general plan for the operation of same."

The conferees have carefully considered the plans of the original Tri-Borough System which involve the extension of the 4th avenue subway from its present terminus to Fort Hamilton, with another extension branching out at about 39th street, and extending as a subway under 39th street, New Utrecht avenue and West End Avenue, and as an elevated along Stilwell and other avenues to Coney Island. It has been suggested, as an alternative to this plan, that elevated lines be generally substituted for the lines included in the Tri-Borough System for South Brooklyn. After a more complete study of the situation than was possible in connection with the other matters embraced in the report of June 5, the conferees have come to the conclusion that the lines in South Brooklyn that should be adopted as a basis for inviting proposals should be:

(1) An extension of the present 4th avenue line from 43d street as a four-track subway to a point to be later determined, where connection can be made with an extension to Staten Island and thence as a two-track subway (so located in the street that at a later time and when necessary two additional tracks may be added) to 86th street.

(2) An extension of the 4th avenue subway through 39th street as a three-track subway to New Utrecht avenue, and thence as a three-track elevated line to Coney Island.

The modified layout as now recommended would not involve any reduction in capacity from that which would be provided by the Tri-Borough layout.

It is estimated that the construction of the line toward Fort Hamilton as a subway would increase the cost of the proposed line by about $4,000,000 over what it would cost if the present 3d avenue elevated line were extended to Fort Hamilton. In the report of June 5, 1911, the conferees recommended that at least $5,000,000 be reserved above the $12,000,000 estimated for the South Brooklyn lines. It will be noted that the increase by reason of building the 4th avenue extension as a subway is well within the figure named.

The Brooklyn Rapid Transit Company has already proposed to operate the above lines, and in addition, if the plan of elevated structures for the Beach lines be adopted:

[fol. 1667] (1) A three-track elevated line on the Sea Beach right of way from 62d street to Coney Island; and

(2) A three-track elevated line on the old Culver route from 10th avenue to Coney Island,

in connection with its existing system and a proposed new system to consist of the Broadway-Lexington route, the 4th avenue route, the Brooklyn loop lines, Broadway and 59th street lines, and the lines to Astoria and Corona in Queens.

In this way South Brooklyn would obtain all rail connection with other parts of Brooklyn and Manhattan through lines of large capacity. The Company has, moreover, proposed to contribute $12,000,000 toward the new city lines in South Brooklyn which should cover all of the cost except the additional amount necessary by reason of continuing the 4th avenue line as a subway toward Fort Hamilton. In connection with this branch, the Company has also proposed to exchange free transfers to the surface lines to Fort Hamilton, so that transfers to and from such surface lines could be made at 86th street without additional cost. If the Brooklyn company be the successful bidder, it also proposed that if the elevated lines are constructed along the routes on which it is now operating rapid transit trains upon the surface, the Company would substitute car for train service upon the surface of the street and confine the train service to the elevated roads. Aside from the benefit to the district by reason of the connections with the existing system and the proposed new city system above referred to, the construction, as suggested, would mean very substantial relief to the South Brooklyn section since the existing facilities would be continued with the elimination of rapid transit operation upon the surface of the streets while there would be added improved rapid transit elevated railroad service.

If the operation of the proposed new lines fall to the Brooklyn Rapid Transit Company, it is part of that Company's plan that the elevated extensions, with the exception of that on the Sea Beach right of way, shall be treated as extensions of the 4th avenue system, title to each to be

vested in the City and each to be recapturable, as the main system would be, at any time after ten years upon payment of the Company's investment, such payment to decrease from year to year and finally disappear.

The conferees are of the opinion that the City should determine at the earliest time practicable whether the trunk line railways now discharging freight along the Staten Island water-front would be prepared to join with the City in the construction of a tunnel to Brooklyn that could be used jointly by the private roads for the carriage of freight and by the City for the desired transit connection with the 4th avenue route. The cost of such a tunnel might be divided between the Companies and the City, if such a plan prove feasible, the City's share in that event not to exceed six million dollars. It has also been pointed out that the bed of such a tunnel might be used for the carriage to Staten Island of the water mains of the Catskill system, which it is now proposed to lay across the Narrows, and that the saving that would be thus effected in the cost of the aque- [fol. 1668] duct system would, according to estimates of the Engineers, be $1,000,000, thus adding additional argument for an early undertaking of the work.

The President of the Borough of The Bronx, while concurring generally in the recommendations of this report, is of the opinion that the 4th avenue subway should not be extended beyond the proposed point of conjunction with the Staten Island line, for the reason that, in his judgment, the additional outlay of money for a subway, rather than an elevated structure, would not be justified by the traffic returns from the area to be served. If the subway is not extended beyond 65th street, one of the suggested points of conjunction with the Staten Island line, the saving effected would amount to $1,200,000.

Commissioner Maltbie of the Public Service Commission concurs in the recommendations as to the several beach lines, but does not believe that the 4th avenue line should be extended at present beyond its present terminus. He has urged, as a substitute, that the 3d avenue elevated line, which now runs to 65th street, be third-tracked and extended as a subway to Fort Hamilton; the 4th avenue line below 39th street to be built when needed for a Staten Island line or when traffic demands the operation of two

lines one block apart. The reduction in expense through the adoption of the line proposed by Mr. Maltbie is estimated at $2,400,000.

The majority of the conferees are of the opinion, however, that it would be better policy to extend the subway at once along the lines originally proposed, at least as far as 86th street, and that, although some additional cost is involved, the neighborhood to be served is entitled to this concession.

All of which is respectfully submitted.

George McAneny, Chairman; Cyrus C. Miller, George Cromwell, Committee of the Board of Estimate and Apportionment. William R. Willcox, Chairman; William McCarroll, Milo R. Maltbie, John E. Eustis, Public Service Commission for the First District.

Consideration of the report was deferred until the next meeting of the Board, February 21, 1912.

W. At a meeting of the Board of Estimate and Apportionment held on February 29, 1912, the following proceedings were had and taken:

Rapid Transit Railways

The President of the Borough of Manhattan, as Chairman of the Committee on Pending Transit Proposals, informed the Board that a general proposal for the operation of subway and elevated railways had been received by the Public Service Commission from the Interborough Rapid Transit Company under date of February 27, 1912, and would in due course be transmitted by the said Commission for the consideration of this Board. He asked that the Board authorize the Committee on Transit Proposals, in [fol. 1669] the event of the receipt of the proposal in question between meeting dates, to prepare its report and recommendations with relation thereto without waiting for a formal reference from the Board itself, and moved that such authority be granted.

The motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, the Presidents of the

Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

X. At a meeting of the Board of Estimate and Apportionment held on March 14, 1912, the following proceedings were had and taken:

Rapid Transit Railways

In the Matter of the Offer of the Interborough Rapid Transit Company to Construct and Operate Certain Additions to the Existing Rapid Transit Railway and Additional Rapid Transit Railways.

The President of the Borough of Manhattan as Chairman of the Committee on Transit Proposals of this Board presented the following:

To the Board of Estimate and Apportionment of the City of New York:

In the development of comprehensive additions to rapid transit, this Commission deemed it advisable to transmit to you, under date of December 20, 1910, copies of the propositions of the Interborough Rapid Transit Company, dated December 5, 1910, and June 10, 1910, for extending the City's subway system and for third-tracking and extending the elevated system operated by that company.

In its communication the Commission stated that, provided certain features not then satisfactory could be properly adjusted, it was prepared to accept such propositions and asked your Honorable Board to consider their general provision.

On January 19, 1911, and January 31, 1911, you authorized the appointment of a committee and empowered it to confer with the Commission and with representatives of the companies interested, and to report.

During the conferences that followed, proposals were submitted by the Brooklyn Rapid Transit Company for the equipment and operation of rapid transit railroads and a further proposition was made by the Interborough Rapid Transit Company, extending and amplifying the proposition of December 5, 1910. After a thorough and prolonged

consideration of these propositions, and of the City's needs in connection with the general rapid transit situation, a report, dated June 5, 1911, was made to your Honorable Board.

The conclusion of the conferees, as expressed in such report, was that a dual system, to be operated in part by the Interborough Rapid Transit Company and in part by the Brooklyn Rapid Transit Company, upon the terms specified in the report, would best serve the present and [fol. 1670] future needs of the City. A recommendation was made, however, of an alternative in case either or both companies declined to accept the terms and conditions set forth in the report, that is, if the Interborough Rapid Transit Company accepted and the Brooklyn Rapid Transit Company refused to accept, provision was made whereby a complete system might be operated by the Interborough Rapid Transit Company, while, if the Brooklyn Rapid Transit Company accepted and the Interborough Rapid Transit Company refused to accept, provision was made whereby a complete system might be operated by the Brooklyn Rapid Transit Company. In the event of both companies declining, the Commission was to proceed with the construction of the Tri-Borough system, as planned by it.

Your Honorable Board, on June 21, 1911, unanimously approved of such report, with certain minor changes mentioned in the resolutions of that date, and, following such approval, the plan was submitted to the operating companies. The Brooklyn Rapid Transit Company, under date of June 27, 1911, accepted the report with certain modifications expressed in such letter, and on June 30, 1911, your Honorable Board adopted further resolutions, modifying the resolution of June 21, 1911, in the particulars therein mentioned. Under date of July 5, 1911, the Brooklyn Rapid Transit Company accepted the terms outlined in such report and such resolutions, but the Interborough Rapid Transit Company declined to accept, withdrawing its offer of December 5, 1910, as extended and amplified by its offer of March 2, 1911.

Following the refusal of the Interborough Rapid Transit Company, conferences were resumed with that company which led to the submission of the offer of July 19, 1911. In this proposition the Interborough R. T. Co. offered to

accept the lines proposed for operation by it in the report of June 5, 1911, but insisted upon different financial terms.

Under date of July 20, 1911, the committee of your Honorable Board and a majority of the Commission presented a report commending this offer of the Interborough Rapid Transit Company as a part of the dual plan for rapid transit, but your Honorable Board refused to accept such recommendation and adopted resolutions disapproving the report.

On July 21, 1911, your Honorable Board adopted further resolutions in which were embodied your conclusions that contracts should be so drawn as to make possible a formal proposal by the Brooklyn Rapid Transit Company, or a company formed in its interest, for the equipment and operation of the entire system of new subways to be constructed by the City, and further, that contracts for construction should be proceeded with under any circumstances.

In accordance with this program, the Commission has proceeded in the awarding of contracts for construction, in the laying out of additional routes and in the preparation of a form of contract for equipment and operation.

The Commission immediately awarded contracts for certain sections on the Broadway-Lexington Avenue route and readvertised and awarded contracts for other sections. As [fol. 1671] soon as these contracts were consented to by your Honorable Board, they were executed and delivered to the contractors. In this connection, it is to be noted that all sections for which contracts have been executed are capable of inclusion either in the larger Brooklyn Rapid Transit plan or in an independent system. The aggregate of contracts executed since July 21, 1911, is now $30,719,-164.54, and active work is progressing under them. Such contracts are shown in the following table:

Section	Name of contractor	Awarded by Commission	Consented to by Board of Est. and Appt.	Amount of contract
6	Bradley Contracting Co	July 5, 1911	July 21, 1911	$3,634,213 50
8	Bradley Contracting Co	July 5, 1911	July 21, 1911	3,369,484 20
10	Bradley Contracting Co	July 5, 1911	July 21, 1911	3,253,072 80
11	Bradley Contracting Co	July 5, 1911	July 21, 1911	3,132,195 05
13	Bradley Contracting Co	Oct. 31, 1911	Nov. 16, 1911	4,071,416 50
12	Oscar Daniels Co	Aug. 1, 1911	Aug. 3, 1911	2,825,740 74
15	Hagerty-Drummond Co	Oct. 10, 1911	Oct. 26, 1911	3,820,129 75
9	Patrick McGovern	Dec. 8, 1911	Feb. 1, 1912	1,961,997 00
3	Underpinning & Foundation Co	Jan. 12, 1912	Jan. 18, 1912	2,295,086 50
2	Degnon Contracting Co	Jan. 24, 1912	Feb. 1, 1912	2,355,828 50
	Total			$30,719,164 54

In addition to the above, the Commission has awarded the following contract which has not yet been acted upon by your Honorable Board:

5.	Metropolitan Contracting Co. July 26, 1911		2,419,127 20

Active construction work is under way on these contracts on the Broadway-Lexington Avenue route, as well as on the Fourth Avenue and Centre Street contracts, which, together, aggregate $60,000,000. In other words, while time is being taken for careful consideration of the contracts for operation, construction is proceeding as rapidly as the work itself will allow, in harmony with the action of your Honorable Board in July last.

In the matter of routes, several lines, included for operation by the Brooklyn Rapid Transit Company under the resolution of July 21, 1911, had not been legalized. The Commission prepared the necessary plans for these routes and the appropriate resolutions were adopted by the Commission and approved by the Board of Estimate and Apportionment on the dates mentioned below. The Mayor has not, however, as yet, given his separate consent, as provided for by the Rapid Transit Act. In consequence, it has not been possible to apply to the property owners for their consents, or in the event of their refusal, to the Appellate Division of the Supreme Court in lieu thereof. This consent of the Mayor and of the property owners is a necessary prerequisite to the preparation by the Commission of the contracts and plans under which construction might be begun. The routes are:

Route	Date of adoption by Public Service Commission	Consented to by Board of Estimate and Apportionment
Eastern Parkway, modified, including Flatbush Ave. with Brighton Beach connection, the Nostrand Ave. connection, the Utica Ave. connection, and the Livonia Avenue connection	Mar. 3, 1911	May 25, 1911
Nostrand Avenue	Mar. 3, 1911	May 25, 1911
Livonia Avenue	Mar. 3, 1911	May 25, 1911
Battery-East River-Atlantic Avenue	June 30, 1911	July 27, 1911
59th St., Woodside and Astoria	Oct. 10, 1911	Oct. 26, 1911
Roosevelt Avenue	Oct. 10, 1911	Oct. 26, 1911

[fol. 1672] With reference to the proposed contract for equipment and operation, it should be thoroughly understood that, as was stated by the Appellate Division of the Supreme Court in the Admiral Realty Company suit, the negotiation and conferences of the past year have been informal and non-statutory. Legal agreements can be entered into only by following the procedure laid down in the Rapid Transit Act.

A form of contract for equipment and operation of a general city system must contain provisions dealing with every phase of equipment and operation in such a way as will assure fair relations between the City, the public and the operating company at any and all times during the period of the contract. Such a contract, because of its magnitude and importance, must of necessity require careful and deliberate preparation. The Counsel to the Commission has been engaged upon this matter and has prepared a draft which, in its final form, will be submitted to a public hearing, as required by law.

This, briefly stated, represents the progress so far made under the program of July 21, 1911. The resolutions of that date constitute the last official expression of opinion on the part of your Honorable Board. So far as the record is concerned, these resolutions indicate that you would consent to contracts whereby the entire new city system would be operated by the Brooklyn Rapid Transit Company, or a company formed to carry out its proposal, although it is to be noted that the contract for section 5 of the Lexington Avenue Route, sent to your Honorable Board on July 26, 1911, has not as yet been acted upon.

The Commission is now in receipt of a communication, under date of February 27, 1912, from the Interborough Rapid Transit Company, submitting another proposition as to the lines suggested for operation by that company in the Joint Report, with modified terms. From this, it is apparent that that company is again desirous of participating in rapid transit development. A copy of the communication from the company is transmitted herewith. The essential points of this new proposition are:

1. The Interborough Rapid Transit Company to equip the lines proposed for operation by it in the report of June 5, 1911, to contribute $56,000,000 toward the construction thereof, and, when constructed and equipped, to maintain and operate them for a term of forty-nine years, in conjunction with the existing subway system, for a single five-cent fare.

2. The leases of the existing subways (Contracts Nos. 1 and 2) to be leveled, so that the subways constructed under

these contracts and the new subways shall fall into the City's possession at one and the same time, provision to be made for exchanging part of the new subway lines for part of the old, so that in the event of recapture the City may take over an east side or west side line.

3. The new lines to be subject to recapture at the end of ten years, in accordance with the provisions of the Rapid Transit Act. This recapture may be exercised directly by the City or through a new contractor.

4. The Belmont Tunnel to be turned in as part of the general system, at a valuation of $3,000,000.

[fol. 1673] 5. The receipts from the existing and new subway lines to be pooled, and from the gross receipts of both lines there is to be deducted and paid, in the order named:

(a) Operating expenses, including damages for accidents, provisions for depreciation, renewals and obsolescence, taxes, insurance and rentals payable to the City under existing subway contracts and amortization and brokerage charges.

(b) A sum to be retained by the company amounting to $6,335,000 per annum, stated by the company as the average annual income received by it from the operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911.

(c) A sum equal to six per cent per annum upon the new investment of the Interborough Company in the new lines, estimated at $77,000,000, or $56,000,000 for new construction, and $21,000,000 for new equipment. This, with the present investment of the company in existing subways, estimated at $48,000,000, would bring its total investment in the new and old lines to $125,000,000.

(d) To be paid to the City, interest and sinking fund upon the bonds issued by the City for the construction of new lines and such further sum as would bring the payments to be made to the City up to an amount equal to 8.76 per cent upon its capital investment in the original construction of the new subways.

(e) Any amount remaining to be divided equally between the City and the company, share and share alike.

6. Future subway extensions required by the City may be added to the new system and will be equipped by the company as part of the entire system upon a separate accounting system, based upon the per passenger method of apportionment.

7. The Interborough Company to extend approximately $30,000,000 in the third-tracking and extension of the Manhattan Elevated Railroad system and to pay therefor to the City a percentage of the increased receipts of that system.

The details of the terms for operation, as expressed in this later communication from the Interborough Rapid Transit Company, are, in general, similar to the terms as set forth by the conferees in the report of July 29, 1911. There are, however, certain modifications in the terms now suggested by the Interborough that are to the advantage of the City. Proceedings are now pending in the courts, in which questions are rasied as to certain important features of the proposition, particularly as to preferential payments to the operating companies. It may be added that this provision for preferential payments is a part of the present proposition of the Interborough Rapid Transit Company, as well as of previous ones, and it is also a part of the proposition of the Brooklyn Rapid Transit Company. Until a final decision has been obtained from the Courts, the Commission does not deem it advisable to discuss such terms at length. The Commission must give consideration to propositions from companies after they have been presented, as provided by law. Consequently, the Commission cannot be, and is not, foreclosed from accepting a better proposition if it is presented in a legal way. The Commission believes, however, that the present Interbor- [fol. 1674] ough proposition is so advantageous to the City and to the traveling public that every proper means should be used to secure it as a part of the dual system.

By the dual system is meant, in general, the proposed adjustment of routes as requested in the conferees joint report, whereby, under proper forms of contract, as required by the Rapid Transit Act, additional lines would be added to the Interborough and Brooklyn Rapid Transit systems, as follows:

Interborough Rapid Transit Company	Brooklyn Rapid Transit Company
Lexington Avenue.	Extensions of present Brooklyn Rapid Transit lines, including South Brooklyn lines, reconstructed.
Southern Boulevard and Westchester Avenue.	Broadway-Seventh Avenue.
River and Jerome Avenue to Woodlawn Cemetery.	Battery to 59th Street.
White Plains Road and Gun Hill Road.	59th Street to Queens Plaza.
42nd Street, Times Square and Steinway tunnel.	Battery tunnel.
Steinway tunnel.	Spring Street.
Steinway tunnel extension to Queens Plaza.	Nassau Street.
Astoria line.	Union Square to Eastern District.
Woodside and Corona.	Fourth Avenue Subway.
7th Avenue, Times Square to Battery.	Centre Street loop.
Whitehall tunnel to Borough Hall, Brooklyn.	Flatbush Avenue connection.
Flatbush Avenue and Eastern Parkway to Buffalo Avenue.	
Nostrand Avenue—Flatbush Avenue.	
Livonia Avenue to New Lots Road.	

Under this proposal of the Interborough Rapid Transit Company the City would gain (1) the Seventh avenue line to Brooklyn; (2), the Steinway Tunney, with its extensions to Times square and to the Queensboro Bridge Plaza; (3) the extensions and additions to the elevated lines of the Interborough Company; (4), the White Plains Road extension, and (5), increased utilization of the present City-owned subway, upon which the City has already expended about $60,000,000. Under the dual system, with a total construction cost of $216,000,000, the City would spend for construction on lines other than the Fourth avenue and Centre street subways about $125,000,000. Under the larger Brooklyn Rapid Transit plan the City would spend, on lines other than the Fourth avenue and Centre street subways, about $145,000,000. Under the dual system, the Brooklyn Rapid Transit Company would spend $30,000,000 in reconstructing, elevating and third tracking its own lines, and the Interborough Company would spend some $30,000,000 on its elevated lines. Under the Brooklyn Rapid Transit plan, that company would spend to the same amount, namely, $30,000,000.

In their Joint Report, the conferees said, page 44:

"We are advised, also, that, in addition to the $60,000,000 reserved especially for subway purposes, the City can readily spare $80,000,000 from this sum (i. e., total City credit) for use during the next five years, or $140,000,000 in all."

[fol. 1675] It will thus be seen that the expenditure necessary for the dual system, $125,000,000, is well within the amount then deemed available for rapid transit.

The Commission has in preparation the necessary plans and resolutions for the legalization of routes incident to the dual system. They will be submitted to your Honorable Board and to the Mayor at the earliest moment. This preliminary step is important, for, in the opinion of the Commission, the form of contract for equipment and operation to be legally submitted to prospective operators, as required by the Rapid Transit Act, should include all routes and connections that would go to make up either the Brooklyn Rapid Transit system or the Interborough Rapid Transit system, under the dual plan, or the larger Brooklyn Rapid Transit system, or an independent system.

If the various routes, heretofore approved by the Commission and those upon which the Commission will shortly transmit resolutions, are promptly legalized, the Commission will proceed with the preparation of contracts for operation and with construction contracts which will be from time to time transmitted to your Honorable Board for consent and appropriation of the required moneys to carry them into effect.

Respectfully yours, William R. Willcox, Chairman.

Interborough Rapid Transit Company, 165 Broadway, New York

Theodore P. Shonts, President and Chairman of Executive Committee

February 27, 1912.

Hon. Wm. R. Willcox, Chairman Public Service Commission for First District, 154 Nassau Street, New York City:

Dear Sir: In connection with the proposal of this Company regarding the subway and elevated lines and improvements described therein, I beg to state that the statement marked "Schedule A," hereto attached, shows how the average annual income referred to in paragraph (b), section 12, of the proposal, under the heading "Pooling of Receipts and Payments Therefrom," is ascertained.

Further, while it is not necessary to embody it in our proposal, I beg to advise you that we have informed our bankers that the city and the company reserve the right to submit, either severally or jointly, to the proper court the determination of any and all questions regarding the legal validity and sufficiency of the formal contract to be made. Therefore, the city and the company should within at least sixty days after due execution and delivery of the said formal contract, begin such proceedings as either or both may deem desirable or necessary for the foregoing purposes.

Very respectfully, T. P. Shonts, President.

Incl.

(fol. 1676) SCHEDULE "A"

Showing Average Annual Income of the Interborough Rapid Transit Company from Operation of Existing Subway Lines and Equipment for the Two Years Ending June 30th, 1910 and 1911

Year ending June 30th:	1910	1911
Gross Operating Revenue	$13,932,505	$14,353,203
Operating Expenses	4,756,449	5,929,665
Net Operating Revenue	$9,176,056	$8,423,553
Taxes	225,280	268,438
Income from Operation	$8,950,776	$8,155,115
Interest and Sinking Fund on City Bonds	2,181,204	2,254,692
Resulting Net Income	$6,769,572	$5,900,423
The Average Sum—as set forth in Paragraph (b) of Section 12 of the Company's proposal of February, 1912, under the heading "Pooling of Receipts and Payments Therefrom"—to be paid to the Company during each of the 49 years of the proposed lease, is		6,335,000

Interborough Rapid Transit Company, by T. P. Shonts, President.

Interborough Rapid Transit Company, 165 Broadway, New York

Theodore P. Shonts, President and Chairman of Executive Committee

February 27, 1912.

Hon. Wm. R. Willcox, Chairman Public Service Commission for First District, 154 Nassau Street, New York City:

DEAR SIR: In order that there should be before the public authorities a complete statement of the subway and ele-

vated extensions and improvements concerning which the Interborough Rapid Transit Company is prepared to enter into a contract with the city, the following offer is submitted on the company's behalf:

The Company will accept the lines assigned to it by the city in the Joint Transit Conferees' report in the Summer of 1911, and will under the terms hereinafter stated, construct, contribute to the construction of, equip and operate such new subway lines, and construct, equip and operate the third tracking, improvements and extensions of the elevated railroads as follows:

I. Subway Lines

(a) A four-track subway line proceeding from Park Avenue at a point between 32nd Street and 42nd Street to a point on Lexington Avenue between 43rd and 44th Streets; thence under Lexington Avenue and the Harlem River to about 135th Street; thence via Park Avenue, private property and Mott Avenue with four tracks to a point of connection with the West Farms Division of the existing subway at 149th Street; thence three tracks, part subway and part elevated, to 162d Street; thence as an elevated three-track line to the intersection of Jerome Avenue [fol. 1677] with Woodlawn Road, adjoining Woodlawn Cemetery. The company, from an operating standpoint, would prefer that this line begin as near to 42nd Street as possible.

(b) A two-track subway line diversing from the proposed Lexington Avenue line at or about 135th Street, under private property, through 138th Street to Southern Boulevard; thence to Whitlock Avenue and to Westchester Avenue; and thence as a two and three-track elevated line through Westchester Avenue to Pelham Bay Park.

(c) A subway line proceeding southerly from Times Square under Seventh Avenue as extended, Varick Street, West Broadway, and Greenwich Street to the Battery, as far as possible as a four-track road.

(d) A two-track tunnel from Whitehall street, via Montague street, to Borough Hall in Brooklyn; or a two-track tunnel via Liberty street, Maiden Lane and Pineapple street, to Borough Hall in Brooklyn.

(e) A two-track subway line running easterly under 42d street from Times Square to point of conjunction with the Belmont Tunnel.

(f) The Belmont Tunnel continued as a two-track subway via Van Alst avenue and Fourth street, northward under Hunter's Point avenue; thence as a two and three-track elevated road over the yards of the Long Island Railroad northward, curving into Davis street; thence via Davis street, Ely avenue, Williams street, and such private property as may be necessary to the Queensborough Bridge Plaza, and thence along the Queensborough Bridge Plaza to Jackson avenue, and via Diagonal street, Thompson avenue and Greenpoint avenue to Woodside, and to Sycamore avenue in Corona.

(g) A two and three-track elevated railroad from Queensborough Plaza via Jackson avenue, Debevoise avenue to Ditmars avenue, Astoria.

(h) A two and three-track elevated line proceeding from a connection with the West Farms Division of the present subway in Boston Road near 179th street, thence over private property and intersecting streets and along the west side of the New York, Westchester and Boston Railway to White Plains avenue, and thence via White Plains avenue to its projected terminus at Becker avenue near the City Line.

(i) A four-track subway line from the terminus of the existing system at Atlantic avenue, Brooklyn, under Flatbush Avenue and Eastern Parkway to Buffalo avenue (subject to the right of the Public Service Commission to construct, or permit the construction and operation of, additional tracks on Flatbush avenue between the said terminus of the existing subway at Atlantic avenue, Brooklyn, and Prospect Park Circle); also a two-track subway extension from Eastern Parkway under Nostrand avenue to Flatbush avenue, and a three-track elevated extension from Eastern Parkway via East 98th street and Livonia avenue through the Brownsville District to New Lots Road.

Trackage Reservations

The right is reserved by the city, and concurred in by the company, to grant trackage rights over the following sections of the enlarged subway system on a basis which shall [fol. 1678] be equitable to each company exercising such rights:

(a) Between the operators of the subway and elevated systems, respectively, or their successors, over the Jerome Avenue Line; and the White Plains Road Extension in The Bronx;

(b) Between the Interborough and any other operator, or the successors of either, of the lines to Astoria and Corona, converging at the Queensborough Bridge Plaza.

II. Elevated Lines, Third-tracking, Improvements, and Extensions

(a) On the Second Avenue Line, the completion of the third track from City Hall station to 129th street; on the Third Avenue Line, the completion of the third track from City Hall station to 129th street and Harlem River, with the necessary track changes to abolish grade crossings at Chatham Square; because of the junction of the third tracks of the Second and Third Avenue lines at the Harlem River the construction of a four-track bridge and a four-track line between the Harlem River and 144th street, and the extension of a third track thence to 147th street, with the privilege of thereafter extending the third track to the present terminus of the Third Avenue Line at Bronx Park; and on the Ninth Avenue Line, the completion of the third track from Rector street to 155th street.

(b) The construction of a two-track elevated road from about 157th street and Eighth avenue across Putnam Bridge over the Harlem River; thence over the right of way of the New York Central Railroad and private property; thence as a tunnel under private property and 162d street, emerging as an elevated structure in 162nd street near Jerome avenue; thence through 162nd street to River avenue, connecting with the elevated structure of the Jerome Avenue extension of the Subway.

(c) From the Third Avenue Line at about 143rd street, a two-track extension through private property and Willis and Bergen avenues to a connection with the West Farms division of the subway at or about Brook avenue.

(d) A two-track extension from the Third Avenue Line at Fordham avenue through Webster avenue and Gun Hill Road to White Plains avenue, connecting at that point with the Becker avenue extension of the subway in White Plains Road.

(e) The construction of a two-track extension from the Second Avenue Line, across the Queensborough Bridge to the Queensborough Bridge Plaza.

Terms Applying to Subway Extensions

Construction

1. The subway lines herein proposed shall be constructed according to plans of the Public Service Commission for this District, and under contracts to be awarded by the Commission, on behalf of the city, after public bidding, to responsible contractors, and the construction thereof shall proceed in such order as the Commission shall direct, due regard, however, being given to the necessity of providing relief from the present traffic congestion and to proper facility and economy in construction. It is understood, [fol.1679] however, that in the preparation and execution of the plans and contracts, there shall be active and cordial co-operation between the company and the Commission, so that the interests of the Company on account of its furnishing at least $56,000,000 of the capital for construction shall be treated fairly and equitably. The formal contract between the city and the company shall provide, first, that the obligation of the city for contracts already let for sections of subway in Lexington avenue shall be accepted as part of the city's share of the total cost of construction; second, for the provision from time to time of the additional capital required for construction or equipment purposes; and such other features as the subway construction situation may require.

The cost of construction, to the extent hereinafter provided, as the work proceeds will be paid monthly, one-half

by the city and one-half by the Interborough Company, and the cost of equipment to the extent hereinafter provided, will be defrayed wholly by the Interborough Company.

2. The costs of construction or equipment, whether borne by the city or by the Interborough Company, or upon a basis of division between the city and the Interborough Company, shall be the actual cost, and shall include:

(a) All contracts for original construction work; or

(b) For roadbed, tracks and station finish;

(c) All carrying charges during construction;

(d) Engineering expenses, including those of the Public Service Commission relating to these lines;

(e) Extras and damages;

(f) Real estate and easements; and

(g) Such other incidental charges as may be agreed upon; the cost of third-rail and signal system to be charged to equipment.

Any incidental fee damage for rights of way in acquiring of streets allowed by the courts shall be paid from the city's general funds and not from the subway construction fund. Subject to the use thereof for transit purposes, the city may sell, lease or otherwise dispose of the surface of all real estate not required for subway uses.

3. Brokerage charges not to exceed three per cent of the $7,000,000 furnished by the company towards the cost of construction and equipment, shall be allowed to be amortized from the earnings of the property during the life of the lease; but if by virtue of the ten-year recapture provision any part of the line constructed, or equipment, shall be taken over by the city, the city shall pay the actual cost to the company of its investment in such construction and equipment, less such portion of the financing cost to the company as may have been amortized.

Forty-nine Year Lease

4. The new lines will be operated by the Interborough Company under a contract with the city which will extend over a period of forty-nine years from the time when the new subways are put into complete operation; provided, however, that the date from which the new leases shall run

[fol. 1680] shall not be later than four years from the time that formal contract is entered into between the city and the company, unless strikes, injunctions or other causes beyond the control of the company shall prevent the opening of the new lines within said period, in which event the necessary delays caused by strikes, injunction or other causes shall be added to the period of four years as aforesaid.

Leveling of Existing Leases to a Forty-nine Year Period

5. The Interborough Company thereupon proposes that its existing leases from the city under which the original subway, from Ann street northward, and the Brooklyn Extension, from Ann street to Atlantic avenue, Brooklyn, are operated, together with the right to renewal terms thereunder, shall be leveled so that the leases of the existing subway shall be co-terminous with the lease or franchise to the Interborough Company to operate the new subway lines herein proposed.

Exchange of Legs of Present Subway

6. So that the city, if it so elects, may obtain possession of either a complete East Side or a complete West Side subway line, the Interborough Company will consent, in event of the necessary legislation having been secured, in the securing of which it will co-operate, and provided the lien of any duly authorized mortgage be not disturbed, to a modification of contracts Nos. 1 and 2 under which the existing subways are operated, so that either that portion of the existing subway system extending southward from 42nd street in Manhattan to Atlantic Avenue, Brooklyn, or north of 42nd Street to The Bronx, shall be held under a lease terminable at any time after ten years from the beginning of operation of the proposed Seventh Avenue, or Lexington Avenue line, upon receiving in compensation therefor the right to hold either the proposed Seventh Avenue Line from Times Square southward to Borough Hall, Brooklyn, or the proposed Lexington Avenue Line and its said extensions from 42nd Street northward into The Bronx, under a non-terminable lease for forty-nine years from the time when the new subways are put into complete

operation; the difference in values upon the exchange to be adjusted by agreement between the city and the company, or, if they cannot agree, to be fixed by arbitration upon terms and conditions to be agreed upon.

Recapture

7. The new lines constructed under this agreement (except either the proposed Seventh Avenue line from Times Square to Borough Hall in Brooklyn, or the proposed Lexington Avenue line and its said extensions from 42nd Street northward into the Bronx, in event of the exchange of legs hereinbefore proposed), as hereinafter provided, shall be subject to the right of the city to take over such new lines at any time after ten years of operation, upon the terms of paying to the Interborough Company the amount of its investment in construction, plus 15 per centum, which aggregate sum shall gradually decrease (under the provisions of [fol. 1681] the contract) as the term continues, so that at the end of the full term of the contract no such amount shall be paid; and the actual cost of the equipment attaching to such lines—not including as a part of the cost any sums spent for depreciation or newcal thereof—plus fifteen per centum thereof, less the amount accrued in any sinking fund created for the amortization of the company's investment in equipment and any deferred maintenance charges with respect thereto. The right of recapture provided for in this paragraph shall nevertheless be exercised by the city with respect to the whole of any one or more of the following groups of lines:

(a) The Seventh Avenue line, including the extensions under the East River to Borough Hall, Brooklyn; the Lexington Avenue line, together with the extension to Pelham Bay Park and on Jerome Avenue to the intersection of the latter Avenue with Woodlawn Road, adjoining Woodlawn Cemetery.

(b) The 42nd Street line from Times Square easterly, including the Belmont Tunnel and the extensions to Corona and Astoria.

(c) The Brooklyn extensions previously described, i. e., a four-track subway line from the terminus of the existing system at Atlantic Avenue, Brooklyn, under Flatbush Avenue and the Eastern Parkway to Buffalo Avenue; also a

two-track subway extension from Eastern Parkway under Nostrand Avenue to Flatbush Avenue and a three-track extension from Eastern Parkway via East 98th Street and Livonia Avenue through the Brownsville District to New Lots Road.

(d) The White Plains Road extension.

8. If the city shall take over the new lines after a period of ten years from the beginning of operation thereof, under any provision of law, the city shall have the right to take over the lines of the present subway at any time after thirty-five years from the date of the beginning of operation of such new lines, upon payment to the company of a sum equal to the then present worth of the unexpired portion of the company's lease under Contracts Nos. 1 and 2, estimated upon the basis of the annual net profits for the five-year period immediately preceding such recapture, or, if the period of final amortization has been passed, then for the five years immediately preceding the completion of amortization.

City May Assign Its Rights

9. Whatever rights the city shall possess under this offer with respect to retaking any of the lines covered by such termination shall be subject to assignment, at the City's option, such third party as the city may designate.

Belmont Tunnel

10. All right, title and interest of the Interborough Company in and to the Belmont Tunnel will be contributed by the company, as part of its half of the construction cost of the foregoing subway lines, at a valuation of $3,000,000.

[fol. 1682] Five-cent Fares

11. All the foregoing subway lines will be operated by the company in connection with the present subway lines for a single fare of five cents.

Pooling of Receipts and Payments Therefrom

12. When the new subway lines shall have been equipped and put in operation the gross receipts from the operation

of the existing subway lines and equipment and from the proposed new subway lines and equipment will be pooled for and during the full term of forty-nine years from the total of such gross receipts deductions will be made as follows:

(a) Operating expenses, including damage for accidents, provision for depreciation, renewals and obsolescence, taxes, insurance and rentals payable to the city under existing subway contracts, and amortization of brokerage charges. Rentals under existing contracts in the amount payable when the new lease becomes effective shall continue to be paid to the city during the full term of the said forty-nine years.

(b) A sum, to be paid to the company out of such gross receipts for each of the said forty-nine years, to represent the average annual income from operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911, which is $6,335,000, as compensation for the pooling of the receipts of the existing subway and equipment with those of the new subway lines and equipment; for the leveling of the leases of the existing subway and the exchange of the legs; for services in connection with the operation of the property; and for the company's agreement to furnish to the extent hereinafter provided, one half of the cost of the construction of the proposed new subways, and the entire cost of the equipment thereof. It is scarcely necessary to explain that this sum is not clear profit, because out of it must be paid the company's fixed charges, such as interest and sinking fund payments on its capital investment in the subway lines and equipment.

(c) A sum equal to six per centum per annum for each of the forty-nine years upon the investment of the Interborough Company in the subway lines and equipment hereinbefore set forth. The investment of the Interborough Company under this clause shall not be less than, and shall not exceed, $77,000,000, or $56,000,000 for new construction and $21,000,000 for equipment (which equipment shall include cars; equipment for the supply and transmission of power; yards and yards' terminals; third rail; signals and interlocking); so that with the company's capital investment in the present subway, aggregating on June 30, 1911, approximately $48,000,000, its total investment shall be

$125,000,000. If less than said $21,000,000 be required from the company for said equipment, such amount shall be expended for construction, so that its total investment shall not be less than $125,000,000. If additional capital be required to construct the new subway lines as hereinbefore defined, the city shall furnish the excess.

[fol. 1683] If the said $21,000,000 shall not be sufficient to properly equip the said new subway system to meet the requirements of the first year of operation in accordance with plans, specifications and contracts for such equipment as approved by the Public Service Commission and accepted by the company, the company shall furnish the excess, and shall receive, during the period of forty-nine years, in the order defined in paragraphs numbered 12 and 13 hereof, the payment of sums equal to the actual cost of such additional capital for equipment, plus a sinking fund therefor of not exceeding one per centum per annum.

If at any time during the term of said lease expenditures for betterments or improvements of the old or new subways, chargeable to capital account, shall be required to be made, the capital for making such construction betterments or improvements shall be furnished share and share alike by the city and the Interborough Company, and if expenditures by the way of betterments or improvements chargeable to capital account shall be required to be made upon the equipment of the old or new subways, or if, after the new subways are put in operation under said lease, additional equipment shall be required, the capital for making such equipment betterments, improvements or additions shall be furnished by the Interborough Company, and in either event a sum equal to the actual cost of such additional capital, plus a sinking fund thereon of not exceeding one per centum per annum, shall be allowed to the company and to the city, respectively, and shall be deducted from the gross receipts in the respective order of the other payments herein provided for in section Nos. 12 and 13 hereof. Out of the sums which the company shall receive as aforesaid, it will pay all charges for interest as the same become due, and provide a sinking fund sufficient to retire and pay off at maturity the principal of its original investment in said subway construction and equipment. If, however, such sinking fund of one per centum shall not be suffi-

cient to amortize any part of the capital furnished by the Interborough Company, for the construction, betterments or improvements of said subways, or for betterments or improvements of, or additions to, the equipment, before the expiration of the lease, the cost of such construction, betterments, improvements or additions, less the amount then accumulated in the sinking fund, shall, upon the taking over or termination of any lease, be assumed and paid by the city.

If any deficiency shall arise in any year in meeting the aforesaid payments to the company, such deficiency shall be cumulative and shall be paid off and discharged annually out of the said subway earnings before the payments herein defined shall be made to the city.

13. After the payment of the foregoing obligations to the company there shall be deducted, out of the profits, interest and sinking fund upon the capital provided by the city for the construction of the new lines, and such further sum as will bring the payments to be made to the city during the entire period of the forty-nine year lease up to an amount equal to 8.76 per centum upon its capital investment in the original construction of the new subways. Upon its capital investment in the betterments or improvements of the old [fol. 1684] or new subways, chargeable to capital account, it shall then receive the same rate of compensation as is provided for in section 12 hereof with respect to investments by the company in betterments or improvements upon new equipment. If any deficiency shall arise in any year in meeting the aforesaid payments to the city, such deficiency shall be cumulative and shall be paid off and discharged annually out of the said subway earnings before the equal division of profits provided for in the following paragraph becomes effective.

14. The remainder of said profits shall annually be divided between the city and the company share and share alike.

Receipts to be Pooled on Completion of Any Substantial Part

15. Upon the completion of a substantial portion of the new system, the gross receipts from operation of the existing subways and equipment shall be pooled with the gross receipts from operation of such newly completed portion, and such pooled receipts shall be distributed as hereinbefore provided, but in the proportion which said new lines shall bear to the whole system as the same may from time to time be placed in operation. In fixing this proportion, the gross receipts shall be ascertained from the tickets deposited at the stations on the new subway lines covered in the proposal, and from any other miscellaneous revenues derived from such stations, and the operating expenses shall be ascertained, as hereinafter defined, for new subway extensions, upon a per-passenger basis.

New Equipment When Amortized to Belong to City

16. New equipment for the operation of the enlarged subway system, as hereinbefore provided, shall, to the extent amortized through the sinking fund, and its accretions, become the property of the city at the end of the lease.

Equipment of Present Subway to be Taken Over by City at End of Lease

17. The equipment of the existing subways owned by the company shall, upon the termination of the new forty-nine year lease, be taken over by the city as provided for under the terms of Contracts Nos. 1 and 2 between the city and the Interborough Company, for the construction and equipment of the existing subway.

III. Subway Extensions

18. Future subway extensions required by the city will be constructed by it, and will be equipped by the company for the city and operated as a part of the entire system, upon the following terms:

A separate account shall be kept of the gross earnings of any such extensions, to be ascertained from the tickets at

the stations thereupon, and any other miscellaneous revenues derived from such stations.

From the gross earnings thus ascertained there shall be deducted:

First.

[fol. 1685] (a) All station expenses.

(b) Maintenance of way and structures.

(c) Damages from accidents happening on the division.

Second. Other operation costs, to be determined according to the unit costs on the Interborough system, upon a per-passenger basis:

(a) Conducting transportation.

(b) Maintenance of equipment and depreciation.

(c) Cost of power.

(d) General and administration expenses.

(e) Taxes, if any.

After the payment of the foregoing charges the company shall receive for its equipment a sum equal to the actual annual charges of the company for carrying the cost thereof, and a partial sinking fund of three-fourths of one per centum per annum to meet obsolescence.

From the balance of the income then remaining shall be paid interest and sinking fund upon bonds issued by the city to defray the cost of construction, upon that part of the road equipped and operated by the Interborough Company.

If the income shall be insufficient to meet the foregoing charges or any part thereof, the deficit shall be paid semi-annually by the city either out of the city's portion of the earnings of the entire subway system, as described in section 13 of this proposal, or from such other sources as the city may see fit. That portion of any deficit which represents payments made by the city upon bonds issued by the city for the construction of subway extensions shall accumulate and be a charge against future profits, before any division thereof shall be effected between the city and the Interborough Company.

The net profits remaining after providing for the foregoing charges shall be equally divided between the city and the Interborough Company, but when any of the future subway extensions shall become profitable, and all deficits

both of the company and the city shall have been fully paid and discharged, it shall, beginning on July 1 of the following year, be operated as a part of the enlarged subway system under the general plan, and shall be governed by all the provisions applying to the enlarged subway system hereinbefore provided for, the Company and the city to receive in each year, on their respective capital investments in these subway extensions, a sum not exceeding the actual cost of furnishing such capital, plus a sinking fund thereon of not exceeding one per centum per annum, until the said investment has been amortized.

In event of recapture of any extension or of the termination of the lease upon any extension, the city shall pay for the equipment in the manner provided for under section 7 hereof.

Examination of Subway Equipment

19. The formal contract between the company and the city shall provide for an examination by the Public Service Commission of the physical condition of the plant and equipment of the present subway before it is taken over for operation as a part of the enlarged subway system contem- [fol. 1686] plated by this proposal, so that the city may definitely assure itself that the property has been adequately maintained, and any expenditures deemed necessary by the Public Service Commission to place it in such condition shall be made by the company before the pooling of receipts proceeds.

Management and Operation

20. The formal contract between the company and the city shall also contain provisions embodying substantially the essentials of the Public Service Law with relation to both operations and management, together with such added reasonable guarantee as the city may require with relation to the character and sufficiency of the equipment to be furnished and of the service to be given.

City to Approve of a Lease or Assignmen', etc.

21. Such formal contract shall also contain provisions that the management of the enlarged subway system cov-

ered by such contract shall be conducted by one company; and without the consent of the city, no lease, transfer or assignment, in whole or in part, of any of the rights granted by the city in the proposed contract shall be made, nor shall any subsidiary company be created to operate or maintain either the whole or any part of the enlarged system, or to furnish to it power, supplies, or any other of the operating necessities.

Classification and Character of Operating Expenses

22. The classification and character of operating expenses under this contract shall be that prescribed by the Public Service Commission for the First District. In the event of any dispute arising regarding the character or amounts of items charged into Operating Expenses, the company and the city, respectively, shall have the right to review by an appeal or certiorari to the Appellate Division of the First District.

IV. Terms Applying to Elevated Third-tracking Improvements and Extensions

1. The franchise for the construction of additional tracks upon the Manhattan Elevated Railroad, as hereinbefore described in paragraph (a) under the head of "Elevated Third-Tracking, Improvements and Extensions," together with all other construction described in said paragraph, shall be embodied in a certificate issued to the Manhattan Railway Company. The term of said franchise shall be twenty-five years, with three renewal periods of twenty years each, for the purpose of readjustment of rentals; the right of recapture shall accrue to the city, either upon the termination of a ten-year or other period, or at the termination of the franchise, but not for railroad transit operation either by itself or by any other party, and without prejudice to the rights of the Manhattan Company in its elevated railway lines, and subject to adequate provisions for the protection of such rights. It is necessary that the city co-operate in obtaining such legislation as may be required [fol. 1687] to render this provision effective. The compensation for said franchise shall not exceed two per centum of the increased gross receipts of each station served by

express trains upon such lines, whether such station be a new station, an enlargement of an existing local or express station, or a relocation of such station, over the gross receipts of the same station, from the transporting of passengers and property on the said line for the year ending June 30, 1911, or a corresponding portion of such year.

2. The franchise for the elevated extensions, hereinbefore described in paragraphs (b), (c), (d) and (e) under the head "Elevated Third-Tracking Improvements and Extensions," shall be embodied in a certificate issued to the Interborough Company. The terms of said franchise shall be eighty-five years from the time the said elevated extensions are put in complete operation. Said extensions and the equipment attaching thereto shall be subject to recapture by the city at any time after ten years from the date of beginning complete operation thereon, upon the same terms as are hereinbefore stated with respect to such subway extensions and equipment thereof as shall be subject to recapture. If the White Plains or Jerome Avenue extensions should be taken over by the city at any time under the ten-year recapture provision, in order that public convenience may not be interfered with, trackage rights will be reserved over those lines for the purpose of enabling the elevated system to reach any terminals, storage yards or shops located upon such extensions and utilized by the Manhattan Company.

City's Compensation for Elevated Franchises

3. As soon as said elevated extensions have been constructed and placed in complete operation, the gross receipts therefrom shall be pooled with the gross receipts derived by the Interborough Company from the operation of the present Manhattan Elevated lines, including the third-track improvements hereinbefore provided for, and so long as the elevated system as thus enlarged shall remain under the control of the Interborough Company, or its successors or assigns, all receipts from the operation thereof, after deducting taxes, operating expenses, including insurance, damage claims, a proper annual allowance for depreciation and obsolescence, rentals payable to the Manhattan Company by the Interborough Company under the lease dated

January 1, 1903, interest and sinking funds upon capital for said elevated improvements and extensions, amortization of brokerage charges not exceeding three per centum, and a sum equal to the average annual profits, after deducting taxes as finally adjusted, derived by the Interborough Company from the operation of the present elevated system for the two years immediately prior to June 30, 1911, shall be equally divided between the city and the Interborough Company.

4. If under this latter arrangement, the Manhattan Company or the Interborough Company shall be under an obligation to pay the two per centum of increased gross receipts hereinbefore referred to as a franchise payment, the Interborough Company before divisions of profits shall first be [fol. 1688] entitled to deduct from the surplus profits arising from the operation of the elevated lines an amount corresponding to the amount of the franchise payment.

5. If in any years the receipts or profits of the Interborough Company from the operation of the elevated system as so enlarged shall be less than the average receipts or profits from the operation of the present elevated system for the two years immediately prior to June 30, 1911, ascertained as above, the deficit shall accumulate and shall be a charge against all future profits from the operation of the enlarged system, before the city under the terms of this arrangement shall be admitted to a division of the said profits. Respectfully submitted,

Interborough Rapid Transit Company, by T. P. Shonts, President.

Which was referred to the Committee on Transit Proposals, the report of said Committee to be on the calendar for March 21, 1912.

Y. At a meeting of the Board of Estimate and Apportionment held on March 21, 1912, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; Adolph L. Kline, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of

Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railway

In the Matter of the Communication from the Public Service Commission for the First District Transmitting Offer of the Interborough Rapid Transit Company Relative to Operation of Certain Rapid Transit Railways.

This communication was presented to the Board at the meeting of March 14, 1912, when it was referred to the Committee on Pending Transit Proposals. The report of said Committee to be considered this day.

The President of the Borough of Manhattan, Chairman of the Committee, stated the Committee had not completed its report and at his request the matter was laid over until March 28, 1912.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District and the Board of Estimate and Apportionment of The City of New York have under consideration plans for the construction and operation of a system of subway and rapid transit lines that will extend rapid transit facilities to every part of the city and secure to the people an extension of service that will increase three fold the area through-[fol. 1689] out which passengers may be carried for a single five-cent fare; and

Whereas, The plans under consideration when approved must give to the city the best possible returns for its own future investment in rapid transit lines; and

Whereas, In order to render possible the adoption of such plans it is necessary that the present rapid transit statutes be amended in certain particulars; and

Whereas, There is now pending before the legislature an act amendatory of the rapid transit act, prepared by the Public Service Commission and designed to permit the public authorities to enter into contracts for the construction, equipment and operation of rapid transit lines in ac-

cordance with the plans aforesaid, and upon the best possible basis to be secured to the city; and

Whereas, The passage of the said act would not commit the city to action of any sort, nor limit or restrict the authority of the Public Service Commission and the Board of Estimate and Apportionment, but merely broaden their powers to the degree deemed necessary; and

Whereas, The failure of the passage of the said act would leave the rapid transit situation in confusion and put off indefinitely the relief for which the people of the city are waiting; now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of the City of New York earnestly urges upon the legislature the importance of the prompt passage of Senate Bill No. 1277, amending the rapid transit act and introduced by Senator Wagner on March 18th; and be it further

Resolved, That the Secretary be directed, on behalf of this board, to forward copies of these resolutions to the President of the Senate and the Speaker of the Assembly, and that the Corporation Counsel be requested to represent this board at such hearings as may be given upon the bill in either house.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

The President of the Borough of Queens offered the following:

Whereas, In the offer made by the Interborough Railroad Company for the operation of certain lines specified in their proposal there is included the operation of the Belmont Tunnel, when completed, as far as the Grand Central Depot and thereafter to Times Square; and

Whereas, It will take, in the estimation of those informed of the situation, at least two years to construct the portion west of Lexington Avenue towards Times Square; and

Whereas, In the meantime the inconvenience to the public will continue and the injury to property will increase

unless steps are taken for the immediate operation of the Tunnel; therefore be it

[fol. 1690] Resolved, That the Interborough Company be requested to include in their offer an agreement to operate without delay that portion of the Belmont Tunnel already constructed, between Lexington Avenue in the City of New York and Jackson Avenue in Long Island City, upon the same terms and conditions as are provided for in their offer to operate the entire tunnel when completed.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the Acting President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

Z. At a meeting of the Board of Estimate and Apportionment held on March 28, 1912, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; Adolph L. Kline, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

In the Matter of the Communication from the Public Service Commission for the First District Transmitting Offer of the Interborough Rapid Transit Company Relative to Operation of Certain Rapid Transit Railways

This communication was presented to the Board at the meeting of March 14, 1912, when it was referred to the Committee on Pending Transit Proposals.

At the meeting of March 21, 1912, the Committee reported that it had not yet formulated its report and the matter was laid over until this day.

A communication was received from the North Van Nest Taxpayers' Association in favor of the offer of the Inter-

borough Company and commending his Honor the Mayor and the members of the Board for their earnest efforts in behalf of the traveling public.

A communication was received from the Seventh Avenue Association in favor of the proposition of the Interborough relative to subway construction in Seventh Avenue, Manhattan.

A communication was received from the Brooklyn Transit Conference relative to rapid transit matters affecting the Borough of Brooklyn.

A communication was received from the Williamsbridge and Wakefield Rapid Transit Committee expressing its fullest confidence in the Board and stating the resolution introduced in the Board of Aldermen by the Alderman from said District does not represent the views of the people of that section.

[fol. 1691] A communication was received from the Business Men's Association of Fordham Heights endorsing the offer of the Interborough Rapid Transit Company.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, stated the Committee was not prepared to report to-day.

AA. At a meeting of the Board of Estimate and Apportionment held on May 10, 1912, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Denis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

The following resolution was offered:

Resolved, That this Board authorizes and directs its conference committee on transit proposals to ascertain from the Public Service Commission the status of each of the

several routes comprised within the proposed dual system of rapid transit lines that have not as yet been presented to this board, and that said committee is requested to urge upon the Public Service Commission the importance of action upon each of the said routes at the earliest moment practicable; and

Resolved, That the said committee inform the Public Service Commission that this board favors the adoption of the so-called Liberty street and Pineapple street tunnel route as part of the system of the Interborough Rapid Transit Company, and the Whitehall street, Montague street tunnel route as part of the system to be operated by the Brooklyn Rapid Transit Company.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

On motion the board adjourned to meet Tuesday, May 14, 1912, at 2.30 o'clock p. m.

[fol. 1692] BB. At a meeting of the Board of Estimate and Apportionment held on May 22, 1912, the following proceedings were had and taken:

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Denis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

One Hundred and Forty-ninth Street and Mott Avenue Subway Connection in the Borough of The Bronx—New Utrecht Avenue Elevated Line in the Borough of Brooklyn—Eastern District Route in the Boroughs of Brooklyn and Queens—Boston Road and White Plains Road Connection in the Borough of The Bronx—Broad Street and Whitehall Street Tunnel Connection in the Borough of Manhattan—Flatbush Avenue, St. Felix Street, Fulton Street Route in the Borough of Brooklyn—Gravesend Avenue Route in the Borough of Brooklyn—Steinway Tunnel and Queensboro Plaza Route in the Borough of Queens

The Secretary presented the following:

To the Board of Estimate and Apportionment of the City of New York:

The Public Service Commission for the First District herewith transmits to your Honorable Board for your approval and the approval of the Mayor of the City as required by law certified copies of resolutions adopted by it on May 17 and May 20, 1912, determining and establishing routes and general plans of construction for eight new rapid transit railroads in the Boroughs of Manhattan, Brooklyn, Bronx and Queens. These lines are all included in the proposed dual system of subways and were adopted after a joint meeting of the Special Committee on Transit of your Board and the Commission. All these routes, with the exception of the Broad Street and Whitehall Street Tunnel Connection, have been laid out for a portion of their length through private property. In certain cases this was practically unavoidable; but in others it was done in order to secure the most advantageous layout. If, however, the property through which or over which these routes have been laid out cannot be acquired at reasonable terms, modifications may need to be adopted, but the Commission feels that the possibility of such changes should not prevent the adoption of these routes. The Commission may then proceed at once to have them legalized, and to negotiate the terms upon which the private rights may be secured.

The routes herewith transmitted are as follows:

[fol. 1693] 149th Street and Mott Avenue Subway Connection in the Borough of The Bronx (Route No. 27): This route provides a connection between the Lexington Avenue Subway now under construction along Mott Avenue and the present Manhattan-Bronx Subway in 149th Street.

New Utrecht Avenue Elevated Line in the Borough of Brooklyn (Route No. 39): This route runs from Fourth Avenue and 38th Street, where a connection can be made with the Fourth Avenue Subway, through the property of the South Brooklyn Railway Company to Tenth Avenue as a subway, and thence continues as an elevated road over Tenth Avenue and New Utrecht Avenue to 81st Street, thence over private property and cross streets to 86th Street and thence over 86th Street to Bay 37th Street, where a connection can be made with the Bensonhurst, Bath Beach and Coney Island Route as already legalized.

Eastern District Route in the Boroughs of Brooklyn and Queens (Route No. 41): This route runs as an elevated road from Bushwick and Johnson Avenues in the Borough of Brooklyn, where a connection can be made with the Brooklyn, Manhattan and Long Island City Route running under the East River from 14th Street in the Borough of Manhattan as already legalized over Johnson Avenue to Wyckoff Avenue and over Wyckoff Avenue, private property and intersecting streets to a connection with the existing elevated railroad on Broadway, East New York.

Boston Road and White Plains Road Connection in the Borough of The Bronx (Route No. 44): This route runs as an elevated road from Boston Road and East 179th Street, where a connection can be made with the present Manhattan-Bronx Rapid Transit Railroad in Boston Road, through private property and intersecting streets and between the tracks of the New York, Westchester and Boston Railroad and Bronx Park, to White Plains Road and over White Plains Road to Astor Avenue, where a connection can be made with the West Farms Road and White Plains Road Route as already legalized.

Broad Street and Whitehall Street Tunnel Connection in the Borough of Manhattan (Route No. 49): This route provides a connection through Broad Street between the present route along Nassau and Broad Streets already

legalized as part of the Third Avenue Route and the Whitehall Street-East River-Montague Street Route heretofore adopted by the Commission and now awaiting the action of your Board.

Flatbush Avenue, St. Felix Street, Fulton Street Route in the Borough of Brooklyn (Route No. 46): This route, running from Flatbush Avenue under private property, the Long Island Railroad Station at Atlantic Avenue, and St. Felix Street to Fulton Street, provides a connection between the Eastern Parkway Route on Flatbush Avenue and the Fourth Avenue Subway in Fulton Street.

Gravesend Avenue Route in the Borough of Brooklyn (Route No. 49): This route runs from 38th Street and Ninth Avenue, where a connection can be made with the New Utrecht Avenue Elevated Line, along private property south of 37th Street to Gravesend Avenue as an ele- [fol. 1694] vated railroad, and thence continues as an elevated railroad over Gravesend Avenue, Shell Road, West 6th Street and private property to Surf Avenue at Coney Island.

Steinway Tunnel and Queensboro Plaza Route in the Borough of Queens (Route No. 50): This route runs from the present terminus of the Steinway Tunnel at Fourth Street and Van Alst Avenue through private property and intersecting streets, as a subway, to the Sunnyside Yard, where it becomes an elevated railroad, thence continuing as an elevated railroad over Davis Street and Ely Avenue to the Queensboro Bridge Plaza.

Dated, May 20, 1912.

Public Service Commission for the First District, by
W. R. Willcox, Chairman.

Attest: Travis H. Whitney, Secretary. (Seal of the Commission.)

The following was offered:

Resolved, That the communication be received and in pursuance of law, this Board fixes Friday, the 31st day of May, 1912, at 10:30 o'clock a. m., and Room 16, City Hall, Borough of Manhattan, as the time and place when and where such plans and conclusions will be considered; and be it further

Resolved, That the Secretary of this Board be and he is hereby directed to publish notice of such consideration in the City Record.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens and the President of the Borough of Richmond—16.

The matter was then referred to the Transit Committee.

Rapid Transit Railways

In the Matter of the Communication from the Public Service Commission for the First District Relative to the Construction, Maintenance and Operation of Additional Rapid Transit Railways and Requesting a Statement of the Position of this Board on the Subject.

The President of the Borough of Manhattan, Chairman of the Committee on pending transit proposals, presented the following:

May 22, 1912.

To the Honorable Board of Estimate and Apportionment:

Dear Sirs: Your Committee was appointed under a resolution adopted January 19, 1911, to confer with the members of the Public Service Commission for the First District upon the then pending proposition of the Interborough Rapid Transit Company for the construction and operation of additional rapid transit lines "or upon any proposed [fol. 1695] modification thereof, or upon any alternative plan that the Public Service Commission may present, or that may be presented to it."

In resolutions subsequently adopted, your Committee was also empowered to confer, in conjunction with the Public Service Commission, with the officers of the Interborough Company or with the representatives of other companies presenting plans for the construction, equipment and operation of rapid transit railways, in order that it might advise the Board with relation to the details of ending propositions, and to submit its recommendations with relation to

such action as the Board, under the provisions of the Rapid Transit Act and of the Charter, might be required to take.

While your Committee was in conference with the Public Service Commission upon the proposals of the Interborough Company, a proposition was received from the Brooklyn Rapid Transit Company to construct, in part, and to equip and operate certain rapid transit lines in connection with its existing elevated railway system.

Under date of June 13, 1911, your Committee and the Public Service Commission submitted a joint report, proposing that the City enter into contracts with both the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company for the construction, in part, and for the equipment and operation of various rapid transit railways to be operated under a dual plan by the respective companies and upon terms which, in the judgment of the conferees, would furnish a basis for such operation just both to the companies in question and the City.

Certain alternatives were also submitted, so that in case either or both the companies declined to accept the terms and conditions set forth in the report, provision would automatically be made for the operation of a complete system by the company agreeing to accept the lines assigned it, or if both declined to accept, by the City itself upon an independent basis.

Your Honorable Board, on June 21, 1911, unanimously accepted the joint report and, with certain minor changes, approved of its recommendations. The Brooklyn Rapid Transit Company, under date of June 27, 1911, accepted the lines assigned it, provided certain modifications were made in the financial and operating terms. The Interborough Rapid Transit Company, in a letter of the same date, declined to accept the terms outlined as a basis for the operation of the routes assigned to it, and by the same letter withdrew its then pending offers—dated June 10th and December 5th, 1910, and May 9th, 1911—for the operation of either subway and elevated lines, upon any basis theretofore considered.

Shortly afterward, upon the statement of the Interborough Company that with certain modifications of terms

it would still be inclined to take the lines originally assigned to it, conferences, with that company were resumed, leading to the submission of its supplementary offer under date of July 19, 1911. In this communication the Interborough Company offered to accept a part in the operation of a dual system if it might be given terms that would furnish certain margins of financial protection upon which its bankers had insisted.

[fol. 1696] Under date of July 20, 1911, your Committee and a majority of the Public Service Commission presented a report recommending the adoption of this amended offer of the Interborough Company as a part of the dual plan; but your Board, at the meeting held July 21, 1911, declined to accept this recommendation.

Upon the same day your Board accepted the plan presented by the conferees as an alternative, in the event of the failure of the dual plan, and agreed to approve contracts with the Brooklyn Rapid Transit Company for the operation not only of the system it had originally proposed to operate, but of those additional lines, originally assigned for operation by the Interborough Company, that would be in any way contiguous to its system and that could be operated as part of a generally coherent plan.

Accepting this as the approved program of the Board, the Public Service Commission proceeded to award contracts for the construction of various routes that would enter into the plan approved, and also to prepare the forms of the contract for equipment and operation. Before the preparation of such forms had been completed, informal conferences between representatives of the Board and of the Commission, and of the Interborough Company and its bankers, were resumed, with the result that under date of February 27, 1912, the Interborough Company submitted a new proposition for the operation of the routes originally assigned to it in the dual plan, agreeing to accept terms far more favorable to the City than those that had been rejected in July. During the course of these informal conferences, the officers of the Brooklyn Company advised the Chairman of your Committee and the Chairman of the Public Service Commission that while that company would prefer to take over and to operate the expanded plan ap-

proved in July, it would on the other hand be willing to take its part in a readjusted dual plan and to co-operate with the City in working out such a plan if the representatives of the City so desired, and if the Brooklyn Company might be assured of an adequate operating basis covering the territory it will serve.

The Interborough Company's offer of February 27, 1912, has been formally approved by the Public Service Commission. On March 15 it was transmitted by the Commission to your Board for consideration, and referred in turn to your Committee for report.

Since the latter date, certain amendments to the Rapid Transit Act, prepared by the Public Service Commisison and extending the powers of the Commission and the Board of Estimate and Apportionment, so as to permit the approval of contracts upon the principles proposed, have been passed by the legislature and approved by the Governor. Within the same period, the decision of Mr. Justice Blacknar in the Supreme Court, upholding the constitutionality of certain of the proposed financial and operating terms, has been upheld by the unanimous judgment of the Appellate Division for the Second Department. Although the questions involved in the cases upon which these decisions have been given will now be taken to the Court of Appeals, it is expected that an early decision will be given there. [fol. 1697] The actual work of construction upon the Broadway and Lexington Avenue lines, as well as upon the completion of the Fourth Avenue and Bridge Loop Lines, in anticipation of the letting of operating contracts, has been under way for some months. As the question at issue in the Courts has no relation to the merit of the plans proposed, and has to do solely with construction of the law, your Committee is of the opinion that if the proposed operating plans are to receive the approval of your Honorable Board, it will prove utlimately an economy of time if action is taken at once, and if the Public Service Commission may thus be enabled to proceed with the completion of the proposed operating contracts with the assurance that its action will be ratified by the Board of Estimate and Apportionment when presented for the Board's final consideration.

Character of the Dual System Proposed

Throughout the negotiations that have led to the presentation of the pending plans, the Public Service Commission and the members of your Committee have kept in mind the need of providing not merely a series of roads for the convenience of the travelling public, but a basis for the future development of the city, along logical and well-ordered lines. The need of a system that will serve this purpose need not be argued. The present congestion of traffic upon all rapid transit lines is great, and the lack of facilities for distributing population through sections that offer an abundance of opportunity for home building and other development, within comparatively short distances of the center of the city, is also clearly apparent. Stagnation of the real estate market in various parts of the city is a reflection of this condition. The assessment of real estate for taxing purposes in the year 1912 shows, for the first time in many years, practically no increase. Although this result is attributable in some degree to other causes, there can be no doubt that it is due, in the main, to the causes to which we refer. The city's prime interest in the building of new transit lines is not, in short, to make money through successful railroading, in the commercial sense, but to lay a basis for city expansion and city growth.

The conferees have also been convinced that the best interest of the city will not be served if new rapid transit lines are built only where they will yield an immediate profit from operation. The single offer for construction and operation pending at the time your Committee was appointed, that of the Interborough Company dated December 5, 1910, was framed upon this principle. It has been the conviction of the conferees that it is far better to establish a system that will penetrate to all parts of the city at approximately the same time, in this way compelling the richer short haul lines to support the less profitable extensions, and, incidentally, keeping the development of outlying localities in all the boroughs in a proper state of balance. It is their belief that the creation of such a system, having in it as well in an important degree the element of competition, will amply justify the cost to the city of carrying such incidental deficiencies as may occur in the earlier

years of operation. It is, however, also their opinion that [fol. 1698] the period of deficiencies will be brief, and that if the plans now pending be adopted the city will within a few years realize a sufficient margin of profit to exempt its entire new investment from the constitutional debt limit. Through this and other means, the city will, after the statutory period of ten years has passed, assume an absolute control of the new lines now to be built, and of all future extensions; reserving the right to recapture any or all of them for combination in an independently operated or municipally operated system, whenever the taking of either course might seem wise.

Your Committee has never doubted that in order to secure the greatest future benefit the existing subway and elevated lines should be used as a nucleus for future growth. The city and the Interborough Company combined have an investment of $100,000,000 in the present subway, and the Brooklyn Company has a private investment, in plant and equipment, estimated at $60,000,000. The two systems embrace 66.9 miles of road and 178 miles of track. A failure to utilize these lines, or to properly articulate them with others in a manner that will offer the best basis for the development of the city plan, and avoid economic waste, would, in the judgment of your Committee be indefensible; certainly, so long as the right to the city to recapture and readapt any of the additional lines now to be built, if it so desires, stand undisturbed.

Instead of three or four separate systems, it has seemed better to so group the lines, new and old, that all would come within two great systems, each offering within its bounds universal carriage or transfer for a five-cent fare, and so adjusted that together, they will bring the benefits of the five-cent fare zone to all but a slight percentage of the people who ride. This was the theory underlying the joint report of the conferees, submitted in June last. We believe it fortunate that through the negotiations that have since proceeded, it is again possible to secure the dual plan, and upon terms distinctly more advantageous to the city than those at first considered.

It is understood that a new company, under a title sufficiently broad to cover its city-wide activities, will be organized by the Brooklyn Rapid Transit Company to take

its part in the plan proposed. The Interborough Company is prepared to proceed under its present organization.

Routing Terms

Your Committee and the Public Service Commission, as well as the representatives of the Interborough Rapid Transit Company and of the Brooklyn Rapid Transit Company, have agreed upon the determination of the new lines to be allotted to the respective operators, and upon the extension and improvement of certain existing lines, as follows:

Lines to be Operated by the Interborough Rapid Transit Company and to be Constructed from Funds Furnished Jointly by the City and the Operator in the Proportions Hereinafter Indicated

(1) A four-track subway proceeding southerly from Times Square under Seventh Avenue to Varick street, [fol. 1629] West Broadway and Greenwich street to Park place, thence as a two-track subway under Greenwich street to the Battery.

(2) A two-track subway proceeding from Greenwich street through Park place, Mail street or the City Hall Park and either Spruce or Beekman street to William street, thence through William street to Hanover Square and Old Slip and under the East River to Clark street in Brooklyn, thence along Clark and Fulton streets to a connection with the present Interborough line at Borough Hall.

(3) A four-track subway from the terminus of the existing Interborough system at Atlantic avenue, Brooklyn, under Fatbush avenue to Prospect Park Circle, and thence under the Eastern Parkway to Buffalo avenue.

(4) A two-track subway running southerly from the Eastern Parkway under Nostrand avenue to Flatbush avenue.

(5) A two or three-track elevated line running easterly from the Eastern Parkway by way of East Ninety-eighth street and Livonia avenue, through the Brownsville District, to New Lots road.

(6) A four-track subway line proceeding from Park avenue—at some point between Thirty-second and Forty-second streets—to Lexington avenue; thence under Lexington avenue and the Harlem River to about One Hundred and Thirty-fifth street in The Bronx; thence via Park avenue, private property and Mott avenue with three or four tracks to a point of connection with the West Farms Division of the present subway at One Hundred and Forty-ninth street, thence three tracks, part subway and part elevated, to One Hundred and Sixty-second street and River avenue.

(7) A three-track subway diverging from the Lexington avenue line at or about One Hundred and Thirty-fifth street in The Bronx; running thence under private property and through One Hundred and Thirty-eighth street to Southern Boulevard, thence under Whitlock avenue to Westchester avenue and thence as a two-track and three-track elevated line through Westchester avenue to Pelham Bay Park.

(8) A three-track elevated line from the junction of One Hundred and Sixty-second street and River avenue via River and Jerome avenues to Woodlawn road adjoining Woodlawn Cemetery.

(9) A two and three-track elevated line proceeding from a connection with the West Farms division of the present subway in Boston road, near One Hundred and Seventy-ninth street, thence over private property and intersecting streets and along the west side of the New York, Westchester & Boston Railway to White Plains avenue, and thence via White Plains avenue to a projected terminus at Backer avenue, near the City line.

(10) A two-track subway line running easterly under Forty-second street, from Times Square to a point of conjunction with the Belmont tunnel at the Grand Central station.

(11) The Belmont tunnel, continued as a two-track subway and elevated line through and over the Sunnyside Yard of the Long Island Railroad Company, thence as a two and three-track elevated line curving into Davis street, Long Island City, thence via Davis street and Ely avenue, Wil-

[fol. 1700] liam street and such private property as may be necessary to Queensboro Bridge Plaza.

(12) A two and three-track elevated line from the Queensboro Bridge Plaza via Jackson avenue, Long Island City, and Debevoise avenue to Ditmars avenue in Astoria.

(13) A two and three-track elevated line from the Queensboro Bridge Plaza to Jackson avenue, Long Island City, and Diagonal street; thence via Diagonal street, Thompson avenue and Greenpoint avenue to Woodside, and to Sycamore avenue in Corona.

Lines to be Operated by the Brooklyn Rapid Transit Company or by a Company to be Organized in its Interest

(A) To be Constructed from Funds Furnished Jointly by the City and Operator in the Proportions Hereinafter Indicated

(1) A two-track subway line from Whitehall street at the Battery in Manhattan, through Whitehall and Morris streets, Trinity place, Church and Vesey streets to Broadway; thence as a four-track subway in Broadway to Forty-second street, and from Forty-second street through Seventh avenue to Fifty-ninth street; thence as a two-track subway through Fifty-ninth and Sixtieth streets to the Queensboro Bridge and by two tracks over the bridge to a point of connection with the lines converging at Queensboro Plaza in Long Island City.

(2) A two-track tunnel line from Whitehall street at the Battery under the East River to Montague street, Brooklyn; thence under Montague street to the Borough Hall; under Borough Hall Square and Fulton street to Willoughby street, and under Willoughby street to a point of connection with the Fourth avenue subway in Flatbush avenue.

(3) A two-track subway from a point of connection with the Fourth avenue subway tracks in Fulton street, Brooklyn, through St. Felix street and under the station of the Long Island Railroad Company to Flatbush avenue, at about Fifth avenue; thence through Flatbush avenue to Prospect Park Circle, and thence to a point of connection

with the tracks of the Brighton Beach line at Malbone street.

(4) A two-track subway in Canal street, Manhattan, connecting with the tracks of the Manhattan Bridge line and proceeding westerly to a point of physical connection with the Broadway line at Canal street and Broadway.

(5) The completion of the Centre Street Loop Line to the Brooklyn Bridge, and an extension of two tracks from the said loop southerly through Nassau street and Broad street to a point of connection with the East River tunnel at Whitehall street.

(6) The completion of the Fourth avenue subway and its extensions to Eighty-sixth street, Brooklyn, such extension to carry four tracks from Fortieth street to Sixty-fifth street, and two tracks from Sixty-fifth street to Eighty-sixth street, with provision for a connection at or about Sixy-fifth street with the proposed tunnel line to Staten Island, and with the tracks of the Sea Beach Railway.

(7) An extension of the Fourth avenue subway from Fourth avenue and Thirty-eighth street, Brooklyn, through [fol. 1701] the property of the South Brooklyn Railroad Company to about Tenth avenue as a subway, thence by a three-track elevated line over Tenth avenue and New Utrecht avenue to a point near Eighty-first street; thence over private property to Eighty-sixth street and thence over Eighty-sixth street and Stillwell avenue to Surf avenue, Coney Island.

(8) A three-track elevated line from a point near Thirty-eighth street and Ninth avenue, Brooklyn, over the line of the present "Culver Route"—that is, over private property to Gravesend avenue, over Gravesend avenue to about Avenue X, and thence over Shell road to Surf avenue, Coney Island.

(9) A two-track subway from Sixth avenue and Fourteenth street, Manhattan, through Fourteenth street and under the East River to North Seventh street, Brooklyn, thence through Metropolitan and Bushwick avenues to Johnson avenue, thence as a two and three-track elevated line over Johnson avenue and private property to Wyckhoff

avenue, and over Wyckoff avenue and private property to a point of connection with the Broadway elevated line at Broadway and East New York.

(10) A two-track subway and tunnel route to be laid out from a point in the Fourth avenue subway, near Sixty-fifth street in Brooklyn, along, under or near the line of Sixty-fifth street and under the Bay to a point on Staten Island, near the foot of Arrietta street, with spurs to Saint George and Stapleton.

(B) To be constructed by the Operating Company at Its Own Expense, but Title to Vest in the Company, Subject to Terms of Recapture by the City

(11) A two-track extension of the Brighton Beach elevated line from the intersection of Fulton street and Franklin avenue through Greenpoint and Long Island City to the Queensboro Bridge Plaza, there connecting with the lines to Astoria and Corona.

(12) A two-track elevated line to Jamaica, with privilege of three tracks, running from the present termination of the Cypress Hill elevated by way of Jamaica Plank road to Grand street.

(13) A two-track elevated line, with privilege of three tracks, from the present termination of the elevated tracks in Liberty avenue, at a point near the old Brooklyn City line, through Liberty avenue to about Lefferts avenue, Richmond Hill.

(C) Third Tracking or Reconstruction of Existing Lines at the Expense of the Operator, Subject to Recapture by the City

The third tracking of the Fulton Street elevated line from Brooklyn Bridge to East New York; the Broadway line from Williamsburg Bridge to East New York, with the privilege of extending either of said third tracks to the present terminus of such lines; and the third tracking of the Myrtle avenue line from Broadway to Ridgewood, with a physical connection between the Myrtle avenue and Broadway tracks.

[fol. 1702] (D) Reconstruction of other Improvements of Existing Lines—for the Purpose of Eliminating Grade Crossings and Generally Facilitating Rapid Transit—at the Expense of the Operator

(14) Reconstruction of the Sea Beach line from a connection with the Fourth avenue subway at Sixty-fifth street to Coney Island, such line to carry either two or three tracks where necessary and to be depressed or elevated as may be found practicable.

(15) (a) Provision for two additional tracks on the Brighton Beach line from Malbone street to Church avenue, thus continuing the four-track line of this road to a point of connection with the subway in Flatbush avenue; and (b) the removal of grade crossings on the Brighton Beach line through the elevation of two of the existing tracks and the addition of two other tracks between Neptune avenue and the new terminal at Coney Island.

(16) Removal of grade crossings for rapid transit service on the Lutheran Cemetery line, between Ridgewood and Fresh Pond road, by elevation of two tracks, with connections at Ridgewood with existing elevated structures.

(17) The establishment of a comprehensive elevated terminal at Coney Island, upon private property and across intersecting streets, between the Culver and West End terminals, and with connecting tracks to enable the use of such terminal facilities by the Brighton Beach and Sea Beach lines and by the city-owned lines in New Utrecht avenue and Gravesend avenue.

(18) Installation of additional tracks to facilitate the connection of the various elevated lines converging at East New York.

Interchange of traffic rights:

(19) The right is reserved to the City to grant trackage rights over the following sections of the enlarged system, on a basis which shall be equitable to each operator exercising such rights:

(a) Between the Interborough Company and its successor or successors in the operation of either subway or

elevated lines over the Jerome Avenue line and the White Plains Road extension in The Bronx; and

(b) Between the Interborough and the Brooklyn Companies or the successors of either over the lines to Astoria and Corona, converging at the Queensboro Bridge Plaza.

(20) All of the new routes proposed for either system have been either completely legalized, or approved by the Public Service Commission and transmitted for the action of your Board and of the Mayor, as a preliminary to legalization, except:

(a) The extension of the Seventh Avenue line through Park Place and Beekman street in Manhattan to the Wall street district and Brooklyn Heights, where the formal consent of the Federal authorities for a curve under the post office building is still to be secured; and

(b) The route from Bay Ridge to Staten Island, the exact line of which will depend upon surveys now being made.

Third Tracking and Extensions on the System of the Manhattan Elevated Railways Company, to be Operated by the Interborough Rapid Transit Company

[fol. 1703] (1) The completion of the third track of the Second avenue line from City Hall station to One Hundred and Twenty-ninth street; and of the Third avenue line from City Hall station to One Hundred and Twenty-ninth street and the Harlem River, with the necessary track changes to abolish grade crossings at Chatham Square; the construction of a four-track bridge across the Harlem River and a four-track line between the Harlem River and One Hundred and Forty-ninth street in The Bronx with the extension of the third track thence to One Hundred and Forty-seventh street, with the privilege of thereafter extending such third track to the present terminus of the Third avenue line at Bronx Park; and the completion of the third tracking of the Ninth avenue line from Rector street to One Hundred and Fifty-fifth street.

(2) The construction of a two-track elevated line from about One Hundred and Fifty-seventh street and Eighth avenue across the Putnam Railroad bridge over the Har-

lem River; thence over the right of way of the New York Central & Hudson River Railroad and private property; thence as a tunnel under private property and One Hundred and Sixty-second street, emerging as an elevated structure in One Hundred and Sixty-second street near Jerome avenue, and thence over One Hundred and Sixty-second street to River avenue and to a point of connection with the elevated structure of the Jerome avenue extension of the Lexington avenue subway.

(3) A two-track elevated extension from the Third avenue line at about One Hundred and Forty-third street over private property and Willis avenue and Bergen avenue to a point of connection with the West Farms division of the subway at or about Park avenue.

(4) A two-track extension from the Third avenue line at Fordham avenue through Webster avenue, Gun Hill road and White Plains avenue to a point of connection with the Becker avenue extension of the subway in White Plains road.

(5) A two-track extension from the Second avenue line at Fifty-ninth street across the Queensboro Bridge to a point of connection with the elevated and subway lines converging at Queensboro Bridge Plaza.

Operating Terms

The operating and financial terms proposed for the contracts under consideration have been revised in various particulars, and at various times, since the joint report of the Conferees to the Board of Estimate and Apportionment. It will, no doubt, aid the Board in its consideration of the whole matter and afford a more definite basis for its present action, if these terms are restated. They are as follows:

Terms applying to either operating company—Rate of fare:

(1) The rate of fare for one continuous ride over any part of the system operated by either operator, including transfers, is to be five cents.

[fol. 1704] Terms of leases:

(2) All contracts for the operation of lines in either system title to which is vested in the City, whether such lines be constructed by the City or by the operating company, or upon a basis of division of cost between the City and the company, are to fix the term of the lease at forty-nine (49) years from the beginning of operation; except that the so-called Centre street loop lines in Manhattan with the extension thereof in Nassau and Broad streets and the necessary tracks on connecting bridges may be leased for twenty (20) years with the privilege of renewal, upon an adustment of terms, for twenty (20) years in addition.

(3) All franchises granted for extensions of existing elevated railroads, or for additional tracks on such elevated railroads, title to which is to vest in the company, but subject to recapture by the City, will be for eighty-five (85) years from the time such extensions or additional tracks are put into operation.

Provision for recapture:

(4) The City will retain the right to take over at any time after ten years of operation, if it so elects, the line or lines covered by any forty-nine year operating contract title to which is vested in the City, upon payment to the operating company of

(a) The amount of the company's money investment, if any, in either construction, or equipment, plus fifteen (15%) per centum—which aggregate sum shall decrease gradually—and less the amount accrued in any sinking fund created for amortization of the company's investment, and of any deferred maintenance charges with respect thereto, and as the term continues, so that at the end of the contract, the investment shall have been completely amortized and the lines become the property of the city without further payment;

(b) The unamortized amount of brokerage charges as hereinafter defined.

(5) The City, in the event of any such recapture, may, upon its option, either

(a) Pay from its own funds the amount required to reimburse the operator; or

(b) Transfer or assign any of the lines to a second operator upon direct payment by such second operator to the original operating company of the amounts unamortized and remaining due on account of its investment.

(6) The contracts are to provide that if the City shall at any time exercise its right to recapture either one or all of the groups described under the heading of routing terms, the pooling arrangement for determining the amount of compensation to be paid respectively to the City and the company shall, at the option of either party, be readjusted; the respective compensation reserved to either party from the results of operation of the lines remaining in the pooling arrangement to be such as they shall agree upon, or, in the case of their failure to agree, such as shall be determined by arbitration in a manner to be prescribed in the contract.

[fol. 1705] Construction:

(7) The contributions of capital furnished by either Operator toward the payment of the cost of construction are to be apportioned to particular lines or groups of lines subject to recapture, so as to afford a basis for proper financial adjustment between the Operator and the City in case such lines are at any time retaken.

(8) The cost of construction, whether borne by the City or by the operating Company, or upon a basis of division between the City and the Company, is to be the actual money cost and will include:

(a) All contracts for original construction work, and all labor and materials entering into such construction, including roadbed, tracks and station finish;

(b) Engineering expenses, including those of the Public Service Commission directly chargeable to construction work;

(c) All carrying charges during construction;

(d) Extras and damages;

(e) Real estate and easements;

(f) Such other incidental charges as may be agreed upon.

(9) It is understood that, subject to its necessary uses for transit purposes, the City may sell, lease or otherwise dispose of the surface of any real estate required for con-

struction purposes, the proceeds of such sale to be credited towards the reduction of the construction cost account.

(10) It is also understood that any incidental fee damages allowed by the courts for rights of way in acquiring streets and public places shall be paid from the City's general fund and not from the subway construction fund.

(11) The several lines embraced within either system are to be constructed according to the plans of the Public Service Commission, and under contracts to be duly awarded for the City in the manner prescribed by law, after public bidding, and to responsible contractors.

The construction of the several lines is to proceed in the manner determined by the Public Service Commission, due regard being given to the necessity for relieving first those sections where present traffic is most congested, and for the letting of contracts in such order that those requiring the longest periods of construction shall, so far as practicable, be given precedence.

Cost of equipment:

(12) The cost of equipment, all of which is to be furnished by the operating company, will be the actual cost, and will include:

(a) All equipment for the supply and transmission of power, all cars, yards, and yard terminals, third rail, signals and interlocking, and such other supplies, materials or labor coming under the head of equipment as defined in the contract;

(b) The cost of acquiring all necessary real estate or of interest therein;

(c) Engineering expense;

[fol. 1706] (d) All carrying charges on the cost of equipment prior to the operation thereof; and

(e) Such other incidental charges as may be agreed upon.

Pooling of receipts and payments therefrom:

(13) When the new subway and elevated lines shall have been equipped and put into operation, the gross receipts from the operation of all the lines, either subway or elevated, to be operated under the contract, are to be pooled

for and during the full term of forty-nine (49) years, and from the total of such gross receipts deductions shall be made in the following order:

(a) To the Operator: All operating expenses, including damages for accidents, provision for depreciation, renewals and obsolescence, taxes and other governmental charges, insurance, general and administration expenses, rental of leased lines or other properties, if any, used in operation, and amortization of brokerage charges; it being understood that brokerage charges are not to exceed three (3) per centum of the amount of the investment by the Operator in the cost of construction and equipment; and it being further understood that no charges under any of the foregoing headings shall be thus deducted that are in any way different from or additional to the charges deducted by the operating companies in the process of determining their present net earnings as referred to in the clause following:

(b) To the City: An amount equivalent to the rental, if any, payable under existing subway contracts at the date of the beginning of general operation under the pooling arrangement;

(c) To the Operator: A sum representing the average net earnings from the operation of the existing subway and elevated lines and equipment to be included within the pooling arrangement. The amount thus reserved to the companies is to be the amount of the earnings after the payment of operating expenses. From it, however, the companies are to pay all interest, sinking fund and other fixed charges upon their present investments of capital. The process of determining the amounts to be allowed each company in lieu of present net earnings will be as hereafter stated in the clauses relating specifically to each.

(d) To the Operator: A sum equal to six (6%) per centum per annum upon the investment of the operator in construction or equipment after the date of the contract, of all lines covered by the contract, where such investment is made prior to the beginning of general operation; and actual interest charges plus an additional one (1%) per centum for sinking fund upon such additional expenditures as the Operator may from time to time make after the beginning of operation for betterments or improve-

ments in construction or for equipment chargeable to capital account;

(e) To the City: A sum equal to the actual interest charges plus an additional one (1%) per centum for sinking fund upon the bonds it issues to provide for the construction of new lines (with such further sum, in the case of the lines to be operated by the Interborough Company, as is hereinafter set forth);

[fol. 1707] (f) To the City: Actual interest and sinking fund charges at the rate of one (1%) per centum per annum upon such bonds as it may issue to cover its share in betterments or improvements upon either the old or the new lines under the pooling arrangement, wherever chargeable to capital account.

(g) The remainder of the earnings and profits after the foregoing deductions to be divided between the City and the Operator share and share alike.

(14) It is understood that if deficiencies arise in any year in meeting the aforesaid payments to the Operator, such deficiencies shall be treated as cumulative and shall be paid off and discharged annually so far as possible out of future receipts before payments are made to the City.

In the same manner, deficiencies arising in any year in meeting the aforesaid payments to the City will be treated as cumulative and paid off and discharged annually out of future profit when available before any equal division of clear profit becomes effective.

Operating expenses:

(15) The classification and character of operating expenses under either contract is to be that prescribed by the Public Service Commission and in the event of any dispute arising with regard to either the character or the amount of specific items charged to operating expenses, either the company or the city shall have the right to review the question at issue through an appeal or certiorari to the Appellate Division of the Supreme Court.

Commencement of operation and provision for the lines ready for operation in advance of pooling:

(16) It is understood that the date from which the new leases will run shall not be later than four (4) years from

the time that formal contracts are entered into between the City and the operating companies; unless strikes, injunctions or other causes beyond the companies' control prevent the opening of the new lines within such period; in which event an allowance of time corresponding to the period of delay shall be added.

(17) In the event of the completion of any substantial portion of the new lines in advance of operation under the pooling arrangement, such lines may be leased upon a temporary basis from such times as they are ready for operation until the beginning of the forty-nine year periods; or the gross receipts from the operation of present subway or elevated lines may be pooled with the gross receipts from the operation of such newly built portion, and the receipts so pooled distributed in the proportion to which the new lines bear to the whole system, in the same general manner as that provided for the ascertainment and the distribution of receipts from the operation of lines under the clause relating to extensions.

(18) It is understood that out of the sums which the operating company receives as aforesaid, it will pay all charges for interest, as the same become due, and provide [fol. 1708] sinking funds sufficient to retire and to pay off at maturity the principal of its original investments in either construction or equipment. If, however, at the termination or taking over of any lease, there remains any unamortized portion of the investments of the Operator for construction, betterments or improvements of the lines, or for betterments or improvements of or additions to the equipment, such unamortized portion is to be assumed by the City.

Extensions:

(19) Each contract is to contain a clause under which the Operator will agree to operate lines additional to those included in the present plan, as part of the single fare system, whether such lines be built now or hereafter, upon the following conditions:

A separate account shall be kept of the gross earnings of any such extension or extensions, to be ascertained from the value of the tickets collected at the stations on such extensions and any other miscellaneous revenues derived

from such stations. From the gross earnings thus ascertained, there shall be deducted:

First. (a) All station expenses;
(b) Maintenance of way and structure;
(c) Damages from accidents happening on the division.

Second. Other operation costs, to be determined according to the unit costs on the system, upon a per-passenger basis:

(a) Conducting transportation;
(b) Maintenance of equipment and depreciation;
(c) Cost of power;
(d) General and administration expenses;
(e) Taxes, if any.

After the payment of these charges, the Operator will receive the actual annual charges for carrying the cost of such equipment as may be necessarily and properly allotted to the extensions, together with the proper sinking fund thereon.

From the balance then remaining, there shall be paid interest and sinking fund upon the bonds issued by the City to defray the cost of construction.

If the income from the operation of the extension shall be insufficient to meet these several charges or any part thereof, deficiencies shall be paid annually by the City either from its portion of the earnings of the entire system or from such other sources as it may determine.

The net profits remaining after provision has been made for the foregoing charges will be divided equally between the City and the Operator; but when any of the extensions shall become profitable and when all deficiencies attributed to the operation of the particular extension shall have been fully paid and discharged, such extension shall, beginning on July first of the year following, be operated as a part of [fol. 1709] the general system and be governed by all of the provisions applying thereto.

Examination of existing properties:

(20) Provision will be made in the contracts for the examination by the Public Service Commission of the physical condition of the plant and equipment of the present systems, both subway and elevated, before they are taken

over for operation under the pooling arrangement, so that the City may definitely assure itself that the property has been properly and adequately maintained; and any expenditures deemed necessary by the Public Service Commission to cover any deferred maintenance or depreciation in either plant or equipment shall be made by the companies before the pooling of receipts proceeds, either out of surplus, reserves or current earnings as the company may elect.

Maintenance and operation:

(21) The contracts will contain provisions embodying substantially the essentials of the Public Service law with relation to both operation and management, together with such added and reasonable guarantees as the City may require with relation to the character and sufficiency of the equipment to be furnished and of the service to be given.

(22) The Public Service Commission will also exercise its right to supervise all accounts of the operating companies with relation either to construction, equipment or operation and to audit all accounts upon which the deductions of receipts and expenditures and the determination of the City's share in profits are based.

(23) Provision will also be made that the management of the enlarged system covered by either contract shall be conducted by one company; and, without the consent of the City, no lease, transfer or assignment, in whole or in part, of any of the rights granted by the City shall be made, nor any subsidiary company be created to operate or maintain either the whole or any part of the enlarged system or to furnish to it power, supplies or any other operating necessity.

Terms Applying to the Interborough Company

Levelling of leases:

(1) The existing leases of the City to the Interborough Company under which the original subway from Ann street northward, in Manhattan, and the Brooklyn extension from Ann street in Manhattan to Atlantic avenue in Brooklyn, are operated, together with a right to renewal terms there-

under, are to be levelled so that the leases of the existing subway shall be coterminous with leases to the Interborough Company for the operation of the new lines.

Exchange of Manhattan lines:

(2) The City will be given the right if it so elects to obtain possession of either a complete East Side or a complete West Side subway line in Manhattan. To this end the Interborough Company will consent, provided that "the lien of any duly authorized mortgage be not disturbed," [fol. 1710] to modify contracts numbers 1 and 2, under which the existing subways are operated, so that either portion of the present subway extending southward from Forty-second street in Manhattan to Atlantic avenue in Brooklyn, or that extending northward from Forty-second street in Manhattan to The Bronx, shall be held under a lease terminable at any time after ten years from the beginning of operation of the proposed Seventh Avenue or Lexington Avenue Line, upon receiving as compensation therefor the right to hold either the proposed Seventh Avenue Line from Times Square southward to the Borough Hall in Brooklyn or the proposed Lexington Avenue Line with its extensions from Forty-second street in Manhattan northward under a non-terminable lease for forty-nine years from the date the pooling arrangement of the new and old lines commences; the differences in values upon such an exchange to be adjusted by agreement between the City and the company, or, if they cannot agree, to be fixed by arbitration upon terms and conditions to be agreed upon.

Recapture:

(3) The Interborough Company agrees that the City's right of recapture after ten years shall be exercised with respect to the whole system of new lines now to be built or to any one or more of the separate groups of lines coming within the system hereinbefore specified under the general head of "Recapture."

The company also agrees that if the City take over the new lines after a period of ten years from the beginning of operation, it shall have the right to take over as well,

at any time after thirty-five years, the lines of the present subway upon payment to the company of a sum equal to the then present worth of the unexpired portion of the company's leases under Contracts 1 and 2, estimated upon the basis of the annual profits for the five-year period immediately preceding such recapture, or, if the period of final amortization has been passed, then for the five years immediately preceding the completion of amortization.

Expenditures for construction and equipment:

(4) The investment of the Interborough Company in the new lines to be added to its system, and in the equipment therefor, is to be not less than $77,000,000; or $56,000,000 for construction and $21,000,000 for equipment; so that with the company's capital investment in the present subway, aggregating on June 30, 1911, approximately $48,000,000, its total investment shall be $125,000,000.

(5) If less than $21,000,000 is required to equip the company's new lines to meet the requirements of the first year of operation, the amount of the difference is to be added to the fund the company will expend for construction.

(6) If more than $21,000,000 be required to provide the equipment necessary to meet the requirements of the first year of operation, the company is to furnish the excess and upon this it will receive annually during the period of forty-nine years in the order defined in paragraph (e) of [fol. 1711] section 13 of the general operating terms sums equal to the actual cost of such additional capital for equipment plus a sinking fund therefor of not exceeding one (1) per centum per annum.

(7) When further outlays chargeable to capital account are required for betterments or improvements in the construction of either the old or new lines, such capital is to be furnished share and share alike by the city and the company. Capital required for betterments or improvements in equipment, chargeable to capital account, or for additional equipment, will be furnished by the company alone.

(8) The company is to contribute all of its right, title and interest in the Belmont tunnel—representing an outlay on its part of $8,500,000—at a nominal valuation of

$3,000,000; this to be accepted as part of its half in the construction cost of the entire system.

(9) The company will also accept as part of the city's half of the cost of construction all of the contracts already let for sections of the subway in Lexington avenue.

Amortization of new equipment:

(10) The equipment of the existing subways owned by the company is to be taken over by the city in the manner provided for under the present contracts between the City and the Interborough Company at the termination of the new forty-nine (49) year lease, the city paying to the company its then value. All new equipment for the operation of the enlarged system, covering both old and new lines, is to be amortized through the sinking fund and its accretions and become the property of the city, without further payment, at the end of the lease.

Pooling of receipts and payments therefrom:

(11) The manner of determining the amount to be reserved to the company on account of the earnings of the present subway lines is to be as follows:

After the deduction of operating expenses as hereinbefor defined, and after the deduction of the amount of the rental to the city for the present subway, the Interborough Company is to receive from the gross receipts of its expanded system for each of the forty-nine (49) years of its lease a sum representing the average annual income from the operation of the existing lines for the two fiscal years ending June 30, 1911—which is $6,735,000. This sum is to be reserved not only as a equivalent of present earnings, but "as compensation for the pooling of the receipts of the old lines and the new; the levelling of leases of the existing subway and the exchange of the legs; for services in connection with the operation of the property and for the company's agreement to furnish * * * one-half of the cost of the construction of the proposed new subways and the entire cost of the equipment therefor."

(12) The payment of interest and sinking fund charges upon new investment will follow in the manner prescribed by paragraphs — and — of the general operating terms.

[fol. 1712] Terms Applying to the Brooklyn Company

Expenditures for construction and equipment:

(1) The Brooklyn Company is to expend not less than $13,000,000 upon the construction of the city-owned lines in its system, this investment to be apportioned to the elevated extensions of the Fourth avenue subway in South Brooklyn, the Flatbush avenue connection with the Brighton Beach lines and the Canal street connection with the Manhattan Bridge.

(2) The Company will expend approximately $21,000,000 upon the extension and improvements in its own elevated system, and $26,000,000 for the equipment of the combined lines it is to operate.

Pooling of receipts and payments therefrom:

(3 The lines operated by the Brooklyn Company, the receipts from the operation of which are to be pooled, will include all of the City lines to be allotted to the company under the general heading of routing terms, the Sea Beach line from Fourth avenue in Brooklyn to Coney Island, and the existing lines of the Brooklyn Union Elevated Railroad Company and the Canarsie Railroad Company (including trackage rights over the Brooklyn and Williamsburg Bridges), with the enlargements and extension also enumerated under the heading of routing terms.

(4) The manner of determining the amount to be reserved to the company on account of the earnings of its present lines is to be as follows:

After the deduction of operating expenses as hereinbefore defined, the Brooklyn Company is to receive from the gross receipts of its expanded system for each of the forty-nine (49) years of its lease a sum representing the average annual net earnings from the operation of the lines and stations of the Brooklyn Union Elevated Railroad Company, the Canarsie Railroad Company and the Sea Beach Railway Company during the four years preceding the June thirtieth next before the date of the beginning of pooling, such average to be ascertained in either one of the following two ways:

(a) An amount equivalent to forty per cent. of the average of the revenue from operation of existing lines and stations during the four years preceding the operation of the Broadway line in Manhattan; in no case, however, to exceed $3,500,000; or

(b) The receipts from the operation of existing lines and stations plus the receipts at the Manhattan terminals of the Brooklyn and Williamsburg bridges during the year prior to the beginning of operation in Manhattan beyond the present terminal, less the operating expenses computed upon the per passenger basis; such balance not to exceed in any year $3,500,000 nor to be less than the net earnings of the Brooklyn Union Elevated Railroad Company for the year ending June 30, 1911.

The net operating income of the lines in question for the year ending June 30, 1911, amounted to $3,211,723.

If the earnings of the Sea Beach Railway Company be included, a corresponding allowance would be made.

[fol. 1713] (5) It is understood that the pooling of receipts of the lines to be operated by the Brooklyn Company shall not proceed until the Broadway line from the Battery to Queensboro Plaza and the line connecting Manhattan Bridge and Broadway through Canal street have been completed and turned over for operation; or until such later time, within four years, as the Public Service Commission may determine.

Recapture:

(6) The company agrees that the City's right of recapture after ten years shall be exercised with respect either to the whole system of new City owned lines now to be built —with the exception of the loop lines through Centre, Nassau and Broad streets—or to any one or more of the separate groups of line hereinafore specified under the general heading of "Recapture."

(7) If the City should exercise its right to terminate the contract as to all of the City-owned lines excepting the loop through Centre, Nassau and Broad streets before the expiration of twenty years from the beginning of pooling, the company would continue to equip, maintain and operate the said loop lines under the general provisions of the

contract except that the rental therefor, after such termination, and for the remainder of the lease, will be such as the original contract may prescribe.

(8) In the event of recapture by the City of the lines essential to the operation of the trains of the Brighton Beach road into Manhattan and should not recapture the connecting link between the Brighton Beach road and the Flatbush avenue extension, it is understood that sufficient trackage rights will be reserved to the Brooklyn Company for entrance to Manhattan over the lines the City retains.

(9) The City is to retain the right of recapture, after ten years, of all the elevated extensions, title to which remains vested in the company, and of all the equipment attaching thereto. The City will also retain the right to retake any of the additional tracks placed upon existing elevated structures in and along the public streets or places at any time after ten years; though not for railroad transit operation, either by itself or by any other party.

(10) In the event of the recapture either of additional tracks or of elevated extensions, the City will make payments therefor in the same manner as in the case of the recapture of lines covered by the forty-nine year contracts.

(11) The cost of additional tracks or extensions, together with the equipment therefor, it to be amortized during the life of the contract, so that at the termination thereof they will become the property of the City without further payment therefor, except as to unamortized portions of additions, betterments or improvements added during the life of the contract.

[fol. 1714] Terms Applying to the Manhattan Elevated Lines

Rates of fare:

(1) The rate of fare over any part of the Manhattan elevated system with its proposed extensions is not to exceed five cents.

Length of lease:

(2) The franchise for the construction of additional tracks upon the structure of the Manhattan Elevated Com-

pany are to be embodied in a certificate issued to the Manhattan Company, for a term of twenty-five years with three renewal periods of twenty years each for the purpose of readjustment of rentals. The right of recapture is to accrue to the City either upon the termination of the ten-year period or at the termination of the franchise; but not for railroad transit operation, either by the City itself or by any other party.

(3) The franchises for the elevated extensions are to be embodied in a certificate issued to the Interborough Company, for a term of eighty-five years from the time the extensions are put in complete operation. Both the extensions and equipment attaching thereto are to be subject to recapture by the City at any time after ten years upon the same terms applicable to the subway lines. If, however, either the White Plains or the Jerome avenue extensions shall be taken over by the City at any time under the recapture clause, trackage rights will be reserved to the company over these lines in order to enable it to reach any terminals, storage yards or shops located upon such extensions and used for its purposes.

Compensation to the city:

(4) The compensation for the third tracking franchises is to be not exceeding two per cent. (2%) of the increased gross receipts of each station served by express trains. As soon, however, as the elevated extensions, as well as the third-tracking improvements, have been constructed and placed in complete operation, the gross receipts from these are to be pooled with the gross receipts of the present lines, including the third-tracking and other improvements; and from the receipts so pooled, and after the deduction of rentals, operating expenses and the two per cent. franchise tax referred to, the company is to pay to the City fifty per cent. (50%) of all increase of net revenue above its present earnings. The average of the net operating receipts of the present system for the two years ending June 30, 1911, is to be the sum thus allowed.

(5) If in any year the receipts or profits of the company from the operation of the enlarged system are less than the average of the receipts of the present system for the

two years referred to, the deficiencies so occurring are to be treated as cumulative and as a charge to lie against future profits before the even division with the City proceeds.

[fol. 1715] Extent of the New System

The magnitude of the proposed new system may be indicated by the fact that the total road mileage of rapid transit routes, subway and elevated, now serving the city— exclusive of the Hudson & Manhattan lines—will be increased from 66.9 to 172.4. The increase in the mileage operated by the Interborough Company will be from 25.9 to 74.4; and in the mileage operated by the Brooklyn Company from 41 to 98. These increases, with the increases of track mileage, and the division between subway and elevated lines, shown in detail, are as follows:

	Road, miles	Track, subway	Track, elevated	Total track
(1) Interborough Company:				
Company's present lines	25 9	56 1	16 9	73
New—built jointly by city and company	48 5	75 6	71 5	147 1
	74 4	131 7	84 4	220 1
(2) Brooklyn Company:				
Company's present lines	41 04		104 9	104 9
New—built by the company	30 14	1 6	84 1	85 78
New—built jointly by city and company	26 9	69 9	6	75 96
	98 08	71 5	195	266 64
(3) Contensed dual system:				
Present lines	66 94	56 1	121 8	177 9
New lines	105 54	147 16	161 68	308 84
Totals	172 48	203 26	283 48	486 74

The benefit following this expansion of lines will be extended to all parts of the city.

Manhattan will secure the completion of the so-called "H" system, through which a continuous line north and south will traverse the length of the Island on the east as well as on the west side, instead of leaving it as at present with half a line on each. The Lexington Avenue line, through which direct transit to the Bronx will be shortened by many minutes, will incidentally open to development one of the most promising areas of the east side. The great lower west side district, which will shortly be opened through the extension of Seventh Avenue southward, with the subway running beneath, will also be given new life.

The Pennsylvania Railroad station, entering the city in this section, will be placed in touch with lines of communication reaching every borough. The service given the rapidly growing districts of the upper West Side and Washington Heights will be considerably aided through the lessening of the pressure of the Bronx traffic, all of which now runs into the present main line at Ninety-sixth Street.

The City Hall and Wall Street districts will be tapped by five great lines instead of one. The William Street and Hanover Square line, rounding the post office from Greenwich Street, will bring the West Side into immediate touch with the financial district, and proceeds to the now neglected area of Brooklyn Heights. The Church and Nassau [fol. 1716] Street lines of the Brooklyn system, while giving two more avenues of access to Brooklyn, will at the same time put lower Manhattan in closer touch with its theatre and hotel district through the express service on Broadway. The third tracking of the elevated lines will add to the convenience and facility not only of the long haul but of the short distance traffic in all parts of the Island.

Brooklyn will gain greatly in the articulation of its forty miles of existing elevated road with all of lower and central Manhattan through the Broadway line, and through the third tracking and general improvement of practically all of its present rapid transit lines. It will be served, in reality, by two great loops; the one proceeding by way of Broadway and Seventh Avenue to Fifty-ninth Street and Long Island City, with connections both at the Battery and by way of Manhattan Bridge, and the other by way of the Williamsburg and Brooklyn Bridges through the Centre, Nassau and Broad Street Loop, back to Borough Hall. It is understood that the Centre Street section of the Bridge Loop line can be placed in operation within sixty days after the signing of the pending contracts.

Flatbush Avenue will have a subway of six tracks; four traversing the Flatbush and Eastern Parkway district, with branches through Nostrand Avenue and to Brownsville, and two tracks linking the present Brighton Beach lines with the Manhattan Bridge.

South Brooklyn will secure the extension of the Fourth avenue subway as far as Eighty-sixth Street, as well as the linking of the subway with the new elevated lines that are to replace the present lines of the old steam roads and cross the broad territory of New Utrecht and Gravesend, as well as the section along the Narrows, to Coney Island.

The entire city below Fifty-ninth Street will receive the benefit of the five cent fare to Coney Island.

The Eastern District of Brooklyn will gain a new subway and tunnel line from the Bushwick Station to Sixth Avenue and Fourteenth Street in Manhattan, with transfers to the intersecting lines in both boroughs, and a connecting elevated service from Bushwick eastward to Ridgewood and East New York. It will secure also the third tracking of the Broadway elevated line, passing through its chief business district and across the Williamsburg Bridge, running directly to the Wall Street district in Manhattan and transferring north; also the third tracking of the Fulton Street and Myrtle Avenue lines westward to the Brooklyn Borough Hall. From the Queensboro Plaza in Long Island, across Newtown Creek and through Greenpoint and Williamsburg, a new elevated line will run to a point of connection with the Brighton Beach road, thus furnishing a new highway of travel, through both Brooklyn and Queens, running literally from the South to the Sea.

The Bronx will secure practically three new lines; those on Southern Boulevard and Westchester Avenue, Jerome Avenue and the White Plains Road line, and will have the benefit of the third tracking of the elevated lines as well. The crossing of lines, and the establishment of new con- [fol. 1717] nections, will, moreover, permit of a general interchange of passengers destined for either the west side or the east side of Manhattan, without extra fare. On the other hand—in the reverse direction of traffic—the entire city will be brought within easy access of the great park and beaches at Pelham Bay, the single fare in this case serving the same social purpose as the five-cent fare to Coney Island.

The Borough of Queens will secure the opening of the Steinway tunnel and its connection with the present subway lines, of the Interborough Company, both at Grand Central station and at Times Square. At Queensboro

Plaza, there will be a union station, at which trains over the elevated lines from Astoria and Corona will proceed southward and through either the Steinway tunnel or the line across Brooklyn; or connect by way of the bridge with the Second Avenue elevated line at Fifty-ninth Street. In South Queens, as a part of the system of the Brooklyn Company, two new elevated lines; one on either side of the lines of the Long Island Railroad, will run to Jamaica and Richmond Hill.

The building of the subway to Richmond will be brought measurably nearer through the extension of the Fourth Avenue subway to the point selected for departure to Staten Island at Sixty-Fifth Street. The Conferees renew the recommendation of the joint report that effort be made to secure the co-operation of the freight carrying trunk lines terminating in Staten Island in the building of a tunnel between these points which would serve the purpose of both freight and subway passenger traffic, and the cost of which might be borne equally by them and the city. This plan would, incidentally, enable the city to carry the pipes of the new Catskill Water System, destined for Staten Island, at a saving of approximately $1,000,000 over the present plans of the Water Board. A supplementary report upon the possibility of this plan will be submitted, we trust, at an early date. Staten Island, meanwhile, will secure an additional subway connection at the Battery with the Broadway line and the other branches of the projected Brooklyn system, as well as the Seventh Avenue line of the Interborough system. With the linking of the Staten Island ferry with these new connecting lines, an effort will be made to secure a transfer basis with both the operating companies that will permit interchange of passengers from either system for a five-cent fare. There is good reason to hope that some arrangement of this sort may be brought about.

In plotting the new lines, the old plan of dependence upon straight north and south routes has been broken, and the beginnings laid for a radial system that should go far in shaping the city's better development. Subways have been provided wherever the congestion of traffic and consideration for the freedom of street surfaces seem to warrant. Where subways would appear to be too expensive,

elevated lines, costing from one-third to one-fifth as much, will be utilized.

Your Committee and the Public Service Commission are of the opinion that through the greater development of taxable values that must follow the construction of the dual system, the city will receive a return in annual taxes, and through other means of indirection, that will repay many [fol. 1718] times the cost of immediate capital outlay that it will make.

Estimates of Cost

The cost of construction of all the new lines and improvements, both subway and elevated, embraced within the dual plan—exclusive of the cost of the Fourth Avenue and Bridge Loop lines, which are nearing completion and for which the city has already provided—will be approximately $214,000,000. The cost of equipment will be $47,000,000, making a total combined outlay on the part of the city and the operating companies of $261,000,000. The Interborough Company will spend, in addition, about $25,000,000 upon the extensions and improvements to the Manhattan elevated system. The city's additional investment in the Fourth Avenue and Bridge Loop Lines, which are to be taken into the Brooklyn system, will be about $28,500 more.

Changes made in certain of the routes within the past few days will slightly alter the estimates upon which these figures of the new work are based; but they may be taken as approximately correct.

For the Interborough system, the company is to furnish not more than $56,000,000 for construction and $21,000,000 for equipment; a total of $77,000,000. The city is to furnish an amount equal to the investment of the company in construction, and any sum additional to this that may be necessary to complete the lines projected.

According to the present estimates, the cost to the city for the completion of all the lines to be operated by the Interborough Company would be $59,649,250. The Public Service Commission has, however, effected many economies in the reshaping of the plans for the Lexington Avenue and Broadway routes, the construction of which is under way;

and it is to be expected that through similar economies the total amount actually required of the city will come within an even half of the total outlay.

The Brooklyn Company will furnish, all told, $60,000,000 of new capital, $13,000,000 of which will be applied on account of the construction of city-owned lines, about $21,000,000 on account of extension and improvement of its existing elevated lines, and $26,000,000 for equipment. The lines to be built by the city for the Brooklyn system, in addition to the Fourth Avenue and Bridge Loop lines, will cost approximately $64,700,000 in addition to the company's contribution.

The cost of all the lines and of the required equipment, the detailed estimates of which are shown in an appendix at pages 46 and 47, would be as follows:

[fol. 1719]	Cost of Construction	
(1) Interborough System:		
By the City	$59,649,250	
By the Company	56,000,000	
		$115,649,250
(2) Brooklyn System:		
By the City—New Lines	$64,722,950	
By the Company—For City Lines	13,000,000	
		77,722,950
By the City for the Fourth Avenue and Loop Lines under construction		28,486,000
By the Company for elevated extensions and improvements		21,000,000
		$127,208,950
(3) Combined Dual System:		
By the City—New Lines	$124,372,200	
By the City—Under construction	28,486,000	
By the Operating Companies	90,000,000	
		242,858,200
	Cost of Equipment	
Interborough Company	$21,000,000	
Brooklyn Company	26,000,000	
		47,000,000
		$289,858,200

The engineering expenses of the Public Service Commission have previously been paid from the appropriations allowed to the Commission in the annual city budget. Under the amendatory act recently passed by the Legislature, it would be permissible to charge these expenses to the cost account, if the Commission and the Board of Estimate so desire. No figures under this heading are, however, as yet included.

It will appear that upon the present estimates, the city's total new obligation in carrying out the dual plant would be limited to $124,372,200, to its share in the building of a tunnel to Staten Island and to the cost of the purchase of such real estate and easements as may be involved in the acquisition of rights of way.

When the present subways were built the cost of real estate was borne by the city separately, and did not enter into the construction account. Under the pending contracts, real estate costs may be so included if the city elects; but there is much doubt as to whether this would be a wise proceeding. Your Committee is of the opinion that it will be cheaper for the city, in most instances, to acquire the fee—rather than an easement merely—and to dispose of such properties later, subject to the continued existence of the easements. Various parcels taken in fee by the Public Service Commission for the purposes of the Centre Street Loop have been sold at a profit, and there seems to be little reason to doubt that a like experience will be met wherever this method is followed. It does not, therefore, seem necessary to carry the item of real estate under the head of permanent investment in subway building, although it will be necessary, of course, to provide from current funds for the properties required for immediate use. The amount of real estate—either fee or easements—has not been accu- [fol. 1720] rately estimated; but it is not expected to exceed a total of $6,000,000 for either system, or $12,000,000 in all.

According to the estimates followed, the distribution of the total cost of construction and equipment between the city and the operating companies (exclusive of the Fourth Avenue and Bridge Loop Lines and of the cost of real estate) will be as follows:

(1) By the city:			
	Interborough System	$59,649,250	
	Brooklyn System	64,722,950	
			$124,372,200
(2) By the Interborough Company:			
	Construction	$56,000,000	
	Equipment	21,000,000	
			77,000,000
(3) By the Brooklyn Company:			
	Construction	$34,000,000	
	Equipment	26,000,000	
			60,000,000
			$261,372,200

The contracts already let by the city for the construction of the Lexington Avenue line, aggregating $28,230,000, will be accepted by the Interborough Company as part of the city's share in the construction of its system. Contracts already let for the two sections of the lower Broadway line, aggregating $4,650,000, will go toward the city's expenditure on account of the Brooklyn system.

It is to be borne in mind that the construction of all the new roads to be embraced within either system—excepting the extensions to the existing lines of the Brooklyn Company and the elevated extensions of the Fourth Avenue line in South Brooklyn—is to be municipal construction; that is, the city is to let all the contracts and to make all payments on account of such construction.

The City's Available Credit

Your Committee is informed that, including the amount of contracts already let for the construction of sections of the Broadway and Lexington Avenue lines, the City will probably have a legal credit margin for rapid transit purposes, during the current year, aggregating $100,000,000—and this probably without drawing more than a relatively small balancing margin from its reserve of credit for other municipal purposes. This credit is arrived at as follows:

Legal borrowing margin secured through the exemption of rapid transit bonds issued prior to December 31, 1910, under the recent constitutional amendment	$47,482,725 18	
Additional margin or credit to be secured through the exemption of rapid transit bonds to cover issues since December 31, 1910 (under an act of the recent Legislature) which are [fol. 1721] self-carrying	3,029,984 74	
Portion of outstanding authorizations for expenditures under Contracts 1 and 2 for the building of the present subway, which outlays when made will come within the exemption clause, estimated at	2,000,000 00	
Amount specially reserved for rapid transit purposes by resolution of the Board of Estimate and Apportionment on April 8, 1910	13,000,000 00	
Estimated proportion of additional borrowing margin which may be secured through the exemption of dock bonds, and which could be applied to rapid transit purposes	28,714,674 43	
	$94,227,384 35	
Balance to be drawn from reserve for general municipal purposes	5,772,615 65	
	$100,000,000 00	

The total amount of outstanding bonds issued for dock purposes up to December 31, 1909, and that may be exempted from the debt margin, and thus rendered available for either transit or dock purposes, is computed at $78,714,674. Your Committee has been assured by his Honor the Mayor and by the Comptroller that not more than $50,000,000 of this sum will be required as a reserve to cover the cost to the City of the river and harbor improvements now under contemplation by the Dock Department. It is, we understand, a matter of general agreement in the Board that the amount remaining and above specified shall be so used for transit purposes as the constitutional amendment permits.

The City's total borrowing margin, exclusive of the above named transit and dock reserves, was on February 29, 1912, $92,950,936. Against this total sum there were outstanding authorizations of Corporate Stock, against which contracts had not as yet been awarded but little or none of which could properly be cancelled, amounting to $59,209,536, leaving a balance of borrowing capacity for general municipal purposes on the date named of $33,741,400.

From the latter amount a sufficient sum may readily be spared to round out an even $100,000,000 margin for rapid transit purposes. Further, there can be no doubt that the increases in borrowing capacity secured in 1913, and in the immediately succeeding years, through the increased valuation of taxable real estate, will run to a normal average of from $30,000,000 to $40,000,000. As the period of construction of the new subway and elevated lines comprised within the dual plan will cover from three to five years, and as the building of some of the outlying extensions cannot be commenced until the trunk lines with which they are to connect have been completed, it follows that the comparatively small amount required to complete the City's share in the cost of the lines will be found readily available before the period of construction has passed.

[fol. 1722] The Operating Basis

The financial and operating terms proposed for the prospective operators have been given in detail, and hardly need further review. The fact should be emphasized, how-

ever, that the city is securing the use of the established rapid transit lines, and their connection with the new lines built for either system, on the basis of a universal 5-cent fare, at the most reasonable consideration that it is possible to secure. The negotiations with relation to terms have been protracted and arduous, and your committee is convinced that the operating companies, in making the many concessions that they have, have yielded the most that they can afford to yield without actually retaining their existing lines for continued separate operation.

As the value of the Interborough lines, developed during the seven years of their operation, is greater in certain degree than the value of the Brooklyn lines, the amount of consideration paid for their use, and for the pooling of their earnings, must be correspondingly greater. As it is, the Interborough Company agrees to operate a system of three times the mileage of its present, to advance $77,000,000 of new capital without further return than the payment of its interest and sinking fund charges, to readjust its present leases so as to add to the city's degree of control upon them, and to give the city the benefit of forty-nine years of its skilled management and services—all in return for the continued allowance of the profit it is receiving today. The amount of that profit, moreover, is to be limited and can go no higher until the city is earning the carrying charges upon all of its own new investment, and a bonus of 3½ per cent. besides.

A statement, frequently made, that a "profit" of 8.76 per cent. is to be allowed the company upon the new money it invests is without foundation. Upon its new money, the company is to receive just 6 per cent., and all of that will go for interest and sinking fund. The basis of this statement as to an alleged profit of 8.76 per cent. is the fact that if the earnings of the present system, amounting to 13.2 per cent. upon an investment of $48,000,000, were combined with the carrying charges paid upon the new investment of $77,000,000, and the whole spread out over the entire system, there would be an average profit of the percentage named. That, however, has no relation to the actual basis of settlement. The present earnings of the company cannot be taken away from it; and if it be true that if in the face of the competition of the new lines, if these were

grouped in a separate system, the present earnings would shrink, it is also true that this shrinkage would be for a brief period only; and that the present rate of profit would soon be restored and probably maintained, with but temporary variation, throughout the term of the company's present lease. In return for any degree of protection given against a short period of sag under competition, the company yields to the city the very material consessions we have enumerated.

The percentage of 8.76, even if it were applied to the new money of the company—as it certainly is not—would by no means mean a "profit" in this amount. From the amount reserved to the company, it is to pay all of the fixed [fol. 1723] charges, interest, sinking fund, installments, etc., upon its present investment.

Taking these at 6 per cent., the actual profit remaining is not 8.76 but 2.76. If the net returns of today be compared with those spread over the proposed enlarged system, with 6 per cent. deducted from each for carrying charges, it mean that the present actual profit of 7.2 per cent. above such charges is reduced to 2.76 per cent., and that the lower figure can not be exceeded—in view of the City's prior claim to a profit upon its own investment before any further division proceeds—for a number of years to come.

Ahead of any allowances to be paid to the company will come the continued payment of $2,700,000 annually to the city on account of the present lease. It was argued in the course of the recent Saratoga arbitration, on claims of the company for extra work upon the present subway, that the City's right to annual payment, based as it is upon the amount of its interest and sinking fund charges, would expire when its bonds have been amortized, and that for the last eight or nine years of the present lease the company would be under no obligation to pay the City anything. This claim, though of doubtful validity, has at least been waived as one of the conditions of the new contract, and the priority of the rental to the City will proceed until the end of the new lease.

After the City's rental, the company is to receive its actual operating expenses, including its charges for taxes, obsolescence, etc. It has been stipulated, however, that no charge shall be allowed that has not been taken into account

in ascertaining the company's net earnings in the past, and that has not been covered, therefore, in the fixing of the preferential based on present earnings. It appears that the structures and equipment of the present subway have been maintained at a high standard of efficiency; expenditures aggregating something over $9,000,000 for "maintenance of way and structures, and maintenance of equipment" having been made from the time the subway was opened, in October, 1904, to the close of the fiscal year 1911. Nevertheless, as an added protection to the City, the contract will stipulate that the present plan shall be carefully examined by the Public Service Commission, and that deferred depreciation of any sort in either the subway or its equipment shall be made good to the satisfaction of the Commission, before any pooling of receipts proceeds. If the cost of caring for obsolescence increases with the age of the plant, that would not be unnatural; but the company states that the higher general operating ratio upon which it is figuring will amply cover any increase of the sort.

The preferred allowance made to the Brooklyn Company after the payment of operating expenses is also to be based upon an average of the net earnings of its present lines. The ratio will be less for the reason that the earnings are less. The receipts of the old lines of the Brooklyn Company, on the other hand, are bound to increase materially as soon as they are linked up with the new City lines. The anticipated returns from the Brooklyn system, will, for the reason that so much more of the investment, in new lines will represent City capital, accrue more promptly. The ques-
[fol. 1724] tion of the precedence of the Brooklyn Company's preferential has possibly for these reasons been debated less. The principal underlying the two contracts in this particular is essentially the same.

Anticipated Results of Operation

Any discussion of the probable operating results of the dual system must, in the nature of the case, be more or less speculative. There are three elements to be considered: First, the volume and distribution of future traffic; second, the carrying capacity of the new roads and developed under operation; and, third, the ratio of operating costs.

That the growth of street railway traffic in the City will, in a very few years give the new roads all the carrying they can attend to, is a matter beyong much doubt. Experience in the past has shown that increases of traffic are due not only to added population, but to the constantly increasing ratio in the number of rides per capita. During the ten years from 1901 to 1911, the average annual increase in traffic of all lines, subway, elevated and surface, was 5¾ per cent: There is no reason to believe that this percentage will dimish; but taking for the sake of conservative view, an annual increase of 5½ per cent. during the decade to come, and of 5 per cent. in the decade following that, significant results are secured. During the year 1911 the various lines—exclusive of those of the Hudson & Manhattan system—carried 1,551 million passengers. At the 5½ per cent. rate of increase, this would grow in the year 1917 (taken as the first year of universal operation of all the new lines) to 2,138 millions. In that year it would be proper to deduct at least 60 millions to represent the double fares now paid by those who exchange from one route to another and that with the new connections wil- become single fares. In other words, the probable traffic of all lines in the year 1917 would be 2,038 millions. Taking the estimates of the operating companies, the number of passengers that will be carried in the first year of operation—and their own figures as to future increases—the result would be as shown in the following table:

Year	Total millions	Total increase	Manhattan Elevated	Total surface	Interboro subway	Brooklyn Company	Total	Surplus
1917	2,138							
	60							
	2,078		365	850	450	385	2,050	28
1918	2,192	114	380	861	490	423	2,154	38
1919	2,313	121	395	873	525	457	2,250	63
1920	2,440	127	405	890	560	484	2,339	101
1921	2,574	134	420	903	592	512	2,427	147
1922	2,703(5%)	129	440	916	625	544	2,525	178
1923	2,838	135	450	930	660	576	2,616	212
1924	2,980	142	450	944	697	610	2,701	279
1925	3,129	149	450	959	736	646	2,791	338
1926	3,286	157	450	975	775	686	2,886	400

It will be seen that after taking care of all the traffic claimed for the several systems there would still be a large surplus of traffic that either would be added to the figures

[fol. 1725] the companies show, or that else would be unprovided for. A more minute study of these figures, and of the history of traffic development generally in the past several years, confirms the belief of your Committee that the new lines will carry a greater number of passengers than is claimed today. The new rapid transit lines extending to every part of the City will, for instance, parallel perhaps three-fourths of the existing surface lines. A large part of the travel that now follows these lines is certain to shift to those that are quicker and more convenient. The City's transit system, in short, will be re-standardized, and it may safely be assumed that the great bulk of traffic increase will go to the lines of the re-standardized type.

Various figures have been published questioning the capacity of the new lines to carry a sufficient number of passengers to pay in full the charges to be placed against them. We believe that such figures, which, it might be added, are the most speculative of all, are without correct bases. The present subway lines, with a road mileage of 25.9, are carrying 300,000,000 passengers per year. If such a ratio were carried out according to the increase in mileage, the capacity at the present rate of congestion would rise to 900,000,000. With due allowance, however, for the fact that the proportion of trunk lines to feeders in the new system is not as great as such proportion in the present system, your Committee has taken no higher estimate than 775,000,000 as the maximum future capacity. A similar figure has been taken for the more extensive mileage of the Brooklyn Company's system. That these figures will be reached without approaching the congestion of today, we believe is beyond reasonable doubt. The development of the art of transportation is constantly producing new means for greater carrying capacity. In the present subway system, the increase of traffic in the non-rush hours and the growth of new traffic centres serving short haul districts is already apparent. The increase in the length of trains from eight to ten cars during the past year has alone added 17 per cent. to the capacity under former conditions; and future development along the same lines is only beginning to show its possibilities. We have been impressed, for instance, by the arguments of Mr. Walter Wellman, who has made a careful and expert study of this subject, and

who believes that through the continued lengthening of trains and corresponding adaptation of station platforms the present car mile capacity may be increased by 50 per cent. We have no doubt that the Public Service Commission, as well as the operating companies, will make their independent studies along these lines. The main thing is that the City, under the proposed contracts, secures possession of the plan, and that whatever added income may be derived from increased carrying will enure to its benefit.

In estimating margins of future profit, your Committee has figured upon a probable ratio of 50 per cent. for operating and taxes for both systems, during the first three years of operations, with a gradual decrease of 1 per cent. a year, down to 44 per cent.

[fol. 1726] The operating ratios upon the existing subway during the first six years of its operation—exclusive of taxes, which have averaged 2 per cent.—were as follows:

1906	42.23
1907	45.64
1908	43.14
1909	37.33
1910	34.08
1911	41.31

The ratios of the Brooklyn Company for four years have been as follows:

1908	53.45
1909	54.37
1910	49.47
1911	47.17

From all of the advice that we have received, we have no reason to doubt that the comparatively high figure taken for the first three years of the new system will amply cover the charges coming under this head. The increase of traffic must naturally tend to force that figure down, though we do not estimate upon any lower amount than 44 per cent.

Upon the several bases therein stated, the Finance Department has prepared a series of tables showing prospective results of operation. These are arbitrary in their nature, as all estimates for the future must be. They show,

however, that under the Interborough Company's share in operation, the deficiencies of the company—which are not to be guaranteed but which must be discharged from future revenues—will probably occur only in the first three years; and that there would be no deficiencies in the City's annual account after six years. They show also that the City's cumulative deficiency account would probably be wiped out in the year 1928, or after eleven years of operation; and that in the year following the City would also receive in full the first annual installment of its added allowance of 3½ per cent.

Under the Brooklyn plan, no deficiencies would occur in the interest account of the company, and there would probably be no deficiencies in the account after four years. The cumulative amount of the City's deficiencies would thereupon disappear in eight years, and a division of profit would proceed in the year following.

It is to be borne in mind that although the cost of carrying the City's part in the Interborough Company's plan would be greater, for reasons that have been set forth, the City's account of profit and loss from the two systems would be pooled; the one, in a sense, aiding the other. The City's half share in the increased profit from the extension of the Manhattan elevated lines would go into the same account, further liquidating such temporary deficiencies as it may be necessary to carry.

It would appear from the tables showing the above results that as the City's investment in the Brooklyn Company's lines would likely become self-supporting in the fifth year of operation (1921), the entire amount of such investment, which at that time would not be less than $100,000,000, would be released from the debt limit, placing at the City's disposal a corresponding margin of borrow- [fol. 1727] ing capacity for further subway development. By the same rule, the City's investment of $56,000,000 in the Interborough system would be released in the seventh year of operation (1923).

Under the proposed terms, the City would carry such deficiencies as may occur in its own interest and sinking fund account—we assume through the issue of revenue bonds to be redeemed from future profit after the period of deficiencies has been passed. Upon the estimates above

referred to, the cumulative total of deficiencies of the first six years would not be greater than $17,640,000 on account of the Interborough system and $9,342,000, for the first four years, on account of the Brooklyn system. As this cumulative would be paid from the actual earnings of the system, the city merely using its credit to tide over the less profitable years, the ultimate cost to the city would not be greater than the cost of carrying the interest on the bonds themselves. That, comparatively, would be trifling.

Recapture

It is to be borne in mind that although the financial and operating terms granted by the City to either of these companies are framed to cover the full period of the lease, they may be cancelled at any time after ten years, if the City so disposes, through the exercise of its right of recapture. In order to facilitate the City's control in this respect, the companies would be required to divide the various lines into groups that might readily serve as the component parts of an independent system, each of which would be subject to recapture separately. These are as follows:

Under the Interborough Company's Plan

(1) The lines comprising the H, being the Seventh Avenue line from Borough Hall, Brooklyn and the Lexington Avenue line to 135th street, with its branches in The Bronx.

(2) The Steinway tunnel from Times Square to Queensboro Plaza, Corona and Astoria.

(3) The Flatbush Avenue and Eastern Parkway extensions, with their branches to Nostrand Avenue and Brownsville.

(4) The White Plains Road extension in The Bronx.

Under the Brooklyn Company's Plan

(1) The Broadway line from the Queensboro Plaza through Fifty-ninth Street to Willoughby Street in Brooklyn.

(2) The Fourth Avenue line, with the elevated extensions in South Brooklyn, and the projected extension to Staten Island.

(3) The line from Union Square, Manhattan, to the Eastern District of Brooklyn.

(4) The Bridge Loop lines in Manhattan, which, however, will be held at the outset under a lease for twenty years.

[fol. 1728] Recommendations

Your committee recommends the following action:

(1) That your Board inform the Public Service Commission that if a contract be executed with the Interborough Rapid Transit Company for the equipment and operation of new rapid transit lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, and the company's communication to the Public Service Commission dated February 27, 1912, such contracts, when presented to your Board, will have its approval.

(2) That your Board inform the Public Service Commission that if a contract be executed with the Brooklyn Rapid Transit Company, or with a company organized in its interest, for the equipment and operation of new rapid transit lines, and for the operation of the existing elevated lines of the Brooklyn Rapid Transit Company in conjunction with such new lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, such contract, presented to your Board simultaneously with the presentation of the contract for the Interborough Rapid Transit Company, will have its ap-

(3) That your Board inform the Public Service Commission that if application be made to it by the Interborough Rapid Transit Company for certificates for the extension and third tracking of its Manhattan elevated lines, and for the cession of the Steinway tunnel to the city and the immediate operation thereof, in accordance with the terms herein set forth, and in advance of the execution of the general contract for the operation of new rapid transit lines, such certificates, when presented, will have your approval.

(4) That the resolutions adopted by your Board dated July 21, 1911, and such other resolutions heretofore adopted that may be inconsistent with the present recommendations, be rescinded; and

(5) That the Special Committee be continued for the purpose of further conferences with the Public Service Commission with relation to any questions of detail that may arise between the two bodies affecting the contracts to be prepared.

All of which is respectfully submitted.

George McAneny, President Borough of Manhattan;
Cyrus C. Miller, President Borough of The Bronx;
George Cromwell, President Borough of Richmond, Special Committee on Pending Transit Proposals.

I. Cost of Projected Lines, Detailed Mileage, and Probable Periods of Construction

(Estimates of Public Service Commission)

A. Proposed for Operation by the Interborough Rapid Transit Company:

(Line to be constructed by the City; part contribution by the Company.)	Sub. or El.	Tracks	Road miles	Track miles	Probable period of construction years	Total cost
1. Seventh Avenue line, four tracks from Times Square to Greenwich Street and Park Place, and two tracks to the Battery	S	4 & 2	4.27	17.1	3½	$20,700,000
2. Eastern extension of Seventh Avenue line through Park Place, City Hall Park and Old Slip to Brooklyn	.....	.....	.....	.....	.....	9,601,350
3. Flatbush avenue, from Atlantic Avenue to Eastern Parkway, and Eastern Parkway to Buffalo Avenue, Brooklyn	S	4	3.18	12.7	3	9,259,800
4. Nostrand Avenue, from Eastern Parkway to Flatbush Avenue	S	2	2.42	4.8	3	4,324,000
5. Livonia Avenue, from Eastern Parkway to New Lots Road	L	2	2.57	5.1	2	1,562,850
6. Lexington Avenue, from 32d Street, Manhattan, to 135th Street in The Bronx	S	4	5.15	20.6	3½	32,465,500
7. Southern Boulevard and Whitlock Branch of Lexington Avenue line, from 135th Street to the Bronx River	S	3	3.2	9.6	3½	8,857,300
7a. Westchester Avenue branch, from Bronx River to Pelham Bay Park	L	3	3.94	11.8	1½	3,409,750
8. Jerome Avenue branch of Lexington Avenue line, from 135th Street to Kingsbridge Road	S	3 & 4	1.1	3.1	3½	3,673,100
	L	3	3.4	10.1	1½	2,812,900
8a. Jerome Avenue branch, Kingsbridge Road to Woodlawn	L	3	1.65	5.	1½	1,260,400
9. White Plains Road to Becker Avenue	L	3	4.92	13.7	1½	4,119,300
10. Times Square to Steinway tunnel	S	2	.42	.8	3½	1,495,000
11. Steinway tunnel adjustment at Grand Central Station	S	.....	.....	.....	.....	2,001,000
11a. Steinway tunnel	S	2	1.6	3.2	1½	3,000,000
11b. Steinway tunnel extension to Queensboro Plaza	S & L	2	.89	1.8	1½	721,050
12. Astoria line, from Queensboro Plaza to Ditmars Avenue	L	3	2.51	7.5	1½	1,960,750
13. Corona and Woodside line	L	3	5.48	16.5	1½	4,425,200
						$115,649,250

(Estimates of Public Service Commission)

B. Proposed for Operation by the Brooklyn Rapid Transit Company:

(Line to be constructed by the City; part contribution by the Company.)	Sub. or El.	Tracks	Road miles	Track miles	Probable period of construction years	Total cost
1. Broadway, from the Battery to Seventh Avenue and 59th Street	S	4 & 2	5	18	3½	$28,846,600
1a. Fifty-ninth Street, Seventh Avenue to Queensboro Plaza	S & B	2	2.23	4.46	2	2,495,500
2. Battery tunnel to Willoughby Street, Brooklyn	S	2	2	4.	3	6,963,250
3. Connection between Manhattan Bridge line at Fulton Street, Brooklyn, through Flatbush Avenue to Eastern Parkway and junction with Brighton Beach line	S	2	1.20	2.40	2½	1,971,100
4. Canal Street, from Manhattan Bridge to Broadway	S	2	.8	1.6	2	4,663,250
5. Extension of Bridge Loop lines through Nassau and Broad Streets to the Battery	S	2	1.	2.	2½	4,397,600
6. Extension of Fourth Avenue line in Brooklyn	S	4 & 2	2.27	6.90	2	4,014,650
7. Connection between Fourth Avenue and New Utrecht Avenue	S & cut	2	.94	1.88	1	2,085,000
7a. New Utrecht Avenue, from 39th Street to Coney Island	L	3	5.5	16.5	2	3,335,000
8. Gravesend Avenue, from 39th Street to Coney Island	L	3	5.35	16.05	2	4,001,000
9. Fourteenth Street, from Sixth Avenue, Manhattan, with tunnel under East River to Eastern District of Brooklyn	S & L	2	7.	14.	3½	14,950,000
						$77,722,950
(To be constructed by the Company:)						
10. Fulton Street, Brooklyn, to Queensboro Plaza, Long Island City	L	2	5.5	11.	2	$3,280,000
11 & 12. Jamaica lines	L	2	4.6	9.2	2	2,796,000
13. Third tracking of existing elevated lines	L			9.3	2	3,117,000
14. Sea Beach extension and elevation of existing lines	O.C & Emb.	3	5.35	16.05	2	2,720,000
15. Brighton Beach connection—Malbone Street to Eastern Parkway	S	2	.9	1.8	1	1,735,000
16. Myrtle Avenue (Lutheran Cemetery extension)	L	2	1.	2.	1	607,000
17. Coney Island terminal connections	L	....	....	....	2½	4,453,000
18. Additional tracks at East New York for connections	L	....	....	....	2	1,340,000
19. Additional tracks, Brighton Beach line	Op. cut	....	1.	2.	1½	869,000
						$20,917,000
(Under construction by the City:)						
20. Centre Street Loop	S	4 & 2	1.5	5.6	2½	$11,179,000
21. Fourth Avenue in Brooklyn	S	4	3.9	17.	...	17,307,000
						$28,486,000

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1925

[fol. 1731]

III. Statistics of Street Railway Traffic in New York City, 1902 to 1911

(Exclusive of Hudson & Manhattan Tunnel Lines)

(A) Total Traffic—Surface, Elevated and Subway

Year ended June 30	Surface railways	Elevated railways	Subways (Interboro)	Total fares	Increase of total over preceding year	Percentage of Inc.
1902	651,767,050	285,858,707		937,625,757		
1903	671,551,057	327,609,630		999,160,687	61,534,930	6 6
1904	680,542,482	383,643,900		1,064,186,382	65,025,695	6 5
1905	680,611,313	375,522,841	72,722,890	1,128,857,044	64,670,662	6 0
1906	730,381,105	383,018,585	137,919,632	1,251,319,322	22,462,278	1 9
1907	719,993,712	429,143,819	166,363,611	1,315,501,142	64,181,820	5 1
1908	716,464,745	435,899,497	200,439,776	1,352,804,018	37,302,876	2 8
1909	722,070,823	427,449,742	238,430,146	1,387,950,711	35,146,693	2 6
1910	709,327,590	459,564,764	268,962,115	1,488,854,469	100,903,758	7 3
1911	802,846,296	471,981,111	276,704,796	1,551,532,203	62,677,734	4 2

(C) Surface

Year ended June 30	Manhattan			The Bronx			Brooklyn		
	Fares	Increase	Per cent	Fares	Increase	Per cent	Fares	Increase	Per cent
1902	388,947,169			28,020,185			213,961,296		
1903	396,570,432	7,623,263	2	30,714,781	2,694,596	96	221,141,499	7,180,203	3 4
1904	389,928,464	*6,641,968	1 7	34,763,809	4,049,028	1 4	231,385,879	10,244,380	4 6
1905	374,554,075	*15,374,389	3 9	37,124,805	2,360,996	6 9	240,654,959	9,269,080	4
1906	391,708,063	17,153,988	4 6	39,893,116	2,768,311	7 5	264,682,958	24,027,999	10
1907	377,017,192	*14,690,871	3 7	42,186,533	2,293,417	6	262,303,592	*2,379,366	9
1908	366,690,345	*10,326,847	2 7	44,237,229	2,050,696	4 9	264,772,569	2,463,977	94
1909	362,077,665	*4,612,680	1 3	50,671,779	6,434,550	14 6	267,408,512	2,635,945	99
1910	375,888,469	13,810,804	3 8	56,524,261	5,852,480	11 7	281,772,163	14,363,651	5 4
1911	386,952,020	11,063,551	2 9	62,777,966	6,253,705	12	298,298,924	16,526,761	5 8

(D) Elevated Traffic

Year ended June 30	Manhattan Railways Co.			Brooklyn Rapid Transit			Totals		
	Fares	Increase	Per cent	Fares	Increase	Per cent	Fares	Increase	Per cent
1902	215,259,345			70,599,362			285,858,707		
1903	246,587,022	31,327,677	14 6	81,022,608	10,423,246	14 6	327,609,630	41,750,923	14 6
1904	286,634,195	40,047,173	16 3	97,009,705	15,987,097	19 7	383,643,900	56,034,270	17.1
1905	266,381,930	*20,252,265	7 1	109,140,911	12,131,206	12 5	375,522,841	*8,121,059	2 1
1906	257,796,754	*8,585,176	3 2	125,221,831	16,080,920	14 7	383,018,585	7,495,744	2
1907	282,924,273	25,127,519	9 7	146,219,546	20,997,715	16 7	429,143,819	46,125,234	12 04
1908	282,845,864	*78,409	02	153,053,633	6,834,087	4 7	435,899,497	6,755,678	1 6
1909	276,250,196	*6,595,668	2 2	151,199,546	*1,854,087	1 2	427,449,742	*8,449,755	1 9
1910	293,826,280	17,576,084	6 4	165,738,484	14,538,938	9 6	459,564,764	32,115,022	7 5
1911	301,449,292	7,623,012	2 5	170,531,819	4,793,335	2 9	471,981,111	12,416,347	2 9

* Decrease.

[fol. 1732] The President of the Board of Aldermen presented the following:

To the members of the Board of Estimate and Apportionment:

GENTLEMEN: While I have always believed that the proper solution of the transit question lies in the building of a new separate and complete rapid transit system by the city and its operation under city control, I was prepared last July to accept the dual plan as a satisfactory settlement of the question, provided that plan be based upon operating terms such as to give the city a control over the new subways, assurance of fixed charges on its investment and a share of the profits that the new system might be expected to produce. I still feel that an independent city built line is the best solution of the question, but I am prepared today, as I was last July, to accept the dual plan upon proper terms.

(B) Total Surface, with Elevated and Subway (Rapid Transit) Combined

Year ended June 30	Total surface	Annual increase	Percentage of increase	Elevated and subway	Annual increase	Percentage of increase
1902	651,767,051			285,858,707		
1903	671,551,057	19,784,007	3	327,609,630	41,750,923	14 6
1904	680,542,482	8,991,425	1 3	383,643,900	56,034,270	17 1
1905	680,611,313	68,831	01	448,245,731	64,601,831	16 8
1906	730,381,105	49,769,792	7 3	520,938,217	72,692,486	16 2
1907	719,993,712	†10,387,393	*1 4	595,507,430	74,569,213	14 3
1908	716,464,745	*3,528,967	* 49	636,339,273	40,831,843	6 8
1909	722,070,823	5,706,078	79	665,879,888	29,540,615	4 6
1910	760,327,590	38,256,767	5 28	728,526,879	62,646,991	9 4
1911	802,846,296	42,518,706	5 6	748,685,907	20,159,028	2 7

† Subway opened 1905. * Decrease.

Traffic

Queens

Fares	Increase	Per cent
13,719,387		
15,689,210	1,969,823	14 4
16,701,653	1,012,443	6 3
20,533,487	3,831,834	22 5
25,151,054	4,617,567	21 9
28,514,743	3,363,689	13 5
29,797,750	1,283,007	4 5
30,545,776	748,026	2 5
34,430,074	3,884,298	12 5
42,515,629	8,085,555	23

Richmond

Fares	Increase	Per cent
7,119,013		
7,435,135	316,122	4 4
7,762,677	327,542	4 4
7,743,987	*18,690	24
8,945,914	1,201,927	15 5
9,971,652	1,025,738	11 4
10,966,852	995,200	9 98
11,367,091	400,239	3 6
11,712,623	345,532	3 1
12,301,757	589,134	5

All boroughs

Fares	Increase	Per cent
651,767,050		
671,551,057	19,784,007	3
680,542,482	8,991,425	1 3
680,611,313	68,831	01
730,381,105	49,769,792	7 3
719,993,712	10,387,393	1 4
716,464,745	3,528,967	49
722,070,823	5,706,078	79
760,327,590	38,256,767	5 28
802,846,296	42,518,706	5 6

(E) Subway Traffic

Year ended June 30	Interborough Company Fares	Increase	Per cent
1905	72,722,890	72,722,890	
1906	137,919,632	65,196,742	91 0
1907	166,363,611	28,443,979	21 0
1908	200,439,776	34,076,165	31 0
1909	238,430,146	37,990,370	19 0
1910	268,962,115	30,531,969	13 0
1911	276,704,796	7,742,681	2 9

* Decrease.

[fol. 1733] I am opposed to the acceptance of the present offer of the Interborough not because it involves the dual plan, not because of the identity or record of this particular operator, but because the offer proposes a bad business bargain for the city and entails an abandonment of the accepted and approved rapid transit policy of the City of New York.

The present offer of the Interborough Company is substantially the proposition of last July, which the board by a majority vote rejected at that time. The form is somewhat changed. Certain minor concessions have been made. In some respects the terms are worse for the city, but in substance, and in fact, the proposition is the same.

The fundamental scheme upon which this offer is predicated, is a practical if not a legal guarantee to the company of its entire net earnings of the present subway, in addition to carrying charges on new capital. It offers to the people of the City the alternatives of perpetual congestion or a subsidization of private investors through the carrying of deficits in taxes. It is directly opposed to the policies of municipal construction, municipal control and municipal profit sharing, approved by popular election and which the members of this board were sent here and expected to carry out.

The defects of this offer are of two classes; those that attack and violate the principles of municipal control and municipal profit sharing; and those that conflict with ordinary business sense and which when understood, I am confident that no member of this board can approve whatever his views upon questions of principle and policy may be. These defects of both classes I propose to enumerate. No one of them is incurable were the company minded to meet the city upon fair terms. If these objections were met by the Interborough Company, the city would be placed in a position to control a complete and cohesive transit system and to share in the profits therefrom. If that were done I should be prepared to vote for the dual plan, though still believing that an independent system is the better solution.

In justification of an abandonment of the policies that the members of this board were elected to carry out, it has been urged that without the dual plan and an Interborough contract, no adequate transit relief can be had. If in truth we were compelled to choose between this offer and no sub-

ways, then perhaps we might be justified in considering a change in that policy. Such, however, is not the fact.

The Broadway-Lexington avenue subway is at this moment under construction. There is absolutely nothing in the present situation to prevent the completion of this trunk line and its extension into The Bronx, Queens, Brooklyn and Richmond. There is no reason why the construction of a city planned and city built system of subways cannot be pushed with all speed, and while construction is in progress, an operating contract can be discussed, negotiated, advertised and awarded. Surely no lack of operators for the most lucrative rapid transit railroad in the world will be experienced. The Brooklyn company stands ready to undertake the contract to-day on terms advantageous to the city. If this company or its offer is [fol. 1734] unsatisfactory, then an open advertisement for competitive bids will bring others. But if the city should find none willing to operate on terms satisfactory to it, then municipal operation is still possible.

While I would prefer not to see the city enter the field of transit operation so long as a private operator can be had on fair terms, I would much prefer to see the city undertake it, with its attendant risks and prospective gains, rather than to make a contract with any company now by which the city assumes all the risks and the company absorbs all of the prospective gains.

The very object heralded as the chief advantage of an Interborough contract, the so-called universal five-cent fare, is forfeited by the plan proposed. The essence of this plan is dual operation. The Brooklyn Rapid Transit Company will cover all South Brooklyn and extend northward to 59th street only. The Interborough Company will cover all the Bronx and the northerly two-thirds of Manhattan and extend southward to Nostrand and Flatbush avenue in Brooklyn only. Two fares will be necessary between South Brooklyn and Coney Island or any point tapped by the Brooklyn Rapid Transit Company alone, and northern Manhattan and the Bronx or any point tapped by the Interborough Company alone. This would not be true if the city let one operating contract for the Broadway-Lexington avenue and other lines proposed with these extensions. Two fares would then be necessary only between the west

side of Manhattan and South Brooklyn or points tapped by the Brooklyn Rapid Transit Company alone. This is interesting when we consider how much emphasis has been laid upon the so-called universal five-cent fare.

It is not true that a Seventh avenue line need be lost by the rejection of this offer if the company refuses to modify it in a way to cure the foregoing vital defects. If built by the city that line could be connected at 42d street with either the new city-built Broadway 59th street line or with the present Broadway line and with the proposed Steinway tunnel line, under a proper operating arrangement with the Interborough Company.

There should be no misapprehension as to delay in construction. A rejection of this offer need not entail delay. It would mean merely more and cheaper building with city money instead of private capital.

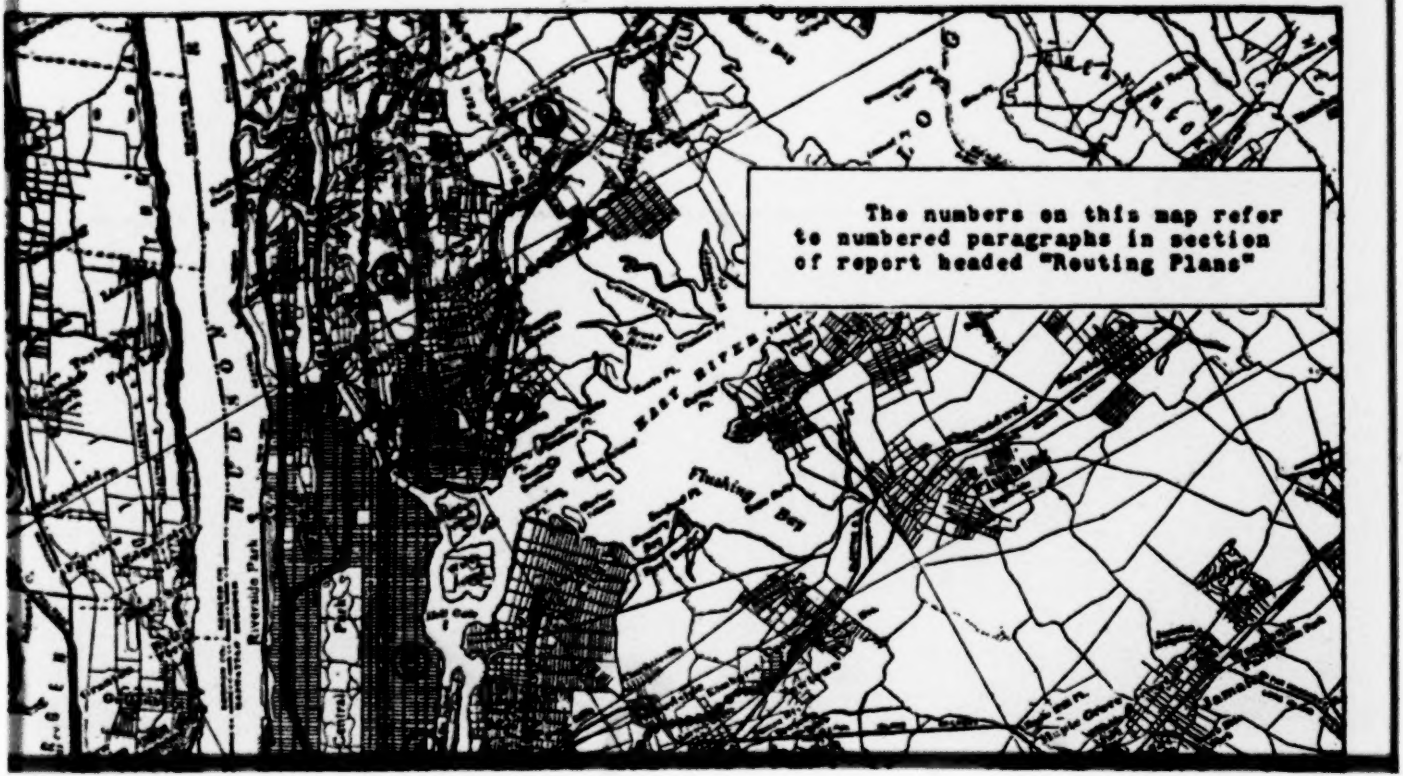
A separate contract with the Interborough Company covering elevated extensions and third tracks and the Steinway tunnel with joint operation in Queens, is desirable and can proceed at once in any event.

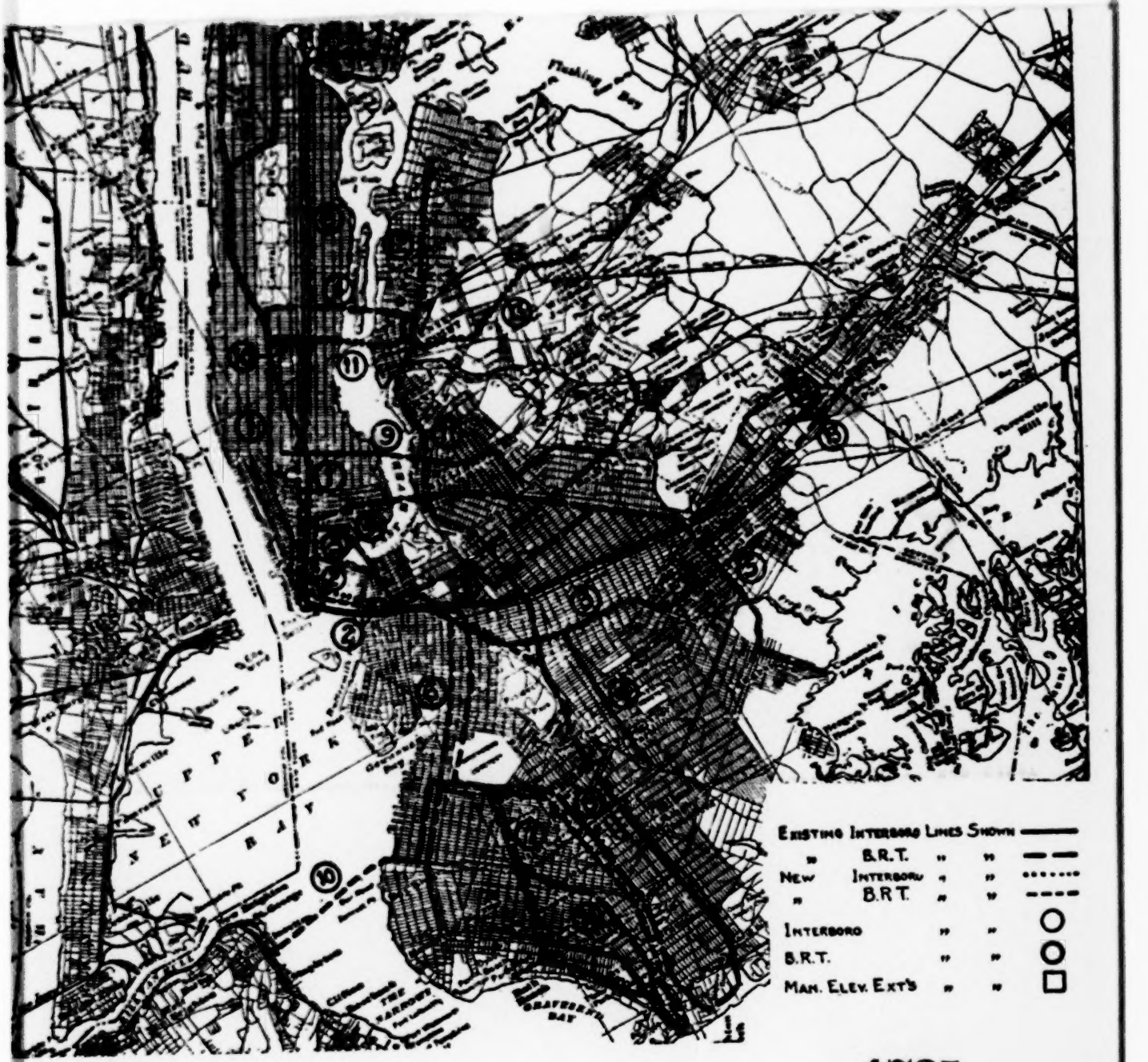
Much has been said to the effect that the increase of taxable values to be expected upon the adoption of this plan justifies the sacrifices of income involved and will more than offset the city's losses. Two fallacies are involved in this argument.

(Here follows map, marked side folio page 1735)

[fol. 1736] In the first place the increase of taxable values will follow the establishment of rapid transit facilities irrespective of the operator. In the second place, increased values of taxable realty will not offset losses of income, for those increases will be necessary to carry the inevitable capital cost of general municipal improvements always entailed in the growth of localities and the spread of population.

If the city were compelled to choose between the present offer of the Interborough Company and a contract with the same financial terms as those of the present leases of the existing subway, bad as we all regard those terms to-day, I should not hesitate for a moment to vote for the latter.


The numbers on this map refer to numbered paragraphs in section of report headed "Routing Plans"
MANHATTAN
EAST RIVER
Flushing Bay
Riverside Park


EXISTING INTERBORO LINES SHOWN
" B.R.T. " "
NEW INTERBORO " "
" B.R.T. " "
INTERBORO " "
B.R.T. " "
MAN. ELEV. EXT'S " "
NEW YORK BAY
GRAVESEND BAY

1735

Under the present contracts 1 and 2, the city is at least assured of interest and sinking fund upon its bonds. The city is preferred as to that sum, though denied all profit. Under the present offer, not only must the city abandon hope of profit, but interest and sinking fund upon its bonds depend upon an increased congestion so intolerable that public policy and the enlightened city administrations that will surely come after us, can never permit it to be attained.

I am opposed to the Interborough offer for the following reasons:

On Fundamental Grounds of Principle

I.

Because the plan proposed in this offer capitalizes congestion and insures, through the excessive preferential payments to be made the company, that the traveling public will either be more crowded in future subways than they are to-day or that the city will never receive interest and sinking fund on its bonds issued for construction.

The offer provides that there shall be deducted annually from gross earnings, in the following order:

(a) Operating expenses including depreciation, renewals, obsolescence, taxes, rentals payable to the city under contracts numbers 1 and 2, etc.;

(b) A sum to be paid the company of $6,335,000 on account of its capital investment in the present subway, to be cumulative;

(c) A sum equal to six per cent upon all new capital to be invested by the company, to be cumulative;

(d) Interest and sinking fund upon the city's capital investment plus a further sum sufficient to bring the payments to be made to the city during the entire period of 49 years up to an amount equal to 8.76 per cent upon the city's capital investment, to be cumulative; and

(e) The remainder of gross earnings, if any, to be divided between the city and the company, equally.

Whether the city will ever receive any return from the enterprise, either interest and sinking fund upon its bonds or profit, will depend upon the amount of gross earnings

and the cost of operating the road. All other factors are fixed by the terms of the contract.

Likewise, in any computation of the time at which the bonds of the city might become self-supporting, the only factors not definitely fixed by the contract are the same, [fol. 1737] namely, volume of traffic and the ratio of operating expenses to gross earnings. These two being determined, conclusions will follow as incontrovertible mathematical deductions. Whether, therefore, the city's bonds issued for construction will ever become self-sustaining, and if so at what time, and whether the city's cumulative deficit for interest and sinking fund on these bonds will ever be wiped out, will depend: on the volume of traffic that the new amalgamated Interborough subway may draw; on the maximum traffic of which it may be capable; and on the percentage of gross revenue represented by the operating expenses of the system. If these can be determined definitely in advance, we can say definitely whether the city's bonds will ever become self-sustaining, and whether the city's cumulative deficit will ever be wiped out.

The Interborough Company submitted a written estimate on July 6, 1911, that the gross total traffic of the amalgamated Interborough system in the first year of operation—1917—would be 425,000,000 passengers. Although this estimate was modified by Mr. E. J. Gaynor, the auditor of the company, during the conferences recently held, to 400,000,000, I have preferred to accept here the more liberal estimate in order to give the benefit of the doubt to the proposed plan in making my computation.

It is futile to speculate as to gross total traffic increases for the combined traffic facilities of the entire city, if there is a point of saturation beyond which the traffic of the amalgamated subway cannot expand without creating congestion greater than that experienced in the present subway to-day. If this contract with the Interborough depends for its success on such a congestion in the new subways, then in that fact is found a good and sufficient reason for rejecting it.

The point of saturation of the new amalgamated Interborough system has been calculated in various ways. All point to the fact that the city can never hope to come out of the contract whole. The City Club and the People's In-

stitute have both made such calculations and have put the point of saturation at 712,000,000 and 680,000,000 passengers, respectively. Each of these bodies has pointed out that this point of saturation will mean a congestion greater than that existing to-day. Both have pointed out the obvious fact that the carrying capacity of an entire subway system consisting of trunk lines and branches, must necessarily be limited by the carrying capacity of trunk lines.

With this fact in view, it has seemed to me that the fairest, most accurate and most scientific basis of calculation is a comparison of the trunk lines and branches of the proposed amalgamated system with the trunk lines and branches respectively of the present subway, on the basis of the number of passengers carried per car mile operated in each, in order to determine at what point congestion in the whole new system will equal present congestion, because this, it seems to me, should be taken as the point of practical saturation, whatever the point of theoretical maximum capacity may be.

[fol. 1738] Population figures for different routes or passenger density per mile of track, as a basis for estimating traffic capacity of a given line, are in themselves misleading because they ignore (1) the number and frequency of cars running past a given station and (2) the length of the route over which the cars run in making a single trip both of which register themselves accurately in the number of car miles operated over a given line in a given period of time.

The present subway consists of a trunk line lying south of 96th street and two branches running north from that point.

Of the total car miles operated during the year ending June 30, 1910, there were run over the trunk and branches as follows:

Broadway Division			
Car miles			Car miles
Trunk, 14,097,906	Branch (North of 96)		7,832,081
Lenox Avenue Division			
Trunk, 16,756,809	Branch		10,906,893
Total 30,854,715			18,758,974

Applying to this car mileage the figures of ticket sales during the year ending June 30, 1910 (as adjusted by the Public Service Commission in the report of the conferees, June 5, 1911), we find that:

In the same year the trunk carried 6.06 passengers per car mile.

In the same year the branches carried 4.38 passengers per car mile.

The proposed new Interborough subway system may be divided into trunk and branch lines, as follows:

Broadway line: Trunk from 96th street south.

New Lexington avenue line: Trunk from 138th street south.

New line, Brooklyn: Trunk from Eastern Parkway & Nostrand avenue, west.

The trunks, therefore, will be all tracks lying south of 96th street and Broadway, on the present subway, and south of 138th street in the Bronx and west of Nostrand avenue and Eastern Parkway, in Brooklyn, on the new subway.

The branches will be—

a. The lines of the present subway north of 96th street.

b. Jerome and River avenue subway in the bronx (138th street to Woodlawn).

c. The White Plains Road line (180th street to Becker avenue).

d. Southern Boulevard & Westchester avenue line to Pelham Bay Park.

e. Eastern Parkway & Livonia avenue lines east of Nostrand avenue.

f. The Nostrand avenue line.

g. The Astoria line.

[fol. 1739] h. The Woodside line.

Applying the car mile figures (found to have been the result of operation on trunk and branch lines) of the present subway and allowing for the same congestion as found in the present subway, we get a traffic for the new lines as follows:

Trunk line (old and new)	426,038,519
Bronx branches (new)	126,452,760
Present branches (old)	82,032,290
Brooklyn branches (new)	29,880,566
Queens branches (new)	37,978,757
Total	702,382,898

In reach this figure the new branches have been given a car mileage per mile of route, on the following ultra liberal basis:

Jerome and River avenue on basis of present Broadway branch.

Brooklyn branches on basis of present Broadway branch.

Queens branches on basis of present Broadway branch.

White Plains Road on basis of present Lenox branch.

Southern Boulevard on basis of present Lenox branch.

The total of 702,382,898 passengers is subject to the following adjustments owing to joint operation over certain branches:

Jerome Avenue Branch: This branch is to be used between 162d street and Woodlawn Cemetery jointly by elevated and subway. On the assumption that eight car elevated trains are to alternate with ten car subway trains, the elevated will get 41.45 per cent of the total traffic of 30,320,743, which will mean a deduction of 12,567,948 due to elevated operation (elevated cars seating 46 persons to 52 for subway cars).

White Plains Road: Between Becker and Olin avenue there will be joint subway and elevated operation. The subway will lose, therefore, 41.45 per cent of the total traffic of 15,710,806, or 6,512,129.

Queens: In Queens the Interborough Company will furnish service over the same tracks as the Brooklyn Rapid Transit Company. The Interborough Company will, however, give no through service beyond 42d street and Park avenue, at which point passengers will have to change to crowded north and south trains. The Brooklyn Rapid Transit Company, on the other hand, will give through service across 59th street and south on Broadway. Furthermore, Second avenue elevated trains will be operated by the Interborough Company across the Queensborough bridge and over the Queens extensions. It is safe to assume under these circumstances that the Interborough subway

division will not get more than one-third of the traffic. This will mean a deduction of 25,318,272.

[fol. 1740] The total deductions are, therefore:

Jerome Avenue	12,567,948
White Plains Road	6,512,129
Queens	25,318,272
Total	44,398,349
We have therefore, a	
Gross total of	702,382,898
Less	44,398,249
Corrected total	657,984,549

These 657,948,549 passengers would suffice to congest the new combined system to a point equal to 1910 congestion. 1912 congestion is, however, 11.62 per cent. greater in number of passengers carried. This means that when the new amalgamated system reaches a traffic of 734,442,352, it will be crowded to the present point and will attain practical saturation.

The second factor not fixed by the contract is the operating ratio.

The only accurate and scientific method of measuring operating expenses is that based upon the cost of operation per car mile operated. In view of the fact that general railroad practice and universal experience have resulted in the adoption of this basis of calculating operating cost, the use of it here scarcely requires justification. The haphazard method of arbitrarily apportioning an assumed percentage of gross receipts to operating expenses is manifestly without accurate basis and is pure guesswork.

Having found the cost of operation in the new subway per car mile and knowing the number of car miles it will be necessary to run in the new subway to carry passengers with the same degree of congestion that has been experienced in the present subway, year by year, it becomes a mere matter of computation to determine the operating cost of the new subway and therefore the percentage of gross receipts that such operating cost will constitute.

The present subway in 1906 had a cost per car mile of 9.32 cents. This cost rose in the most expensive year to 10.43 cents, and in the present year is 10.4 cents. As the new subway cannot be expected to operate on a more economical

car mile cost than the present subway (witness the recent increase in wages), the car mile cost of the present year, namely, 10.4 cents, has been taken as the car mile cost of operation in the new subway. Knowing precisely, as we do, the number of passengers carried per car mile in the present subway, year by year, and applying these figures to the assumed passenger traffic of the new subway, year by year, we find the number of car miles that it will be necessary to operate in the new subway each year in order to carry passengers with the same congestion experienced in the present subway, year by year.

The passenger figures for the years 1909 and 1910 have not been used because during these years there existed ab- [fol. 1741] normal conditions, among them the opening of the Brooklyn extension. In their place I have used the average of the other years of operation of the present system, namely, 4.5 passengers per car mile. The percentage of operating cost is, therefore, reckoned as follows:

For the Year 1917	
Operating cost per car mile	10.4 cents
Depreciation, per car mile (as per report of Bion J. Arnold, rendered to the public service commission)	1.5 cents
Total	11.9 cents
Assumed passenger traffic for 1917, 425,000,000	
425,000,000 divided by 4.32, the number of passengers per car mile which the present subway carried in the year ending June 30, 1906, equals 98,379,620 car miles.	
Multiplying this number of car miles by the operating cost—11.9—we have a total operating cost of	$11,707,172
Allowance for obsolescence of equipment, three-fourths of one per cent (taken from the report of conference committee of June, 1911) equals	420,000
Allowance for insurance of equipment, one-half of one per cent equals	280,000
Gross totals	$12,407,172

This sum equals 58.38 per cent of the gross revenue of the new subways for the year 1917.

Similar calculations have been made for succeeding years, the number of passengers per mile carried by the present subway in the year 1912 being used for all years following 1922.

Taking, therefore, 425,000,000 passengers, the Interborough's more liberal estimate, as the traffic of the first year of the new combined system, and 735,000,000 passengers as

the point of saturation reached in the year 1926, and taking the car mile costs for operating expenses at 10.4 and the passenger density per car mile at that of the present subway, the company's cumulative deficit will not be wiped out until the year 1941, and the city's cumulative deficit will never be wiped out. Further, the net earnings of the system will not be enough to pay current interest on the city's bonds in any year.

The net result will be that at the end of the contract term, the city will have paid approximately $118,000,000 out of the tax budget for interest and sinking fund upon its bonds issued for construction even if its deficits are not all funded. Whether this represents the limit of the city loss on account of interest and sinking fund, will depend upon the people's willingness to be crowded in the new subways as shamefully as they now are in the old. If popular opinion and comfort of fare-payers demand the construction of more subways before congestion has been reached equal to the present, the city's loss of interest and sinking fund will be proportionately and enormously increased. The amount [fol. 1742] of this loss, whatever it may be, must be found somewhere by the city, and can be had from but one source, whether defrayed during the life of the lease or upon its termination. That source is taxation.

II

Because the plan proposed combines all of the worst features of municipal operation with all of the worst features of private operation, and forfeits for the city all of the beneficial features of municipal operation and most of the beneficial features of private operation.

First. It makes the city underwriter of all losses and guarantor of the enterprise.

Second. It depletes the city's treasury and impairs its borrowing capacity without securing the objects of municipal construction.

Third. By making the company's profits independent of efficiency and economy it tends to make the company disregardful of public comfort and convenience.

Fourth. It gives to the company all of the profits of the enterprise.

Fifth. It deprives the city of control by making recapture impracticable or impossible.

Sixth. By giving to the company a large preferential profit and denying to it the prospect of any further profit, it removes all incentive to efficient management once the preferentials have been safely earned, and supplies the strongest motive for seeking indirect profits and for political chicanery.

If, as has already been demonstrated, there is no prospect that the city will earn interest and sinking fund on its bonds, there certainly is no prospect that there will ever be a surplus profit for division between the city and the company. The company therefore, once it has wiped out its accumulated deficit, and is in the safe enjoyment of its annual preferential income, will find no further incentive for economy or improved operation. It will, however, find strong incentive to lay its hands on any surplus earnings over its own preferentials which would otherwise go to defray, in part, the city's fixed charges. In other words, every motive is supplied for the organization of subsidiary companies for the sale of cars, equipment, etc. True, the contract provides that no such subsidiary companies shall be organized. In the first place, however, such a covenant is incapable of practical enforcement, because the city cannot be in a position to prove that any given corporation has been organized for such purposes or that the operator is interested therein. In the second place, it is easy to acquire an existing corporation, without going to the trouble of new organization, and this the contract does not inhibit. In point of fact the Interborough Company already has such a subsidiary in the Rapid Transit Subway Construction Company, which has served in the past and is ready to hand.

Under a contract such as that proposed, there would be nothing to prevent the making of unduly lucrative contracts with favored individuals, should the operator so desire. [fol. 1743] Another inherent vice lying in this absence of motives of economy, is the invitation that the contract holds

out to the operator to turn the administration of the new subways into the worst type of political machine, by filling the payrolls with supernumeraries once the preferentials have been earned. A motive is supplied in the threat of recapture by a subsequent city administration.

III

Because for the reasons already stated under points I and II foregoing, to enable the city to get back even a part of the interest and sinking fund upon the capital that it is about to invest in the new subways, requires a congestion, in the new subways equal to, or worse than, that in the present subway. This board ought not to force upon the people of New York the choice of indecent congestion or a burdensome tax rate, while adequate means of relief through a city-built, city-controlled and, if necessary, city-operated line are available.

It is quite clear that if the argument made under Point I holds good, the subway will never carry sufficient passengers in any one year to earn interest and sinking fund for that year upon the city's bonds issued for construction, unless through a crowding of passengers worse than that found in the present subway.

As the city in any case can never hope to wipe out its cumulative deficit by the earnings of the new subways under this contract, it must determine in advance of the first year of operation, how each deficit shall be met when it arises.

On the basis of the most liberal traffic estimate submitted for the first year of operation, of 450,000,000 passengers, the city's deficit that year would amount to $2,940,000, and on the basis of the Interborough's estimate at 425,000,000 it would be the same. The city, therefore, must determine in 1917 whether this deficit can be met by writing the amount thereof into the tax budget for the ensuing year or by the issue of bonds to fund it. The funding of a deficit which the city can never expect to discharge, but which, as far as reasonable foresight can predict, will go on increasing during the life of the contract, would constitute reckless municipal financing. Such a course would shortly destroy the city's credit. We must expect, therefore, that the city's deficits in interest and sinking fund

upon the city's bonds, as they occur from year to year, will be carried in the tax budget.

As the first such deficit, on the basis of all traffic estimates will amount to $2,940,000, it is quite clear that the city, in adopting this contract, is compelled to choose between deplorable congestion to relieve which it was supposed new subways were chiefly to be built, and large and burdensome additions to the tax rate.

On the other hand the estimates of traffic and cost prepared by the engineers of the Public Service Commission show that the independent city subway system, whether operated by the Brooklyn Rapid Transit Company or by some other operator will earn not only interest and sinking fund on the city's bonds, but within a few years will show a handsome profit to be shared with the city.

[fol. 1744]

IV

Because the city's power to recapture, which everyone considers indispensable, is made practically impossible by the proposed terms and is surrounded with conditions that practically insure confusion and litigation.

(a) While the offer appears to conform to the condition precedent to a contract with the Interborough laid down by the Comptroller and myself in the transit committee's majority report of January 5, 1911, and in memoranda submitted to this board, namely, an exchange of its lease upon its Fourth avenue subway south of Forty-second street for an equivalent lease upon the new Seventh avenue subway, in point of fact it leaves a loophole through which the company may escape compliance with this essential part of its contract.

The company's offer, section 6, reads in part as follows: so that the "city if it so elect may obtain possession of either "a complete east side or a complete west side subway line, "the Interborough Company will consent, in the event of "the necessary legislation having been secured, in the "securing of which it will co-operate, and provided the "lien of any duly authorized mortgage be not distributed to "a modification of contracts numbers 1 and 2 * * * so that "that portion of the existing subway system extending "southward from 42nd street in Manhattan to Atlantic

"avenue in Brooklyn * * * sh:ll be held under a lease "terminable at any time after ten years. * * *"

The condition named by the Company—"provided the lien of any duly authorized mortgage be not disturbed"—affords an opportunity for avoiding compliance with this part of the offer. As already twice pointed out in this board, there are two mortgages effecting the present leases of the existing subway.

The first is a mortgage made by the Interborough Rapid Transit Company and is a direct lien upon these leases. This is an ordinary railroad mortgage and contains a release clause such as to enable the Interborough Rapid Transit Company to effect the exchange desired.

The stock of the Interborough Rapid Transit Company is held and owned by the Interborough-Metropolitan Company. The other mortgage is one made by the Interborough-Metropolitan Company, pledging this Interborough Rapid Transit Company stock as security for the Interborough-Metropolitan Company's bonds. One clause of this mortgage reads as follows:

"And the Interborough (Rapid Transit) Company shall "do all other things necessary or proper to preserve its "rights in said rapid transit railways under and pursuant "to said leases."

Quite obviously, when the Interborough Rapid Transit Company is called upon to comply with the terms of its offer it may answer that, the lien of the above described duly authorized mortgage would be disturbed by compliance and that, therefore, under the terms of its offer, it [fol. 1745] need not comply. In order that the city may be in a position to compel an exchange of these leases, the Interborough-Metropolitan Company, the mortgage trustee and the bondholders should join in the agreement for exchange.

As it stands, this clause of the offer is calculated to mislead the city's authorities into the belief that they are about to obtain control over a continuous east side trunk line which, in point of fact, they will never get.

(b) The recapture provision becomes inoperative when read in the light of subd. 7, sec. (a) of the offer, which reads in part as follows:

"The right of recapture provided for in this paragraph "shall nevertheless be exercised by the city with respect to "the whole of any one or more of the following groups of "lines (a) the Seventh Avenue line including the extension "under the East River to Borough Hall, Brooklyn; the "Lexington Avenue line together with the extension to "Pelham Bay Park and on Jerome Avenue to the exten- "sion of the latter avenue with Woodlawn Road adjoining "Woodlawn Cemetery."

The provision just quoted makes it encumbent upon the city to take both the Seventh avenue and Lexington avenue lines or neither. It thus nullifies that part of the offer relating to the exchange of the present Fourth avenue for the Seventh avenue or Broadway for Lexington avenue divisions. If the exchange were effected then this provision for the taking of both or neither the Seventh and Lexington avenue division becomes both impracticable and impossible.

(c) In failing to provide for a segregation of city capital to trunk lines or for the taking by the city of trunk lines up to the aggregate of its total investment without additional payment to the company, the proposed contract places serious difficulties in the way of recapture by the city of any material portions of the new subways.

If the city capital were segregated to trunk lines, then in exercising its right to recapture such trunk lines, the city would not be compelled to make a large capital payment to the company. The same is true, if the city were permitted to take over a specified group, or groups, of lines up to a total value equal to its capital investment, either without payment of any additional capital sum to the company or if the value of the lines recaptured were found to exceed the total of the city's investment, then on payment of such excess only. Under the present terms of the offer, to take over any group or groups of lines, the city will be compelled to pay to the company a capital sum equal to the company's investment in such lines which, as the offer now stands, will be upwards of 50% of the cost of construction. The improbability of the city's ever being in a position financially to pay over so large a lump sum has been pointed out sufficiently heretofore.

(d) The provision for the recapture of the present subway at the end of thirty-five years "upon payment to the "company of a sum equal to the then present worth of the [fol. 1746] "existing subway leases estimated upon the "basis of the annual net profits of the five year period im- "mediately preceding recapture," is absurd and impossible of performance.

As receipts of old and new divisions are to be pooled from 1917 forward, it will manifestly be impossible to determine the net profits of the old portion for any five year period subsequent to 1917, and therefore impossible to compute the then present worth of the lease of that portion of the system. This provision sounds well, but is wholly valueless to the city, not only for the reason stated, but also because, even were it possible to compute the then present worth of the lease, recapture would entail a lump sum payment far beyond the city's means.

V

Because, by insuring that the city will never receive interest and sinking fund upon its bonds issued for construction, for all of the reasons stated under Point I, it prevents the exemption of these bonds from the debt limit and thereby impairs the city's subway building capacity for the future.

VI

Because, in providing that future extensions as soon as they become profitable be included under the operating terms of the general unprofitable contract, it makes certain that the city will never receive interest and sinking fund upon bonds issued for future extensions.

This will work two harmful results: first, it will prevent such bonds from exemption from the debt limit; second it will greatly discourage the building of future extensions because of the necessity for the inclusion of the bonds issued for their construction in the general city debt.

On Plain Business Grounds

VII

Because an indefensible failure to provide for depreciation and obsolescence in the present subways in the past is

made the basis of a gift to private capital of over $1,000,000 a year for forty-nine years.

On account of the company's alleged capital now invested in the present subway, the preference to be paid to the company is $6,335,000, which is said to be the average of the net profits of the last two years of operation. In point of fact it is no such thing, but, approximately, $1,000,000 higher than the actual average of net profits of the last two years. During these two years of operation when the net profits of the Interborough Company from the subway were claimed to be respectively $6,769,577 and $5,900,423, the company, as already stated, was not providing for depreciation or obsolescence. A reasonable allowance for depreciation and obsolescence during those two years would have been $2,128,002. This figure is based upon the following:

[fol. 1747] Depreciation during year ending June 30, 1910, at 1.5 cents per car mile	$746,339
Obsolescence at ¾ of 1% on $35,000,000	262,500
Total	$1,008,839
Depreciation during year endnig June 30, 1911, at 1.5 cents per car mile	856,663
Obsolescence at ¾ of 1% on $35,000,000	262,500
Total	$1,119,163

The rate of depreciation per car mile is taken from the report rendered by Bion J. Arnold upon the "Return on the Investment in the Subway" to the Public Service Commission, and is his estimate of the amount that ought to be set aside annually for that purpose. The rate for obsolescence is that suggested in the conference committee's report of last June and is ¾ of 1% of the cost of equipment. It follows therefore that the preferential sum to be paid the company, including as it does one million dollars of deferred depreciation and obsolescence, is more than a million dollars higher than the average net earnings of the last two years. This city will therefore pay to the company every year during the life of the proposed contract,

as part of this preferential, one million dollars more than the average net earnings of the Interborough subway during the past two years.

VIII

Because from $40,000,000 to $50,000,000 is needlessly given to private capital by sacrificing terms in existing contracts as to readjustments.

This result has been fully explained already in memoranda which I have filed with this board heretofore and is clearly and fully restated in the memoranda of the City Club and of the People's Institute. It will be sufficient to refer here to the fact that the initial terms of contracts 1 and 2 expire respectively in the years 1954 and 1943; that under the existing contracts there will be on those dates readjustments of terms and that, if agreement cannot be reached between the city and the company, arbitration may be had.

A 49 year flat term without readjustment would extend the period of the company's enjoyment of its present lucrative terms of operation for 12 years, in the case of the longer lease, and for 23 years in the case of the shorter lease.

The estimate of forty to fifty million dollars which the company will gain and the city lose by extending the term of both leases to 49 years without readjustment, is based upon the reasonable assumption that neither through agreement nor arbitration would the company get better terms than an even division of profits with the city over and above expenses of operation.

Assuming that the present subway would be carrying no more than 300,000,000 passengers at the time of the expira- [fol. 1748] tion of the initial term of leases 1 and 2 and operating at the same cost ratio as now, the net profits per year would be $4,368,100 for contract No. 1 and $1,681,900 for contract No. 2.

Assuming that agreement or arbitration would then result in an even division between city and company, the city, by waiving the readjustment at the end of initial terms, gives up $2,184,050 per year for 12 years in the case of contract No. 1 and $840,950 for 23 years in the case of contract No. 2 or $45,549,450 in all.

IX

Because the company is to be given back the value of the equipment of the present subway three times over and the value of new equipment twice over.

As to old equipment:

Once, as a part of operating expenses under the name of depreciation and obsolescence funds, as per sec. 12, subdivision (a) of the offer. The amounts which the company may annually write into the depreciation and obsolescence funds are not limited. The conference committee's report of last June calls for an annual sum sufficient fully to amortize equipment by the end of the contract. These funds will, therefore, undoubtedly equal the cost of equipment at the end of the 49 year period.

A second time: through the preferential payment of $6,335,000, which, as has already been pointed out, includes sums for depreciation and obsolescence which should have been, but were not, deducted in the past.

A third time: through the operation of sec. 17 of the offer, which compels the city to take over the existing equipment on the expiration of the contract term at its then appraised value. As the funds above named, established under sec. 12, subdivision (a) of the offer undoubtedly will be sufficient to amortize the value of the equipment on the expiration of the contract term, any sum which the city pays the company for the then value of the equipment will be pro tanto a third payment.

As to new equipment:

Once, as a part of operating expenses under subdivision (a) of sec. 12 of the offer.

A second time, through the sinking fund presumably to be provided for as a part of the six per cent. preference upon new capital payable to the company under subdivision (c) of sec. 12 of the offer. I say presumably, because the offer contemplates that the company shall get a flat six per cent. on its new capital investment, without the segregation of this sum into interest on the bonds and sinking fund.

X

Because the sinking funds established are grossly excessive, without any provision that the city shall share in the surplus created.

[fol. 1749] With all of the guaranties included in this proposition, the company's bonds cannot conceivably fail to sell at par or better, if offered as five per cent. bonds, and if sold by public letting or auction, as they should be, as ordered by the Public Service Commission in the cases of the Bronx Gas and Electric Co., and Kings County Lighting Co., in New York; and as in the case of the Consumers' Gas Co. of Toronto, and all gas and water companies in Great Britain. This will leave a sinking fund of one per cent. to amortize the cost of construction. In point of fact, at the end of the contract term, the sinking fund which is the result of accumulations of annual payments of one per cent. upon the new capital, if invested at four and one-half per cent. will equal the amount of the company's capital investment plus a surplus of $60,000,000. In other words, an annual payment of one per cent. on $77,000,000, if invested at four and one-half per cent. throughout a term of 49 years and one per cent. on $10,000,000 for 44 years will amount to the sum of $147,000,000. This exceeds the company's total investment of $87,000,000 by $60,000,000. If invested at four per cent. it will amount at the end of the lease term to $126,404,086. This exceeds the company's total investment of $87,000,000 by $39,404,086.

The offer does not provide that such surplus of $60,000,000, or $39,404,086, as the case may be, shall revert to the city. As the offer now stands the company may, and will, appropriate this enormous bonus. Any fair contract should provide either that all surplus in such funds shall revert to the city until all the accumulated deficits are wiped out, and that the remainder of any surplus in such funds shall be shared by the city and company equally, or that the allowance to the company upon new capital shall be divided into interest and sinking fund, which latter should not exceed .588722%, an annual increment sufficient, if invested at four and one-half per cent., compounded annually, to wipe out the principal in 49 years.

This objection applies alike to the offer of the Interbor-

ough Company and to the proposed contract with the Brooklyn Rapid Transit Company.

XI

Because the offer denies the city a share of any advantage that may be reaped by the company through the sale of its bonds at a premium.

This applies to both companies.

In view of the city's extraordinary guaranties against all and any conceivable loss, the company's bonds would undoubtedly sell considerably above par if sold at public auction or letting, as they should be. As the price realized will be wholly the result of the city's guaranties, some share of the premium should be reserved to the city or at least credited toward amortization of principal.

John Purroy Mitchel, President Board of Aldermen.

Action was deferred until Friday, May 24, 1912.

On motion of the Comptroller, the Board adjourned to meet Thursday, May 23, 1912, at 10.30 o'clock a. m.

[fol. 1750] CC. At a meeting of the Board of Estimate and Apportionment held on May 24, 1912, the following proceedings were had and taken:

President: William J. Gaynor, Mayor; Douglas Mathewson, Deputy and Acting Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President; Borough of Manhattan; Alfred E. Steers, President; Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Denis O'Leary, Acting President, Borough of Queens, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

In the matter of the communication from the Public Service Commission for the First District relative to the construction, maintenance and operation of additional rapid transit railways and requesting a statement of the position of this Board on the subject.

At the meeting of May 22, 1912, a report was received from the Committee on Pending Transit Proposals, and also a communication from the President of the Board of Aldemen in opposition to such report and the matter was laid over until this day.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, offered the following:

Whereas, Under provisions of the Rapid Transit Act and of the city charter, all contracts for the construction, equipment or operation of rapid transit railways, and all routes established as a basis for the operation of such railways, require the approval of the Board of Estimate and Apportionment before becoming effective; and

Whereas, The Public Service Commission for the First District in order to expedite the preparation of proper contracts, and to promote harmonious action, has from time to time referred for the advance consideration of the Board proposals it has received for operation of new rapid transit lines and extensions of the present lines of existing operating companies; and

Whereas, A Committee of this Board, appointed to confer with the Commission upon the several plans from time to time presented, has submitted a final report recommending that the Board inform the Public Service Commission that it will approve contracts for the equipment and operation, and for contributions in part toward the cost of construction of certain lines by the Interborough Transit Company, and the Brooklyn Rapid Transit Company, or a company to be organized in its interest, upon certain terms and conditions as set forth; and

Whereas, The said Committee informs the Board that the respective operating companies have signified their willingness to enter into contracts under the terms proposed; and

Whereas, In the judgment of the Board, the execution of such contracts will enure to the Public interest; therefore be it

[fol. 1751] Resolved:

(1) That the Board inform the Public Service Commission that if a contract be executed with the Interborough

Rapid Transit Company for the equipment and operation of new rapid transit lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, and the company's communication to the Public Service Commission dated February 27, 1912, such contracts, when presented to your Board will have its approval.

(2) That the Board inform the Public Service Commission that if a contract be executed with the Brooklyn Rapid Transit Company, or with a company organized in its interest, for the equipment and operation of new rapid transit lines, and for the operation of the existing elevated lines of the Brooklyn Rapid Transit Company in conjunction with such new lines, and for contribution, in part, toward the cost of construction of such lines, in accordance with the statement of routes and of operating terms herein set forth, such contract, presented to your Board simultaneously with the presentation of the contract for the Interborough Rapid Transit Company, will have its approval.

(3) That the Board inform the Public Service Commission that if application be made to it by the Interborough Rapid Transit Company for certificates for the extension and third tracking of its Manhattan elevated lines, and for the cession of the Steinway Tunnel to the City and the immediate operation thereof, in accordance with the terms herein set forth, and in advance of the execution of the general contract for the operation of new rapid transit lines, such certificates, when presented, will have your approval.

(4) That the resolutions adopted by your Board dated July 21, 1911, and such other resolutions heretofore adopted that may be inconsistent with the present recommendations, be rescinded; and

(5) That the Board's Special Committee on pending Transit Proposals be continued for the purpose of further conferences with the Public Service Commission with relation to any questions of detail that may arise between the two bodies affecting the contracts to be prepared.

Discussion then ensued between the President of the Borough of Manhattan and the President of the Board of Aldermen.

The following appeared in favor of the report: Hon. Seth Low, Earnest Gilmore, James J. O'Brien, Dr. George W. Brush, Chairman, Brooklyn Transit Conference, and on behalf of the Flatbush Association and the Brooklyn League; Thomas E. Clark, on behalf of the Allied Boards of Trade of South Brooklyn, and R. E. Simon.

A. Henschel appeared in favor of more transverse routes and connections for intercommunication across the City.

Hon. Francis P. Bent appeared on behalf of the United Boards of Trade and Twenty-eighth Ward Taxpayers' Association of Brooklyn in favor of the subway continuing as a subway instead of an elevated structure from the old Bushwick station to East New York or Manhattan Junction.

[fol. 1752] Henry S. Wood appeared in support of his offer to construct subways.

Frederic C. Howe, representing the People's Institute, suggested that action be deferred.

Cornelius M. Sheehan on behalf of the Allied Boards of Trade, Brooklyn, appeared in opposition.

Dr. William H. Allen, Director, Bureau of Municipal Research, who requested action be deferred.

Arnon L. Squiers protested the proposition for an elevated road across Brooklyn.

The resolutions offered by the President of the Borough of Manhattan were then adopted by the following vote:

Affirmative—The Mayor, the Deputy and Acting Comptroller, the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, the Acting President of the Borough of Queens, and the President of the Borough of Richmond—13.

Negative—The President of the Board of Aldermen—3.

In explaining his vote in the negative the President of the Board of Aldermen made the following statement:

"If the resolutions were to be divided I would be willing to vote for a continuance of the Committee cheerfully, for the certifying of the third tracking of the elevated railroad; for the Steinway Tunnel, the operation of which I suppose includes Queens, and the approval of the contract

with the B. R. T. with one modification as to the Sinking Fund. As to the others I can not vote for, for the reasons stated in my memorandum the other day."

DD. At a meeting of the Board of Estimate and Apportionment held on March 6, 1913, the following proceedings were had and taken:

Rapid Transit Railways—Additional Tracks on the Existing Elevated Railroads, Extensions Thereto, and the Construction, Maintenance, Equipment and Operation of Additional Rapid Transit Railroads and Future Extensions of the Same in the Several Boroughs of the City (Cal. No. 4).

The Secretary presented the following:

State of New York, Public Service Commission for the First District, Tribune Building, New York

March 4, 1913.

To the Board of Estimate and Apportionment of the City of New York:

The Public Service Commission for the First District herewith transmits for appropriate action under the Rapid Transit Act the following documents which is proposes to execute:

1. Contract between The City of New York, acting by the Commission, and New York Municipal Railway Corporation for additional rapid transit railroads.

[fol. 1753] 2. Certificate to be granted by the Commission to New York Municipal Railway Corporation for Broadway, Fulton street and Myrtle avenue additional tracks.

3. Certificate to be granted by the Commission to the New York Municipal Railway Corporation for Jamaica and Liberty avenue extensions.

4. Contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads.

5. Certificate to be granted by the Commission to Interborough Rapid Transit Company for Webster avenue extension, 8th avenue and 162d street connection, Queensboro Bridge extension and West Farms subway connection.

There are also transmitted two supplemental agreements which the commission proposes to enter into upon the execution of the two main contracts. Those supplemental agreements are:

1. Agreements between The City of New York, acting by the Commission, Interborough Rapid Transit Company and New York Municipal Railway Corporation, covering trackage rights to be exercised by the latter company.

2. Agreement between The City of New York, acting by the Commission, Interborough Rapid Transit Company as lessee, under the contract with the City, and Interborough Rapid Transit Company as lessee of the Manhattan Railway Company, covering trackage rights to be exercised by the Interborough Company as lessee of the Manhattan Railway Company.

The contracts and agreements to become effective will require the approval and consent of the Board of Estimate and Apportionment; the certificates will require the approval of your Board and in addition the consent of your Board and of the Mayor, as the local authorities, to the construction and operation of the railroads therein described.

In view of the extended conferences with your Committee on Pending Transit Proposals and of the widespread discussion of these matters, it is unnecessary here to recite the various provisions of these documents or to declare the public policy that underlies them. The documents are the result of nearly five years of negotiation, actively participated in by your committee since its appointment two years ago. In transmitting them, the Commission desires to record its high appreciation of the work of your committee and especially the work of its chairman, the President of the Borough of Manhattan.

Public Service Commission for the First District.
By Edward E. McCall, Chairman.
Attest: Travis H. Whitney, Secretary.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, offered the following:

Whereas, The Public Service Commission for the First District has forwarded a communication dated March 4, 1913, to the Board of Estimate and Apportionment transmitting for approval proposed certificates, contracts and [fol. 1754] supplementary agreements for the construction, maintenance and operation of certain elevated railroad extensions, additional tracks and the construction, maintenance equipment and operation of additional rapid transit railroads and future extensions to the same in the several boroughs of the City, as follows:

Proposed Certificates

Company	Line
Interborough Rapid Transit Company (Railroad extensions)	Webster Avenue.
	Eighth Avenue and One Hundred and Sixty-Second street connection.
	Queensboro Bridge.
	West Farms Subway connection.
New York Municipal Railway Corporation (Additional tracks)	Broadway.
	Fulton Street.
	Myrtle Avenue.
New York Municipal Railway Corporation (Railroad extensions)	Jamaica.
	Liberty Avenue.
Proposed Contracts:	
New York Municipal Railway Corporation	Rapid Tansit Railways and Future Extensions of same.
Interborough Rapid Transit Company	Rapid Transit Railways and Future Extensions of same.

Proposed Supplementary Agreements

City of New York (acting by Public Service Commission for the First District), Interborough Rapid Transit Company, New York Municipal Railway Corporation, for joint use of tracks over certain sections of the Steinway Tunnel Line, and any extensions thereof.

City of New York (acting by Public Service Commission for the First District), Interborough Rapid Transit Company (as lessee and as grantee) for joint use of tracks for through service.

Now, therefore, be it

Resolved, That the communication and the proposed certificates, contracts and supplementary agreements be received and referred to the Corporation Counsel for his

examination, and to the Committee on Pending Transit Proposals for report; and be it further

Resolved, That Tuesday, March 11, 1913, at 10.30 a. m., be and is hereby fixed as the date for consideration of the proposed certificates, contracts and supplementary agreements; and be it further

Resolved, That the Secretary of this Board be and is hereby directed to publish notice of said date for consideration in the City Record.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

[fol. 1755] EE. At a meeting of the Board of Estimate and Apportionment held on March 11, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: William J. Gaynor, Mayor; William A. Prendergast, Comptroller; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens; and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

The Board proceeded with the consideration of the communication dated March 4, 1913, from the Public Service Commission for the First District submitting for approval of this Board proposed certificates, proposed contracts and proposed supplementary agreements as follows:

1. Proposed certificate to be issued to Interborough Rapid Transit Company to construct, maintain and operate certain elevated railroad extensions as follows: (a) Webster avenue line, (b) 8th avenue and 162d street connection, (c) Queensboro Bridge line, (d) West Farms subway con-

nection, in the Boroughs of Manhattan, The Bronx and Queens.

2. Proposed certificate to be issued to New York Municipal Railway Corporation to lay, maintain and operate certain additional tracks on its (a) Broadway elevated line, (b) Fulton street elevated line, (c) Myrtle avenue elevated line, in the Borough of Brooklyn.

3. Proposed certificate to be issued to New York Municipal Railway Corporation to construct, maintain and operate certain elevated railroad extensions known as (a) Jamaica line, (b) Liberty avenue line, in the Boroughs of Brooklyn and Queens.

4. Proposed form of contract to be entered into with New York Municipal Railway Corporation for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Broadway-Fourth avenue line, (b) Culver line, (c) Fourteenth-Eastern line, and future extensions in the several boroughs of the City.

5. Proposed form of contract to be entered into with Interborough Rapid Transit Company for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Seventh avenue-Lexington avenue line, (b) Eastern Parkway line, (c) Steinway Tunnel line, (d) White Plains road line, and future extensions in the several boroughs of the city.

6. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

[fol. 1756] 7. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company, as lessee under the preceding subway contract and as grantee under the certificate granted for additional elevated railroad extensions, for joint use of tracks for through service.

This communication was presented to the Board at the meeting of March 6, 1913, when, by resolution duly adopted, this day was fixed as the date for consideration, and the communication and accompanying instruments referred to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

The following appeared in opposition: Henry S. Wood, Fred C. Leubuscher, L. S. Bedford, J. B. Allee and Miss C. P. Fincher.

Thomas E. Clark, on behalf of Brooklyn civic associations, appeared in favor.

Communications were received from the 10th Assembly District Republican Club and the 18th Assembly District Republican Club in favor.

No one else desiring to be heard, the Chair declared the consideration concluded. Action was then deferred until Monday, March 17, 1913, at 2 P. M.

On motion, the Board adjourned to meet Thursday, March 13, 1913, at 10:30 o'clock A. M.

FF. At a meeting of the Board of Estimate and Apportionment held on March 17, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: William J. Gaynor, Mayor; John Purroy Mitchel, President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Alfred E. Steers, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx, and George Cromwell, President, Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

In the matter of the communication dated March 4, 1913, from the Public Service Commission for the First District, submitting for approval and consent of this Board proposed certificates, proposed contracts and proposed supplementary agreements as follows:

1. Proposed certificate to be issued to Interborough Rapid Transit Company to construct, maintain and operate certain elevated railroad extensions as follows: (a) Web-

ster Avenue line, (b) 8th avenue and 162d street connection, (c) Queensboro Bridge Line, (d) West Farms Subway Connection, in the Boroughs of Manhattan, The Bronx and Queens.

[fol. 1757] 2. Proposed certificate to be issued to New York Municipal Railway Corporation to lay, maintain and operate certain additional tracks on its (a) Broadway Elevated Line, (b) Fulton Street Elevated Line, (c) Myrtle Avenue Elevated Line, in the Borough of Brooklyn.

3. Proposed certificate to be issued to New York Municipal Railway Corporation to construct, maintain and operate certain elevated railroad extensions known as (a) Jamaica Line, (b) Liberty Avenue Line, in the Boroughs of Brooklyn and Queens.

4. Proposed form of contract to be entered into with New York Municipal Railway Corporation for the construction, maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Broadway-Fourth Avenue Line, (b) Culver Line, (c) Fourteenth Street-Eastern Line, and future extensions in the several Boroughs of the City.

5. Proposed form of contract to be entered into with Interborough Rapid Transit Company for the construction maintenance, equipment and operation of additional rapid transit railroads, divided into several lines, to be known, respectively, as (a) Seventh Avenue-Lexington Avenue Line (b) Eastern Parkway Line (c) Steinway Tunnel Line, (d) White Plains Road Line, and future extensions in the several Boroughs of the City.

6. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

7. Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and Interborough Rapid Transit Company, as lessee under the preceding subway contract and as grantee under the certificate granted for additional ele-

vated railroad extensions, for joint use of tracks for through service.

This communication was presented to the Board at the meeting of March 6, 1913, when by resolution duly adopted March 11 was fixed as the date for consideration and the communication and accompanying instruments referred to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

At the meeting of March 11, 1913, action was deferred until this day.

On motion, the Board adjourned to meet Tuesday, March 18, 1913, at 3 p. m.

GG. At a meeting of the Board of Estimate and Apportionment held on March 18, 1913, the following proceedings were had and taken:

The Board met in pursuance of an adjournment.

Present: William J. Gaynor, Mayor; William A. Prendergast Comptroller; John Purroy Mitchel, President Board of Aldermen; George McAneny, President Borough [fol. 1758] of Manhattan; Alfred E. Steers, President Borough of Brooklyn; Cyrus C. Miller, President Borough of The Bronx; Maurice E. Connolly, President Borough of Queens; and George Cromwell, President Borough of Richmond.

The Mayor, Hon. William J. Gaynor, presided.

Rapid Transit Railways

In the matter of the communication dated March 4, 1913, from the Public Service Commission for the First District, submitting for the approval and consent of this Board proposed certificates, proposed contracts and proposed agreements.

At the meeting of March 17, 1913, action was deferred until this day.

The Secretary presented the following:

City of New York, Law Department Office of the Corporation Counsel, New York

March 10, 1913.

Board of Estimate and Apportionment, 277 Broadway, New York City:

SIRS: A communication from the Secretary of your Board, dated March 6, 1913, has been received. It reads as follows:

"I transmit herewith certified copy of resolution this day adopted by the Board of Estimate and Apportionment, fixing Tuesday, March 11, 1913, at 10:30 o'clock a. m., as the date for consideration of the communication dated March 4, 1913, from the Public Service Commission for the First District to this Board, transmitting for approval proposed certificates, contracts and supplementary agreements for the construction, maintenance and operation of certain elevated railroad extensions, additional tracks and the construction, maintenance, equipment and operation of additional rapid transit railroads and future extensions to the same in the several Boroughs of the City; and referring said communication and the accompanying instruments to the Corporation Counsel for his examination and to the Committee on Pending Transit Proposals for report.

"I transmit herewith a copy of the communication and accompanying instruments.

"I would request that you endorse your approval on each of the contracts, certificates, and supplementary agreements and return same to this office as speedily as possible so that they may be ready for action by the Board at the meeting of March 11, 1913."

I return said contracts endorsed approved as to form.

Yours truly, John L. O'Brien, Acting Corporation Counsel.

The President of the Borough of Manhattan, Chairman of the Committee on Pending Transit Proposals, on behalf of said Committee, made the following statement:

[fol. 1759] When, on May 24 last, the Board of Estimate adopted the report of the Conference Committee setting

forth the terms upon which contracts for the operating companies would be approved, the committee was continued "for the purpose of further conference with the Public Service Commission with relation to any questions of detail that may arise between two bodies affecting the forms of contracts to be prepared." Under this authority, the committee continued to confer with the Public Service Commission upon various questions of policy, and of construction of the terms of the report that arose during the summer. When the first drafts of the contracts were presented for public hearing, on December 31, 1912, they were carefully examined by the committee, and various questions raised with relation to details in which they did not appear to conform to the report of May. Some of these questions upon which the Commission had been unable to agree with the companies had been deliberated by the Commission until the conferees of the two bodies might pass upon them. The result of the further negotiations that followed was that every proposed clause did not conform to the report of May was either eliminated or properly modified. The contracts as now presented for approval are little more, therefore, than the expression in exact contractual terms of the general transit plan to which the Board has already subscribed. The Conference Committee does not deem it necessary to rehearse the various terms which were stated in detail in its previous reports, and it now recommends the adoption of the several contracts, certificates and agreements as they stand.

The formal resolutions of approval that the committee now submits incorporate the express reservation of borrowing capacity sufficient to cover the city's share in the construction of all the lines embraced within the Dual Plan. The estimates submitted in May covering the contributions of both the city and the companies, whether for construction or equipment, and including also the item of real estate, reached a total of $301,860,000. The third tracking and extensions of the Manhattan elevated system adds approximately $25,000,000 more. The estimates as they have since been carefully revised, and as now re-submitted, are but $67,000 beneath this figure. They are distributed as follows:

Interborough System:	
City funds	$63,335,637.00
Company, for construction	56,260,000.00
Company, for equipment	21,000,000.00
	$140,595,637.00
Brooklyn System:	
City funds for new work	$72,005,991.00
City funds for Fourth Avenue and Centre Street loop lines	28,496,000.00
Company funds for the construction of city-owned lines	13,695,000.00
Company funds for improvements to its existing system	21,000,000.00
Company funds for equipment	26,000,000.00
	$161,196,991.00
Interborough System	$140,595,637.00
Brooklyn System	161,196,991.00
Grand total	$501,792,628.00

[fol. 1760] The sum total of the required investment of the City, is, therefore, $163,837,628. Deducting the cost of the Fourth avenue and Centre Street Loop lines, the City's share for the new work will be $135,341,628. This is $1,030,572 less than the estimates of the City's share on account of both systems presented in last May.

Since the adoption of the first report of the conferees, in June, 1911, contracts have been let and work has proceeded upon certain of the truck lines, embraced within the Dual Plan; and more recently upon the extension of the Fourth avenue line in Brooklyn. These contracts which, having been duly registered, are already charges against the debt limit, amount to $48,259,847. The contracts let within the past three or four year for the Fourth avenue and Centre street loop lines amount to $24,453,450; and the contracts for the elevated lines to Corona and Astoria in northern Queens, which were registered to-day, add $2,924,331 to the City's present commitment, bringing the total to $75,637,628. Deducting this from the estimated total of the City's share in the entire work, there remains in round numbers $88,200,000 still to be appropriated. The committee presents resolutions covering the appropriation of this amount, carrying $60,000,000 still to be devoted to the construction of the Brooklyn company's lines and $28,200,000 for the Interborough Company.

The constitutional margin of the city's borrowing capacity on March 1, after allowing for outstanding authorizations of every description, was $114,813,445. Deducting from this the amount of all commitments for subway pur-

poses to-day including those that will be authorized upon the adoption of the resolutions now presented, there will remain for general purposes $23,689,114. To this sum there may be added outstanding authorizations for subway and other purposes that are no longer required and which may immediately be rescinded, amounting to $7,200,000. The margin of borrowing capacity for other than transit purposes that may readily be realized within the next several weeks is, therefore, in round numbers, $31,000,000.

(Franchise)

March 18, 1913

Interborough Rapid Transit Company

Proposed certificate to construct, maintain and operate elevated railroad extensions known as Webster Avenue Line, Eighth Avenue and One Hundred and Sixty-second Street Connection, Queensboro Bridge Line, West Farms Subway Connection in the Borough of Manhattan, The Bronx and Queens.

The Secretary presented the following:

Public Service Commission for the First District,
New York

March 4, 1913.

To the Board of Estimate and Apportionment of The City of New York:

As stated in a communication of this date from the chairman and the Secretary of this Commission, there is transmitted herewith a copy of the proposed certificate to be [fol. 1761] granted by the Commission to the Interborough Transit Company for the Webster Avenue Extension, the 8th Avenue and 162d Street Connection, the Queensboro Bridge Extension and the West Farms Subway Connection.

I also transmit herewith a certified copy of a motion amending the said certificate, together with a certified copy of the resolution approving and adopting such contract as amended. Yours very truly,

Travis H. Whitney, Secretary.

Commissioner Eustis moved to amend the certificate to the Interborough Rapid Transit Company for elevated extensions in the following respect:

Page 22, line 9: omit "and" and insert "or."

STATE OF NEW YORK,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this fourth day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

Whereas, Counsel to the Commission has presented a form of proposed certificate to Interborough Rapid Transit Company for the construction, maintenance and operation of certain railroads therein referred to as the Webster avenue line, the 8th avenue and 162d street connection, the Queensboro Bridge line and the West Farms subway connection;

Resolved, That the form of the proposed certificate now submitted by Counsel, as amended, be and the same hereby is approved and adopted and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said certificate has been approved by said Board of Estimate and Apportionment and the construction and operation of the railroads therein described have been consented to by said Board of Estimate and Apportionment and by the Mayor, the Chairman be and hereby is authorized and directed to execute said certificate for the Commission in five identical originals and that the Secretary be and hereby is authorized and directed to attest the said certificate and to affix thereto the seal of the Commission.

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

[fol. 1762] In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission this 4th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

Public Service Commission for the First District,
New York

March 15, 1913.

To the Board of Estimate and Apportionment of the City of New York:

This Commission at its meeting today adopted a resolution amending in certain respects the proposed certificate to the Interborough Rapid Transit Company for elevated line extensions.

In accordance with this resolution, a certified copy of the same is transmitted herewith with the request that the Board of Estimate and Apportionment make the amendments described therein in the copy of the proposed certificate heretofore transmitted to it. Respectfully submitted.

Travis H. Whitney, Secretary.

Resolved, That the proposed certificate to Interborough Rapid Transit Company for Webster avenue line, 8th avenue and 162d street connection, Queensboro Bridge line and West Farms subway connection, approved and adopted by the Commission on the 4th day of March, 1913, be and the same hereby is amended in the following respects.

Page 16, line 6, striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway."

Page 32, line 3, by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway."

Page 35, sixth line of paragraph (7), by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway."

Page 54, first line of paragraph (1), by striking out the word "Interborough" and inserting in the place and stead thereof the words "Manhattan Railway."

Page 54, first line paragraph (1), by inserting after "Company" the words "being the lessor of the Interborough Company."

Page 54, ninth line from bottom of page, by striking out the word "Interborough" and inserting in the place and stead thereof the words "said Manhattan Railway."

Page 54, sixth line from bottom of page, by striking out the word "Interborough" and inserting in the place and stead thereof the words "said Manhattan Railway."

Further resolved, That the Secretary be and hereby is authorized and directed to transmit a certified copy of this resolution to the Board of Estimate and Apportionment and to request the said Board to make the above amendments in the proposed certificate heretofore transmitted to it.

[fol. 1763] State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 15, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission this 15th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

Note:—The pages and lines referred to above relate to the printed copy of the certificate as presented to the Board on March 6, 1913, and such corrections have been made.

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District has fixed and determined the routes designated as Webster avenue line, 8th avenue and 162d street connection, Queensboro Bridge line, West Farms subway connection, within the City of New York, by which the Interborough Rapid Transit Company may extend its elevated lines, and the location and plans of construction of the railroads upon such routes, and the times within which they shall be respectively constructed and the compensation to be made therefor to the City by the said company; and

Whereas, The Public Service Commission for the First District has transmitted to the Board of Estimate and Apportionment a proposed certificate in respect thereof, to be issued to the Interborough Rapid Transit Company, subject to certain terms, conditions and requirements, all set forth in said proposed certificate; and

Whereas, Said proposed certificate was received by the Board of Estimate and Apportionment on the 6th day of March, 1913, at a meeting of said Board of Estimate and Apportionment, duly held on said day; and

Whereas, The Public Service Commission for the First District did, by resolution adopted March 15, 1913, amend in certain respects the proposed certificate to the Interborough Rapid Transit Company for elevated line extensions; and

Whereas, The proposed certificate as amended, and the terms, conditions and requirements therein contained, are as follows:

Public Service Commission for the First District to Interborough Rapid Transit Company

Certificate

(Here follows Certificate to I. R. T.)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of the City of New York, by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves the foregoing proposed certificate to the Interborough Rapid Transit Company, [fol. 1764] and hereby consents to the construction, main-

tenance and operation of the railroad extensions in accordance therewith.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, the Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Manhattan Railway Company

Proposed Certificate to Construct, Maintain and Operate Certain Additional Tracks on its Second Avenue Line, Third Avenue Line and Ninth Avenue Line, in the Boroughs of Manhattan and The Bronx.

The Secretary presented the following:

Public Service Commission for the First District,
New York

March 15, 1913.

To the Board of Estimate and Apportionment of the City of New York:

Referring to the Commission's communication of March 4, 1913, transmitting contracts, agreements and certificates for the so-called "Dual System," the Commission now transmits a proposed certificate to Manhattan Railway Company for the construction and operation of additional tracks on the Second, Third and Ninth avenue lines. This certificate will require the approval of the Board of Estimate and Apportionment, and in addition there will be necessary the consent of the Board of Estimate and Apportionment and the Mayor to the construction and operation of the railroads authorized by such certificate.

Public Service Commission for the First District,
by Edward E. McCall, Chairman.

Attest: Travis H. Whitney, Secretary. (Seal.)

Whereas, On or about the 27th day of February, 1912, Interborough Rapid Transit Company, as Lessee of Manhattan Railway Company, duly made application to the Public Service Commission for the First District for the grant of a certificate to Manhattan Railway Company,

authorizing the construction and operation of additional tracks on the Second, Third and Ninth Avenue Elevated Lines of Manhattan Railway Company; and

Whereas, On the 15th day of March, 1913, Manhattan Railway Company has duly made application to the Public Service Commission for the First District for the grant of such certificate; and

Whereas, Counsel to the Commission has presented a form of proposed certificate to Manhattan Railway Company for laying additional tracks upon its Second, Third and Ninth Avenue lines;

Resolved, That the form of the proposed certificate now submitted by Counsel be, and the same hereby is, approved and adopted, and that the Secretary be, and hereby is, authorized and directed, to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

[fol. 1765] Resolved, That if and when said certificate has been approved by said Board of Estimate and Apportionment, and the construction and operation of the railroads therein described have been consented to by said Board of Estimate and Apportionment, and by the Mayor, the Chairman be, and hereby is, authorized and directed to execute said certificate for the Commission in five identical originals and that the Secretary be and hereby is authorized and directed to attest the said certificate and to affix thereto the seal of the commission.

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission on March 15, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 15th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District has fixed and determined the location and plans of construction and proposes to authorize the Manhattan Railway Company to lay an additional track or tracks on, above or contiguous to portions of the route or routes of its Second Avenue line, Third Avenue line, Ninth Avenue line within the City of New York, and has fixed the times within which they shall be respectively constructed and the compensation to be made therefor to the City and by the railroad company; and

Whereas, The Public Service Commission for the First District has transmitted to the Board of Estimate and Apportionment a proposed certificate to be issued to the Manhattan Railway Company, subject to certain terms, conditions and requirements, all as set forth in said proposed certificates; and

Whereas, Said proposed certificate was received by the Board of Estimate and Apportionment on the 17th day of March, 1913, at a meeting of said Board of Estimate and Apportionment duly held on said day; and

Whereas, The proposed certificate and the terms, conditions and requirements therein contained, are as follows:

(Here follows Certificate for Additional Tracks.)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of the City of New York by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves the foregoing proposed certificate to the Manhattan Railway Company and hereby [fol. 1766] consents to the construction and operation of the additional track or tracks in accordance therewith.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Interborough Rapid Transit Company

Proposed form of contract for the construction, maintenance, equipment and operation of additional rapid transit railroads to be known as Seventh Avenue-Lexington Avenue line, Eastern Parkway line, Steinway Tunnel line, White Plains Road line and future extensions in the several boroughs of the City.

The Secretary presented the following:

Public Service Commission for the First District, New York

March 4, 1913.

To the Board of Estimate and Apportionment of the City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is transmitted herewith a copy of the proposed contract between The City of New York, acting by the Commission, and the Interborough Rapid Transit Company, for additional rapid transit railroads.

I also transmit herewith a certified copy of a motion amending the contract, together with a certified copy of the resolution approving and adopting such contract as amended.

Yours very truly, Travis H. Whitney, Secretary.

Commissioner Eustis moved to amend the contract with the Interborough Rapid Transit Company in the following respect:

Page 90, line 3, Article XXIII; omit first "and" and insert "or."

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above with the original adopted by said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this fourth day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

Whereas, The Commission has determined that the public interests require the entering into a contract with Interborough Rapid Transit Company for additional rapid transit railroads; and,

[fol. 1767] Whereas, Counsel to the Commission has presented a form of proposed contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads;

Resolved, That the form of the proposed contract now submitted by Counsel as amended be and the same hereby is approved and adopted and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said contract has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said contract for the Commission in four identical originals and that the Secretary be and hereby is authorized and directed to attest the said contract and to affix thereto the seal of the Commission.

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed contract to be entered into with the Interborough Rapid Transit Company, for additional rapid transit railroads; and

Whereas, Said communication and proposed contract were received by the Board of Estimate and Apportionment at a meeting of said Board duly held on the 6th day of March, 1913; and,

Whereas, The contract proposed to be entered into with the Interborough Rapid Transit Company and submitted to this Board for approval and consent, is as follows:

(Here follows Contract No. 3.)

Now, therefore, it is

Resolved, That the Board of Estimate and Apportionment of The City of New York, by a majority vote according to the number of votes by law pertaining to each member of the Board, hereby approves and consents to the proposed contract to be entered into with the Interborough Rapid Transit Company.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission, with the request that it be amended by reducing the sum of $6,335,000, the preferential deduction from gross earnings allowed the Company on account of its old capital invested in the present subway, by a sum equal to the annual deferred depreciation and obsolescence [fol. 1768] upon its plant and equipment during the two years ending June 30, 1911, which said sum shall be fixed at not less than $580,000.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, The Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that a readjustment of operating terms under existing contracts Nos. 1 and 2 required at the expiration of the present initial leasehold periods.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that in case of recapture of any division or divisions of the new subways to be constructed thereunder, the same may be had by the City without payment of any sum by the City to the Company on account of construction cost, when the amount of the construction cost of such division or divisions so recaptured does not exceed the total amount contributed by the City to construction under this contract.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that the Company shall not capitalize three points of discount upon the sale price which it is to receive from the Steinway tunnel.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by reducing the preferential deduction from gross earnings allowed the Company, from 6 per cent. to an amount suffi- [fol. 1769] cient to pay interest upon the actual cash investment of the Company in construction and equipment, and to amortize the investment within the period of the lease.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The President of the Board of Aldermen offered the following:

Resolved, That the proposed contract with the Interborough Rapid Transit Company be returned to the Public Service Commission with the request that it be amended by providing that The City of New York shall have a share in any premiums above par realized in the sale of the bonds issued for construction and equipment, and to that end, that the Company be required to sell its bonds at public sale and upon competitive bidding.

Which was lost by the following vote:

Affirmative—The President of the Board of Aldermen—3.

Negative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

The resolution as offered by the President of the Borough of Manhattan was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

The President of the Board of Aldermen then presented the following:

March 11, 1913.

To the Board of Estimate and Apportionment:

GENTLEMEN: The contracts to carry into effect the plan of the Transit Conference Committee, approved by the Board of Estimate on the 24th day of May, 1912, have been prepared by the Public Service Commission, and are now presented to this Board for adoption. These contracts are designed to carry into effect the so-called dual subway plan. To the physical features of that plan I have no objection, such as to lead me to refuse to acquiesce with the majority members of this Board in its adoption, although I believe now, as heretofore, that a wholly new and independent transit system, constructed entirely with City money, and absolutely controlled by the City in its own interests, would be preferable to the dual plan.

Being prepared to accept the dual plan upon proper terms, I desire once more, and probably for the last time, to point out to this Board that the contracts proposed are ruinously unfair and disadvantageous to the City, will lock the rapid transit facilities of New York fast in the grip of the two great operating companies for the full span [fol. 1770] of two generations, will put an end to further rapid transit expansion and development for many years, will deprive the municipality at the same time of its legitimate share of the profits of the enterprise which its capital creates, and of the control of that enterprise which alone would insure to the public adequate service.

The contracts now presented, like the agreement of last May, are based upon terms fundamentally wrong. These I shall enumerate, together with the conclusive proof of the facts which I shall allege. These terms are all matters of negotiation and agreement between the City and the companies. They all represent merely the selfish and excessive demands of the operating companies and of their banking backers. All of them might be changed without losing the routing advantages which are claimed for the dual plan. Since the provisions of the contract in these respects are now grossly unjust to the City, and a revision of them in accordance with the suggestions herein made would be but common justice, and in accordance with sound business principles, I maintain, as I have in the past, that with these facts thoroughly before the public, a revision of these terms would be not only possible, but inevitable, and the dual system still preserved.

In addition to the objections which run to the basis of the financial features of the agreement of last May, the present forms of contract are grossly defective in many respects, wherein they fail adequately to protect the City, or to carry out even the plan of last May, as reported by the Transit Conference Committee of this Board. It was my understanding that the Transit Conference Committee proposed to insist upon a revision of the contracts in these respects.

Whatever revision has been made is now reflected in the contracts submitted to this Board. On an examination of these documents, it appears that of the sixteen objections against the form of the Interborough contract submitted by me to the Transit Conference Committee, and which I was informed that Committee would insist be pressed for amendment, but eight have been met by the revision which has taken place. Eight remain as in the draft upon which the public hearings were recently accorded. Of the eighteen objections to the form of the proposed contract with the Brooklyn Rapid Transit Company, all of which I likewise submitted to the Transit Conference Committee, but seven have been met by the recent revision. Eleven remain as in the forms considered at the recent public hearing.

Some of the changes made in these forms are of considerable moment to the City. Chief among them is the

elimination from the contract of the obstructive proviso clause in the section dealing with the exchange of branches in case of recapture by the City. As I have always contended, this clause was inserted for the purpose of enabling the company to avoid its obligation in the future, and its excision alone, by securing a practical as well as a theoretic power of recapture, has been worth all of the efforts directed to compelling an amendment of the terms of last May. Other changes, including the designation of the Chief Justice of the Court of Appeals as the nominator of the third member of arbitration and depreciation boards; the provision for adequate depreciation and obsolescence [fol. 1771] reserves in the future; the elimination of double payment for equipment of the old subway; the assumption by the company of taxes and liens upon the Steinway tunnel; the provision that the City shall have a credit for past depreciation on items other than rolling stock in case of recapture or at the end of the contract; the limitation of subsidiary contracts to periods of five years; the submission of Interborough payrolls, including those prior to December 1, 1912, for audit by the Public Service Commission; the requirement for the approval of the Board of Estimate and Apportionment to future changes in the contract; the five cent fare to Coney Island made operative immediately instead of five years hence; and many other minor amendments securing a better control and better safeguards for the administration of these contracts, have been made since the public hearing. In these respects the contracts have been materially improved as to form and substance. There still remain, however, many serious and radical defects in form and substance in these instruments, in addition to those fundamental vices of the agreement of last May, which are still reflected in these contracts. The contracts, upon all of those fundamentals, except the matter of recapture, still remain unchanged, and as instruments designed to carry out the plan of last May, they are still grossly defective, and fail to protect the City.

I shall state first the objections to the financial terms approved by a majority of this Board last May, and later the defects of the contracts as instruments designed to effectuate the plan approved last May.

As to the Interborough Contract

I

The practical guaranty to the company of $6,335,000, in the preferential payment allowed on account of old capital invested in the present system, is based upon earnings from inadequate service and indecent congestion, is predicated upon false accounting and indefensibly padded to the extent of a vast sum, which is thereby donated each year by the City to the company.

In my brief filed with this Board on the 24th day of May, 1912, at page 18, under the heading of Point VII, I submitted proof of the fact that the Interborough Company has never provided for depreciation or obsolescence in the past, but has paid out in dividends to its stockholders and in interest to its bondholders sums of money which sound and honest railroad practice demanded that the company pay into depreciation and obsolescence funds. That proof has never been contradicted, much less successfully attacked. It stands upon the authority of Bion J. Arnold, recognized as probably the foremost expert on railroad costs and operation in the United States, and is found in his report rendered to the Public Service Commission upon this very question. The figure representing the annual depreciation and obsolescence which the Interborough should have provided for, and failed to provide for, upon the basis of Mr. Arnold's report, is approximately $1,000,000. This means that the preferential payment of $6,335,000, which is claimed to be the average of net profits of [fol. 1772] the two years prior to last May, instead of being the average of actual net profits, is approximately $1,000,000 more than the average of the true net profits of those two years. The preferential of $6,335,000 really contains approximately $1,000,000 of deferred depreciation and obsolescence, wrongfully paid out to bondholders and stockholders in place of being paid into depreciation and obsolescence reserves. To that extent it is padded.

Since the filing of my brief with this Board, new evidence of the accuracy of the claim which I then made has come to hand. The Public Service Commission requested a special Board of Consulting Engineers, consisting of Mr.

Alfred Craven, the Chief Engineer of the Commission; Mr. George Gibbs, Chief Electrical Engineer of the Pennsylvania Railroad; Mr. E. R. Hill, Assistant Electrical Engineer of the Pennsylvania Railroad, and Mr. C. W. Wilder, Electrical Engineer of the Public Service Commission, to report to it upon the deferred depreciation and obsolescence of the present Interborough plant. This Board of Consulting Engineers reported that in their estimation deferred depreciation and obsolescence up to January 30, 1916, would equal $6,000,000. The period covered is twelve years. This means that they estimate that deferred depreciation and obsolescence in the past has been at the rate of upwards of $500,000 per year. This estimate of the Board of Consulting Engineers does not cover rails, third rail, cables, feeders, electric lines and signal equipment.

The contracts themselves supply the proof that the Interborough admits the failure to provide for depreciation and obsolescence in the past, and the resultant padding of this preferential to approximately 120 per cent. of existing net profits. The revised contract provides that the company shall make good in future years past depreciation upon rolling stock to the extent of $2,759,000. It also provides in another section that in case of recapture by the City, or when, at the expiration of the contract period, the City takes over the Company's equipment of the present subway, there shall be a credit to the City on the part of the Company on account of depreciation of plant, other than rolling stock, to an amount of $3,239,000. It will be observed that these two sums together equal $6,000,000, the amount of deferred depreciation which the Board of Consulting Engineers recently reported that the Interborough has failed to provide for. These facts establish beyond attack the minimum figure of $500,000 per annum by which I have contended that the preferential payment on account of old capital is indefensibly padded and increased above the Company's present net earnings.

Another provision in the contract constitutes additional proof upon this head. The amount of gross earnings which the Interborough Company has consumed for purposes of maintenance in the past has equaled approximately 14 per cent. The first revised draft of the Interborough contract provided for an allowance of 12 per cent. for maintenance

and 2 per cent. for depreciation, the total being about equal to what the Interborough had provided for maintenance alone in the past. The new or revised form provides that [fol. 1773] the Company shall be limited to 12 per cent. for maintenance in the future, and shall have an additional 6 per cent. of gross receipts for depreciation and obsolescence. This increases the total for maintenance, depreciation and obsolescence to 18 per cent. of gross receipts, 4 per cent. more than the Company has set aside in the past. The additional 4 per cent. about equals what I have always contended the Company should have set aside in the past for depreciation and obsolescence, and constitutes a conclusive admission of the propriety of this deduction, and of the failure on the part of the Company in the past to provide therefor.

On the basis, therefore, of the recent report of the Board of Consulting Engineers rendered to the Public Service Commission, the preferential payment of $6,335,000 is wrongfully and unjustifiably padded to the extent of something more than $500,000. Upon the basis of the Arnold report, it is padded to the extent of $1,000,000. It follows, therefore, that The City of New York will be permitting the Interborough to deduct from the gross earnings as a preferred payment to it each year, a sum greater than all of the present net profits of the Interborough from its existing subway by an amount ranging from $500,000 to $1,000,000. In the life of the contract, therefore, the Company will pocket from $27,000,000 to $54,000,000, representing a profit in excess of 100 per cent. of the Company's present net profits, continued throughout the life of the proposed lease. Whatever justification there might be for allowing to the company 100 per cent. of the present net profits of its existing subways, as the price of the pooling of the present tubes with the new divisions, a proposition which I deny, no justification can be found for the allowance of a sum on account of old capital in excess of 100 per cent. of present profits.

The preferential payment on account of old capital should be reduced by at least $1,000,000, as a condition to the execution of the proposed contracts.

II

The provision for the leveling of existing leases to a flat forty-nine year term, by extending the present unduly favorable operating terms for the company for long periods of years, resulting in a gift to the Company of approximately $45,000,000.

In my brief filed with this Board on the 24th day of May, 1912, at page 19, under the heading of point VIII, I submitted the facts which demonstrated that the above gift is needlessly made to the existing companies through the leveling of present leases. The fact that readjustment of operating terms is provided for in the existing contracts Nos. 1 and 2 at the time of the expiration of initial leasehold terms is undeniable. That the leveling of the leases to a flat forty-nine year term results in an extension of the present operating terms eleven years in the case of the longer lease, and twenty-two years in the case of the shorter lease, is equally undeniable. The only question open to debate is the percentage of profits from the existing subways which a board of arbitration would award to the City upon any readjustment of terms.

[fol. 1774] In view of the trend of public opinion in these matters, and the establishment of the principle of municipal profit sharing which is becoming more and more widely recognized, it is scarcely reasonable to suppose that the City, whose money has created the present subway, upon a readjustment of these terms, would be awarded less than 50 per cent. of the profits. Such an award would bring to the City, upon the basis of existing traffic, a gross total of approximately $45,000,000 during the two periods of years for which the present operating terms under the respective leases are now proposed to be extended.

The above argument was made to this Board by the Comptroller and myself in our joint report submitted to this Board on the 5th day of January, 1911. It was sound then; it is sound now.

The contracts should be amended by retaining the provision for readjustment of operating terms, at the expiration of initial periods, such readjustment to be based on present day traffic.

III

The above leveling of terms of existing leases to forty-nine years is virtually and in effect a guarantee to the company by the City for forty-nine years of all operating expenses, taxes, etc., a lump sum of $6,335,000 on account of old capital, and at least 6 per cent. upon all new money provided by the company.

Even in case of default on the part of the company such that the City becomes entitled to eject the company as an operator, the contract makes the City still liable to pay the preferential on account of old capital and the 6 per cent. on new capital which sums are to be applied, first to the payment of interest and sinking fund upon the bonds; then to any damages which the City may have suffered, and the surplus, if any, to the company.

IV

It makes certain the loss of interest and sinking fund upon the City investment in the new subway, or insures and perpetuates indecent congestion as a condition of earning a return on City money.

In my memorandum of May 24, 1912, under Point I at page 4, I have already furnished evidence which establishes the fact that the gross income from the amalgamated system of subways to be operated by the Interborough Company will not be sufficient to pay the preferentials to the company and leave a balance sufficient to wipe out the cumulative deficit in the City's interest and sinking fund. Since the filing of the above memorandum, the investment of the company in the enterprise has been increased. It, therefore, becomes less likely that the City will ever realize its interest and sinking fund. The Board is referred to the facts and calculations contained in the memorandum of May 24 in this connection.

It is a significant fact that most of the technical advisers of the Public Service Commission who have examined the offer of the Interborough Company have concluded that the City will never be able to earn out under the Interborough contract, and have so advised such members of the [fol. 1775] Public Service Commission as have seen fit to seek their advice. It is curious that with these technical

advisers in its employ receiving high salaries for the purpose of guiding it in just such matters as this, the Public Service Commission has disregarded their conclusions and accepted those of the interested companies and of their equally interested engineers. Mr. Connette, Traffic Engineer of the Interborough Company, demonstrated that the proposed contract will be a ruinous bargain for the City, and that without congestion equal to or greater than that now experienced in the existing subways, the City will never be able to get back interest and sinking fund upon its investment. The most recent tables prepared in the Bureau of Statistics of the Public Service Commission, upon the basis of the Interborough's own estimates of traffic and of operating expenses, show a cumulative deficit in the year 1927 of approximately $43,000,000, and at the end of the contract period of approximately $85,000,000. These losses will have to be carried by the City through taxation.

Both preferentials should be reduced to fair and adequate sums on account of old and new capital respectively, as indicated under points 1 and 8 herein. The City might then hope to get back interest and sinking fund on its investment.

V

The Interborough contract offers no incentive or reward for efficient or economical operation, but does offer every incentive for chicanery and political manipulation.

After several years, the company will earn operating expenses, the preferential of $6,335,000 and 6 per cent. upon new money. But the company will receive nothing further until the City has been paid 8.76 per cent. upon its money for each and every year, the interest upon the deficit being compounded semi-annually. For all of the reasons already stated, it is absolutely certain that the company will receive no further sum after the payment of the preferential. Such being the case, it is evident that once the company has earned enough to pay its preferentials, the incentive to operate the railroad economically and efficiently will be gone. The company's share will not be increased by economy or efficiency, and it will not be decreased by waste and inefficiency. Wasteful expenditure or unnecessary

payrolls will be met out of the money which would otherwise go to liquidate in part the City's deficits. The only way in which profits may be increased for those in control of the company at that time will be through the payment of large salaries to officers and directors, or through the purchase of supplies, etc., from controlled companies at high prices. Political demands may be granted. Unnecessary officers and employees may be put upon the payroll. Every such increase and expense will come out of the City's interest and sinking fund, and, therefore, out of the pockets of the taxpayers. With this condition, what is to prevent manipulation of supply contracts, or the gradual creation of a political machine within the organization of the operating company?

The only cure for this condition, if there be one under the peculiar partnership plan proposed, lies in a reduction of the preferential to fair and adequate figures, leaving [fol. 1776] to the City the expectation of its interest and sinking fund, and to the company the hope, though remote, of an ultimate divisable surplus profit.

VI

The plan sought to be effectuated by this contract contains none of the advantages of private management, but practically all of the disadvantageous features of municipal operation.

First. It makes the City underwriter of all losses and guarantor of the enterprise.

Second. It depletes the City's treasury and impairs its borrowing capacity without securing the objects of municipal construction.

Third. By making the company's profits independent of efficiency and economy it tends to make the company disregardful of public comfort and convenience.

Fourth. It gives to the company all of the profits of the enterprise.

Fifth. It deprives the City of control by making recapture impracticable and impossible.

VII

By insuring that the City will never receive interest and sinking fund upon its bonds issued for construction, it prevents the exemption of these bonds from the debt limit, and thereby impairs the City's subway building capacity for the future.

If the City is never to receive interest and sinking fund upon its capital investment, of course the bonds will not become self-sustaining, and can, therefore, never be exempted from the provisions of the constitutional debt limitation. Under the constitutional amendment and the enabling act, however, the City's investment must not only produce interest and sinking fund but some margin of profit in excess of carrying charges, in order to become exempt.

It is manifest, therefore, that with the ruinous preferentials in the way, no exemption of the City's investment can ever take place, except under conditions of congestion so intolerable as to be even more undesirable than the loss of the exemption of these bonds.

VIII

The excessive sinking fund of one per cent. allowed upon the company's new capital will produce a surplus in the sinking fund of from $39,000,000 to $60,000,000, which the company is permitted to appropriate to its own exclusive use.

The company is to receive as a second preferential, ahead of all returns on City money, 6 per cent. of the company's new money invested in construction and equipment.

The company's bonds are to be 5 per cent. bonds. It will therefore have to pay out only 5 per cent. in interest. After paying interest to the bondholders, therefore, there will be 1 per cent. left as an annual sinking fund increment. One per cent. upon the company's proposed investment, if paid into a sinking fund annually and invested at 4½ per cent. compounded semi-annually, will produce, at the time of the expiration of these contracts, an amount $60,-[fol. 1777] 000,000 greater than the company's investment. This surplus of $60,000,000 over and above the sum required to amortize the company's investment, will be re-

tained by the company under the present provisions of the contract. The company may do what it pleases with all of the funds in this sinking fund.

There can be no justification for paying to the company more than enough to meet interest and sinking fund upon its capital investment. Any sum in excess of that requirement constitutes profit upon new capital invested. This provision for the payment of 6 per cent. upon new capital invested, therefore, is tantamount to allowing the company a profit of $60,000,000 upon new capital.

I have always contended that the interest rate allowable upon new capital as a preferred payment to the company should be calculated so that it would equal precisely the interest on the bonds, an amount just sufficient to sink the company's investment. This, upon an actual basis, would be 5.588722 per cent. The interest rate upon new money should be reduced accordingly.

IX

It permits the inordinate and unnecessary profits of the bankers who underwrite the bonds to be made the apparent excuse for the excessive sinking fund surplus awarded the company as stated above.

In a communication already addressed to the Public Service Commission, the Company proposes to sell its bonds to the amount of $170,000,000 to an underwriting syndicate of bankers at 93½. In the same communication, it proposes to make these bonds retirable at 110. The funds realized upon this bond sale are to be used in part to retire the company's existing bond issue, amounting to $35,000,000. The company's existing bonds are retirable at 105, and the latest sale price upon the Stock Exchange recorded on March 8th, 1913, was 103⅝. Here is a new bond which, for its interest and sinking fund, comes ahead of $70,000,000 contributed by the city to the upbuilding of the enterprise. $70,000,000 of City money is to work night and day in the Interborough's subway to earn interest and sinking fund first upon the Interborough Company's bonds, and yet the company proposes to sell these bonds to its bankers at 93½. The bond is better than the existing bonds of the Interborough Company which are selling at

103⅝s, are retirable at only 105. It is better because the interest and sinking fund, by virtue of the preferential payments are in all respects, other than as matter of technical law, guaranteed upon the faith and credit of the City of New York. If this bond was offered at public sale, beyond any question it would sell at par or higher. No one doubts for a moment that it is the intention and expectation of the banking syndicate to sell these bonds to the public at par or higher. The evidence of that fact is found in the retirement rate of 110 proposed in this agreement, and yet th public is excluded from any opportunity to buy these bonds at first hand at a fair price.

The importance of this enormous profit which is being needlessly donated to the underwriting bankers is found in the fact that the sale price of the bonds at 93½ is urged as a reason for paying the company 6 per cent. upon new [fol. 1778] capital, and thereby creating the vast surplus in sinking fund noted in the preceding point. It is argued that because the bonds sell at 93½, the company's money is going to cost not 5 per cent., but 5.347 per cent., and that the remaining fraction of a per cent. is only about enough to create a sinking fund equal to the company's investment by the end of the contract period.

The effect of the transaction here is merely to transfer from the sinking fund of the operating company into the pockets of the bankers the surplus in sinking fund which would, if the bonds were sold at par, remain in the pockets of the owners of the Interborough Company. By this means the City is actually compelled to return to the Interborough Company, in the form of a surplus in sinking fund, all that that company now pays to the bankers in the form of discount by selling its bonds below par.

The sale price of these bonds becomes, therefore, a matter of great moment to the City, since it is asked, through the excessive rate allowed on new money to make up to the company what is now proposed to turn over to the banking syndicate. If the bonds were sold at par, as they should be, there would be no excuse, either apparent or real, for the allowance of 6 per cent. on new capital. I have always argued that it makes little difference whether $60,000,000 be handed to the Interborough Company at the end of the lease in the form of a surplus in sinking fund, or its pres-

ent worth be now handed to J. P. Morgan & Co., in the form of brokerage and discounts, and the company later reimbursed therefor through the surplus in sinking fund, if the unfortunate City, as is here proposed, is compelled to bear the cost.

It is interesting to observe that the total discount which the company proposes to pay its banking syndicate on the entire issue of $170,000,000 is $11,050,000, assuming that the bonds are worth only 100, which nobody believes. This discount represents a capital outlay which the company proposes to make now as the price of getting $158,950,000 in cash to refinance itself, build in part our subways, and in whole its elevated extensions. The cost of carrying this capital outlay of $11,050,000 at 5 per cent. interest with a sinking fund instalment to amortize it in the life of the contract is $30,260,391. In other words, the surplus created in the sinking fund on the $80,000,000 invested in the City's subway by the City's allowance of 6 per cent. on that sum, namely, $60,000,000, more than carries and balances in the life of the contract the cost to the company of the bankers' discounts on its entire bond issue of $170,000,000. Why should the City bear this cost?

Another demonstration is even more convincing. The net discount which the company is to pay its bankers on its entire bond issue of $170,000,000 may be regarded as a capital expenditure which the company is compelled to make, or a capital debt which it is compelled to contract, as the price of getting the money which it needs for construction and refinancing. The City is to pay the company 6 per cent. on all money invested in construction and equipment of new subways. It is also to pay the company 6 per cent. on all moneys invested by the company in elevated construction and improvement. The surplus in this 6 per [fol. 1779] cent. preferential over and above what is required to pay interest and to amortize the investment, is sufficient to pay interest and sinking fund on the entire net discount regarded as a capital expenditure, which the company proposes to pay its bankers on its total bond issue of $170,000,000.

Calculated upon the basis of a yearly cost to the company of carrying this discount which it pays its bankers on its entire bond issue of $170,000,000, we find also that the sur-

plus or excessive portion of the interest allowance of 6 per cent. upon the cash investment of the Interborough Company in the subways and elevated lines just about equals interest and sinking fund upon the capital outlay represented by this discount upon the total issue of $170,000,000. This appears from the following: The total cash investment of the Interborough Company in subways and elevated lines upon which it is to be allowed 6 per cent. is $104,624,000. The company, however, is to be permitted to capitalize and amortize out of earnings three points of any discount paid. This makes the sum upon which it will receive 6 per cent. equal $107,859,000. The remaining 3½ per cent discount on $104,624,000 involved in the sale of the bonds at 93½, which the company apparently will have to assume itself, equals a gross sum of $4,039,000. The remainder of the capital raised by the issue of $170,000,000 is for refinancing of the Interborough's present bonds and notes. The bonds, if retired at 105, will require $34,668,000. The notes will require $15,000,000 to retire them. This makes the cash capital necessary for refinancing $49,668,000. Selling the bonds at 93½, the company apparently bears a discount of 6½ points upon bonds sold to produce the above sum. This discount equals $3,452,918. The company will retain a reserve sum of $8,327,000 upon which it apparently is to bear a discount of 6½ points, or $578,000. The net discount, therefore, on the entire transaction, which the company appears to bear, equals $8,969,918. Considering this as a capital debt which the company is compelled to undertake as the price of getting the money necessary for the entire transaction involved in the proposed contracts, including its own refinancing, and assuming that the company must pay interest on that debt, and set aside annually sufficient to amortize the amount thereof during the life of the contract, this capital debt of $8,969,918 will cost the company annually in interest and sinking fund $451,005. The company is to get 6 per cent. on $107,859,000 on account of both subway and elevated. To sink and amortize $107,859,000 in forty-nine years, and to pay interest thereon at 5 per cent., requires 5.588722 per cent. annually. This leaves a surplus of .411278 annually. This fractional percentage on $107,859,000 will produce annually $443,600. It will be observed that this

practically equals the cost of carrying and sinking the company's debt or outlay made on account of banker's discount. In other words, the surplus percentage received annually by the company over and above the amount necessary to pay interest upon and amortize the company's total capital outlay, plus the three points of discount which it is allowed to capitalize, upon all of which it will receive 6 per cent. as a preferential, is almost exactly enough to pay interest upon the entire net bankers' discount upon the total bond issue of $170,000,000, and in addition, repay to [fol. 1780] the company through a sinking fund that total capital sum paid as discount within the life of the contract. This means that the City of New York, through the preferential payment, is bearing for the company the entire cost of the bankers' discounts which it now pays not only to raise the money for construction and equipment of subway and elevated lines, but also for the refinancing of its own bonds and notes.

The interest on new capital to be allowed the company as a preferential should be reduced to 5.588722, a rate sufficient to pay interest on the company's bonds and amortize its investment.

X

A failure to provide for competitive public bidding on the sale of the company's bonds causes these bonds to sell below their real value and excludes the enjoyment of the premiums that the City's own guaranty would bring upon such a public competitive sale.

The company's bonds should be sold at public auction or by public letting, to the highest bidders. If this were done, in view of the unusual value of the bonds by reason of the preferential, they would sell at par or higher, and in that event, the City should participate in any premium realized. It is only necessary to recollect some of the many instances when public service corporation bonds of a value far less than those here involved, have been sold at public letting well above par, to prove that the private sale here proposed is merely a means of diverting into the pockets of the banking syndicate an extraordinary and unconscionable profit. That the City is not wholly at the mercy of the banking syndicate in this matter, the experience of the United States

Government, when dealing with these same bankers at the time of the $100,000,000 bond sale under President Cleveland, fully demonstrates.

It is pertinent, too, to recollect that the Interborough's present 5 per cent. bonds, less valuable than the new bonds, were put on the market at 104½, and are selling now at 104⅝.

It is submitted that the proposed contract, as an attempt to carry out the plan of the Conference Committee, is vitally defective in the following respects:

I. Recaption provisions of the contract have been devitalized—

(a) The recaption provisions as to the new lines are of little value. The 7th avenue Lexington avenue line is not an operable unit, the two parts being disconnected. To connect the two lines would mean the reconstruction of parts of both branches, the loss of millions of dollars through the impossibility of utilizing certain stations, and the construction of a crosstown line to connect the two branches. Furthermore, the two lines would terminate in Brooklyn at the Borough Hall, as tracks in Fulton street, which are to be used to connect with these lines, are part of the present subway and could not be taken over under any provision of the old or new contracts.

(b) It has been frequently suggested that, in view of the City's financial condition, the only means of effecting recap- [fol. 1781] tion will be to provide that the City's total contribution to the construction cost of the subways may be applied to such sections or lines as the City may desire to take over at the time of the exercise of its election. This would mean that the City might retake any or all new divisions up to a total construction cost equal to the City's total contribution without the payment to the Interborough of any capital sum. As the contract stands, whenever the City may elect to recapture a leg or division, it must pay to the Interborough Company the amount of the company's proportionate contribution to the construction cost of such leg or section. As it is generally recognized that the City will be taxed to its utmost, and perhaps beyond its financial ability for the primary construction of these lines, and that all funds available for rapid transit purposes in the years

to come for a considerable time will have to be devoted to the cost of construction of extensions, it is obvious that recaption, under the existing provisions, though it be theoretically possible, will be practically out of the question. No reason has been advanced for the failure to provide for the application of the City's contribution to recaptured divisions. The suggestion has been wholly ignored with the result that the City, as far as recapture is concerned, will be entirely in the hands of the company.

(c) There are a number of other points throughout the paragraphs relating to recaption which will render recaption of the whole line, or any part of it, extremely difficult. For example, the Lexington avenue line is to be connected with the present subway for a diagonal branch and station extending through the tunnel of the New York Central Railroad and private property at the corner of 42nd street and Park avenue. The construction of the line will be enormously expensive and will be of no use whatever if the Lexington avenue line should be recaptured and made a part of an independent system. The amount spent in constructing this station would be thrown away, for it would need to be abandoned and a new station constructed in Lexington avenue or upon some other site, the proposed station being connected with the present subway upon the same grade and in such a way that the Lexington avenue line could not be connected with any other line without reconstruction. The same objection is largely true of the express station at Times Square, and it is evident that if recaption were proposed the waste of several millions of dollars and the necessity of issuing bonds to build new stations and new connections would be of such importance that it would deter the City from exercising the power of recaption even if it had the money or credit. A station could be built in Lexington avenue which would be as convenient to the public as the proposed diagonal station, and if recaption were exercised the station in Lexington avenue north of 42d street would be as useful to the new line as it would be to the present line, and it would cost from $1,500,000 to $2,000,000 less.

(d) The grouping of the lines for recaption purposes combines the Astoria, Woodside-Flushing and Steinway tunnel lines into one group. The Steinway tunnel line is

distinctly an Interborough line, but the Astoria and the Woodside-Flushing lines are to be operated jointly by the [fol. 1782] New York Municipal Railway Corporation (B. R. T.) and the Interborough Company, the latter running two sets of cars over these lines, one to connect with the Steinway tunnel, the other with the 2nd avenue elevated line in Manhattan. In order that the City may treat this joint operation advantageously to the public interest it is necessary that the Astoria and the Woodside-Flushing lines be placed in a separate group so that they may be recaptured separately from the Steinway tunnel line.

(c) Recaption will also be prevented by the lack of funds with which to pay for the lines. It is pertinent to recollect that the constitution and enabling act make it necessary that all new investments for rapid transit purposes to become exempt must pay more than interest and sinking fund. If, therefore, the City earns only a portion of the interest and sinking fund, it will not suffice to exempt the part of the bonds issued for such construction. The most favorable estimates which have been made by the most ardent advocates of the present contract show that there will be no income sufficient to exempt the entire investment for a long period of years to come.

II. Steinway Tunnel. Notwithstanding all previous reports, opinions and resolutions adopted by the Public Service Commission and the Board of Estimate and Apportionment, the contract provides that the City shall pay for the Steinway tunnel $90,000 more than has been heretofore agreed upon.

The company is allowed a 3 per cent. discount on the amount to be paid, which discount is $90,000. As this amount was paid by the company years ago and forms no part of the present bond issue, but is merely a credit to the company in the transaction, there is no excuse for allowing a bankers' discount on this sum.

III. No limit is provided as to the amount of discount which hereafter may be included in the cost of construction in the case of additions to the property after initiation of operation, the date of which is fixed as January 1, 1917.

If the company were to sell its bonds at a 10 per cent. discount and then to call them at a 10 per cent. premium,

the City would be virtually paying it a 20 per cent. profit on money cost of construction in case the additions were taken over.

IV. The contract permits the Interborough Company to charge 6 per cent. interest during the construction period upon all funds provided, according to annual estimates, whether actually in use or not, and requires only a credit of 2½ per cent. upon funds in bank.

As a matter of fact, the bonds of the company are 5 per cent. bonds, and it is probable that with such large sums of money as the company will have, it could secure 3 or 3½ per cent. from bankers for amounts on deposit. This provision would enable the company to make from 1 to 1½ per cent. clear profit on funds during the period of construction.

V. The contract at present provides for a bond of $1,000,000 to secure the faithful performance of the company's covenants. This may be the bond of a surety company. [fol. 1783] Such a bond requires litigation in order that the City may collect. In place of a bond of a surety company the contract should call for the deposit of cash or securities in the sum of $1,000,000, of which the City might take possession in case of a default by the company. The construction contract requires such a deposit of cash or securities to secure its faithful performance, and there appears to be no good reason why the operating contract should not call for a similar security.

VI. The contract relieves the Interborough Company from providing for past depreciation upon any of the subway property except rolling stock, except through a credit in case of recapture or on termination of contracts I and II.

According to the Board's Consulting Engineers, the total accrued depreciation to January 1, 1917—the beginning of the contract—is practically $6,000,000. The contract merely requires that at certain dates fixed therein, running from 1939 to 1957, the company shall pay into depreciation fund $2,808,150. The Engineers advise that this is the amount of depreciation accrued to July 1, 1916, on rolling stock only. The contract, therefore, relieves the Interborough Company from making any provision what-

ever for depreciation upon power equipment, buildings and structures, and all other equipment subject to accruing depreciation, except rolling stock. In a separate section the contract provides that in case of recapture, or on termination of contracts I and II, the City shall have a credit against the amount payable by it to the company for equipment, of $3,000,000, as an allowance for deferred depreciation on equipment other than rolling stock. All of these figures have been based upon assumptions most favorable to the company. The total life of the buildings and structures has been assumed to be seventy five years, all power equipment thirty years, and all rolling stock an average of forty five years. The composite cars of an inflammable structure have been given a life of thirty years, when, as a matter of fact, these cars will probably or should be removed from service within a few years and modern steel cars substituted therefor. It is also inconceivable that the steel cars will have a life of fifty years in view of past experience, where improvements in car construction and railway operation have caused rolling stock to be scrapped within a much shorter period.

VII. The contract is not to take effect until the "Seventh Avenue Branch" shall have been completed. As this includes a tunnel under the river, and as the tunnel cannot be built within the same period as the remainder of the line, this clause will virtually extend the contract for a considerable time.

VIII. The contract provides that even in the event of the lessee's default resulting in the termination of the contract and further operation either by the City or by a new lessee, that nevertheless the preferential payment of $6,335,000 and the interest on new capital furnished by the company shall first be applied to discharging the interest on construction and equipment bonds of the Interborough Rapid Transit Company. This means that the bondholders are protected in the receipt of their interest as a prior lien upon the income before the City can recover damages for breach of the contract.

[fol. 1784] If the company chooses to refer any alleged default to arbitration, it may do so and pay the arbitrated damages instead of making good the default. In other

words, the company might refuse to carry out any particular provision of this contract, and the City's only remedy would be money damages.

Brooklyn Rapid Transit Company Contract

The following objections, which have already been stated as lying against the proposed contract with the Interborough Company, apply with equal force to the proposed contract with the Brooklyn Rapid Transit Company.

I

The excessive sinking fund of 1 per cent. allowed upon the company's new capital will produce a surplus in the sinking fund which the company is permitted to appropriate to its own exclusive use.

II

It permits the inordinate and unnecessary profits of the bankers who underwrite the bonds to be made the apparent excuse for the unnecessary sinking fund surplus awarded the company as stated above.

The company proposes, in a communication already addressed to the Public Service Commission, to sell its bonds to the underwriting syndicate of bankers at 97. The contract provides that the company shall be permitted to capitalize all of these bankers' discounts at 3 per cent. Here, as in the case of the Interborough Company, the bonds are practically guaranteed upon the faith and credit of the City. Here, as in the case of the Interborough Company, some $80,000,000 of City money will be earning interest and sinking fund for private capital in advance of any return for the City. With all of these advantages the bankers propose to buy, and the company proposes to sell, these bonds at less than par; and yet in the same application the company requests to be permitted to retire the bonds at 107½, demonstrating, as does the Interborough Company, a confidence that the bonds will sell to the public far above par.

III

A failure to provide for competitive public bidding on the sale of the company's bonds causes these bonds to sell below

their real value and excludes the public from the enjoyment of the premium that the City's own guaranty would bring upon such a public competitive sale.

In the following additional respects the proposed contract with the Brooklyn Rapid Transit Company is, in the opinion of the undersigned, defective in that it fails to give effect to the plan reported by the Transit Conferees and to safeguard the City thereunder:

IV

As in the Interborough contract, no limit is provided as to the amount of discount which hereafter might be included in the cost of construction in the case of additions to the property after initial operation.

V

[fol. 1785] Here, as in the case of the Interborough contract, a surety bond of $1,000,000 to secure faithful performance is permitted. The surety should be restricted to cash or approved securities.

VI

As in the case of the Interborough Company contract, it is provided that in the event of default the preferential payment and interest on new capital shall first be applied to discharging the interest on construction and equipment bonds of the company.

This means that bondholders are protected in receipt of their interest and sinking fund increment by lien prior to that of the City for damages for breach of contract.

VII

As in the case of the Interborough Company, if the company chooses to refer any alleged default to arbitration, it may do so and pay the arbitrated damages in place of making good the default.

VIII

Recaption provisions of the contract do not protect public interests.

The contract does not provide for adequate terminals for the New Utrecht Avenue line, the Culver line and the East-

ern District line. The terminals are to be owned by the company, and there is no provision for the purchase or recaption of such terminals or any part thereof in case the City should take over the lines. Consequently, the City would either be without terminals or would be obliged to spend large sums to construct them.

IX

The preferential allowed to the company has been increased $80,000, or a total of $4,000,000 during the period of the contract, not including interest thereon.

In the reports adopted by the Commission and the Board of Estimate, the company was to pay rentals on leased property out of its preferential. The contract now permits such rentals, now amounting to $80,000 annually, to be added to the preferential.

X

The cost of certain property and the reconstruction of existing lines is to be amortized prior to payment of the City's interest and sinking fund, and the company is to retain ownership of the property.

This violates the fundamental provision of the conference agreement, namely, that the company shall receive no profit upon its new investment until the City's fixed charges have been paid. Its constitutionality may also be questioned. Upon the argument of the case taken to the Court of Appeals, it was repeatedly stated by the counsel for the Commission that neither company was to receive any [fol. 1786] amount in excess of the necessary fixed charges on new capital, and that the property to be amortized in advance of the City's interest and sinking fund would be the property of the City, or would revert to the City free and clear of all encumbrance. The amount involved in this item probably ranges from $15,000,000 to $20,000,000.

XI

The contract permits the formation of subsidiary companies not under public regulation.

The company insists that the Transit Development Company is not subject to the provisions of the Public Service Commission Law. The contract should not permit the con-

tinued existence or formation of new companies controlled by the company and beyond any control of the Commission.

XII

The contract relieves the company from making adequate provision for depreciation.

According to the Board's Consulting Engineers, the total depreciation, upon rolling stock alone, to January 1, 1917, is over $3,600,000. The contract merely provides that at certain dates fixed therein, running from 1924 to 1946, the company shall provide approximately $2,500,000. The contract thus relieves the company from any provision for depreciation upon the elevated lines, and foists upon the City a charge of approximately $70,000 per year for depreciation on rolling stock which the company should have provided for. These figures are based on the assumption that the present rolling stock, which consists of wooden cars, may be operated underground upon the new subway lines. If it is decided that such operation is dangerous, and that the present B. R. T. equipment should not be so operated, new equipment must be purchased. Thus the City will be burdened with additional depreciation and interest and sinking fund payments upon new capital for duplicate equipment.

XIII

The contract permits the company to capitalize about $1,500,000 in "interest," representing unused funds on deposit with the bankers.

This interest runs from October 1, 1912, several months prior to the signing of the contract, and will increase the cost of recapture and annual charges for interest and amortization.

XIV

Contract should provide that supplementary agreement for joint operation of Queens lines by Brooklyn Rapid Transit Company and Interborough Rapid Transit Company shall be executed by the City and companies simultaneously with the main operating contracts.

Any other course will lead to discussion, differences, possible litigation and certain delay.

Again, and for the last time, let me direct the attention of the Board to the fact that no advanage, collateral or [fol. 1787] otherwise, involved in the adoption of the dual plan justifies the unconscionable financial terms upon which it is proposed to award these contracts to the respective companies. Not only public opinion, but common business principles, would insure an acceptance by either company of contracts for the operation of the dual system upon terms modified as I have indicated herein. If the companies, through shortsighted policy, or in the hope of advantaging themselves through the City's pressing need for transit, should refuse to accept contracts if modified as here indicated, then the City is still by no means helpless. Construction of the new subways can go on as it is now proceeding. A new system, wholly independent of the Interborough, and equal to the dual plan save only in connection with the upper west side of Manhattan, can be carried to completion as rapidly almost as with the contribution of private capital proposed in these contracts. An upper west side connection can be added as funds become available. When completed, the new system, lucrative as everyone must admit that it will be, will not lack an operator, upon terms fair to both the operator and the City. But if the City should find itself lacking an operator, it has ample powers, under the Rapid Transit Act, to undertake operation directly, and to employ for that purpose at least as competent a manager as either the Interborough Company or the Brooklyn Rapid Transit Company now finds in its employ.

Because I do not believe that the City should be deprived of a fair return from this tremendous public utility which will be created chiefly on City credit; because I believe that strict municipal control should be maintained over all the future subways of the City; and because the proposed contracts secure neither, but surrender both, I vote against the adoption of these contracts as now presented. Respectfully submitted,

John Purroy Mitchel, President of the Board of Aldermen.

Interborough Rapid Transit Company; New York Municipal Railway Corporation

Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District), Interborough Rapid Transit Company and New York Municipal Railway Corporation for joint use of tracks under the preceding contracts.

The Secretary presented the following:

Public Service Commission for the First District, New York

March 4, 1913.

To the Board of Estimate and Apportionment of the City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is transmitted herewith a copy of a proposed supplemental agreement between The City of New York, acting by the Commission, the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, covering trackage rights to be exercised by the latter company.

[fol. 1788] I also transmit herewith a certified copy of the resolution approving and adopting such agreement.

Yours very truly, Travis H. Whitney, Secretary.

Whereas, A proposed contract between The City of New York and Interborough Rapid Transit Company, and a proposed contract between the City of New York and New York Municipal Railway Corporation, for additional rapid transit railroads have been approved and adopted by the Commission; and

Whereas, Counsel to the Commission has presented a form of proposed agreement, supplementary to said contracts, between The City of New York, Interborough Rapid Transit Company and New York Municipal Railway Corporation for trackage rights over the Steinway Tunnel Line described in said proposed contract with Interborough Rapid Transit Company:

Resolved, That the form of the proposed supplementary agreement now submitted by Counsel be and the same here-

by is approved and adopted, and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That, if and when said agreement has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said agreement for the Commission in four identical originals, and that the Secretary be and hereby is authorized and directed to attest the said agreement and to affix thereto the seal of the Commission.

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District, forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed supplementary agreement, to be entered into by and between The City of New York acting by the Public Service Commission for the First District, the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, for a joint use of tracks over certain sections of the Steinway Tunnel Line; and

Whereas, Said communication and proposed supplementary agreement were received by the Board of Estimate and [fol. 1789] Apportionment, at a meeting of said Board duly held on the 6th day of March, 1913; and

Whereas, The supplementary agreement proposed to be entered into by and between The City of New York (acting

by the Public Service Commission for the First District), the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, and submitted to this Board for approval and consent, is as follows:

The City of New York, by the Public Service Commission for the First District, Interborough Rapid Transit Company, and New York Municipal Railway Corporation

(Here follows Supplementary Agreement.)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of The City of New York, by a majority vote, according to the number of votes by law pertaining to each member of the Board, hereby approves of and consents to the proposed supplementary agreement to be entered into by and between The City of New York (acting by the Public Service Commission for the First District), the Interborough Rapid Transit Company and the New York Municipal Railway Corporation.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

Interborough Rapid Transit Company

Proposed form of supplementary agreement between the City (acting by the Public Service Commission for the First District) and the Interborough Rapid Transit Company as lessee under the preceding proposed subway contract and as grantee under the proposed certificate for additional elevated extensions, or joint use of tracks for through service.

The Secretary presented the following:

March 4, 1913.

To the Board of Estimate and Apportionment of the City of New York:

As stated in a communication of this date from the Chairman and the Secretary of this Commission, there is

transmitted herewith a copy of a proposed supplemental agreement between The City of New York, acting by the Commission, the Interborough Rapid Transit Company as lessee under the contract with the City, and the Interborough Rapid Transit Company as lessee of the Manhattan Railway Company, covering trackage rights to be exercised by the Interborough Company as lessee of the Manhattan Railway Company.

I also transmit herewith a certified copy of the resolution approving and adopting such agreement.

Yours very truly,

Travis H. Whitney, Secretary.

[fol. 1790] Whereas, A proposed contract between The City of New York and Interborough Rapid Transit Company for additional rapid transit railroads, and a proposed certificate to Interborough Rapid Transit Company for certain railroads, have been approved and adopted by the Commission; and

Whereas, Counsel to the Commission has presented a form of proposed agreement, supplementary to said contract, between The City of New York and Interborough Rapid Transit Company, as lessee under said contract and as grantee under said certificate, for trackage rights over the Lexington Avenue branch of the Seventh Avenue-Lexington Avenue Line, the White Plains Road Line and the Steinway Tunnel Line described in said proposed contract;

Resolved, That the form of the proposed supplementary agreement now submitted by counsel be and the same hereby is approved and adopted, and that the Secretary be and hereby is authorized and directed to transmit the same to the Board of Estimate and Apportionment for appropriate action on its part under the Rapid Transit Act.

Resolved, That if and when said agreement has been approved and consented to by said Board of Estimate and Apportionment, the Chairman be and hereby is authorized and directed to execute the said agreement for the Commission in four identical originals, and that the Secretary be and hereby is authorized and directed to attest the said agreement and to affix thereto the seal of the Commission.

STATE OF NEW YORK,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 4, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 4th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The President of the Borough of Manhattan offered the following:

Whereas, The Public Service Commission for the First District forwarded a communication to the Board of Estimate and Apportionment, transmitting, for approval and consent, a proposed supplementary agreement to be entered into with the Interborough Rapid Transit Company as lessee under a certain subway contract this day approved by the Board of Estimate and Apportionment, and as grantee under a proposed certificate likewise approved, to be issued to said company for railroad extensions, for joint use of tracks for through service; and,

Whereas, Said communication and proposed supplementary agreement were received by the Board of Estimate and Apportionment at a meeting of said Board duly held on the sixth day of March, 1913; and,

Whereas, The supplementary agreement proposed to be entered into with the Interborough Rapid Transit Company and submitted to this Board for approval and consent, is as follows:

[fol. 1791] The City of New York, by the Public Service Commission for the First District, with Interborough Rapid Transit Company

Supplementary Agreement

(Here follows Supplementary Agreement.)

Now, therefore, be it

Resolved, That the Board of Estimate and Apportionment of The City of New York by a majority vote according to the number of votes by law pertaining to each member of the Board, hereby approves of and consents to the proposed supplementary agreement to be entered into with the Interborough Rapid Transit Company, as lessee under a certain subway contract, and as grantee under a proposed certificate for additional elevated railroad extensions, for joint use of tracks for through service.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

His Honor the Mayor then approved the certificates to be issued to the New York Municipal Railway Corporation, the Interborough Rapid Transit Company and the Manhattan Railway Company for additional tracks and elevated railroad extensions.

The President of the Borough of Queens offered the following:

Resolved, That it is the sense of this Board that the Public Service Commission take such steps as are necessary under the agreement with the Interborough Rapid Transit Company for the operation of the Steinway Tunnel, to provide temporary operation thereof as speedily as possible.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

By the Comptroller: I cannot conceive of a more seemly appropriate thing for this Board to do at this particular moment than to express its official voice in appreciation of the very distinguished services to The City of New York by the Hon. William R. Willcox, and I have the very great pleasure of moving that a minute to that effect be placed on the minutes of this meeting.

Which motion was adopted by the following vote.

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

[fol. 1792] By the Comptroller: Mr. Mayor, Mr. Willcox is no longer a public official, and I felt that to offer a separate resolution in his honor would be proper. While we thoroughly appreciate all his services and know what they represent to the City, that will not in the slightest degree affect our appreciation of the co-operation of the other members who labored with him so long a time, and more especially are we appreciative of the services of the new Chairman of the Public Service Commission, Hon. Edward E. McCall, and I would like to move that the thanks of this Board be extended to Chairman McCall and his associates for the manner in which they performed their services with reference to the improvement of the transit situation in this city.

By the President of the Board of Aldermen: This resolution calls upon us to vote in approval of the policy of the majority of the Public Service Commission, for that Commission did act by a majority. Of course, I am not in accord with that. For that reason and for that reason only, I am unable to vote in the affirmative on this resolution, as I would like to do on personal grounds, but cannot do.

By the Comptroller: In making this motion, I was fully aware that the action of the Commission was not unanimous, and that Messrs. Maltbie and Cram did not agree with their associates, still, I believe at this time the cloak of charity and good will should cover all. Consequently, I made it to the whole Public Service Commission.

The motion of the Comptroller was then adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

By the President of the Borough of Manhattan: I wish to move that, in the name of the City, the thanks of this Board be extended to a distinguished private citizen who has aided us greatly in the course of our negotiations. I mean former Mayor Low. Mr. Low has been with us from the beginning. He gave to the Committee not only his personal aid and counsel, but the results of his experience as a member of the first Rapid Transit Board, as former Mayor of the City of Brooklyn, and of the greater City, and as Chairman of the Joint Transit Committee of the Chamber of Commerce and the Merchants' Association. He has been an important factor in bringing about the solution of the transit problem that the Board to-day has confirmed, and his services to the City should be gratefully remembered. I move, therefore, the adoption of this motion.

Which motion was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

[fol. 1793] Financial Matters

Public Service Commission—Relative to Issues of Corporate Stock for Subways

The President of the Borough of The Bronx offered the following resolution:

Resolved, That any authorization or issue of corporate stock of The City of New York authorized and directed to be issued by this Board for the purposes specified in the requisitions made by the Public Service Commission for the First District in respect to contract No. 3, between The City of New York, acting by the Public Service Commission for the First District and the Interborough Rapid Transit Company, and in respect to contract No. 4, between

The City of New York, acting by the Public Service Commission for the First District, and the New York Municipal Railway Corporation, be authorized and charged against the debt limit and the borrowing capacity of The City of New York in the following manner, apportioned between and for the purposes of said contracts, according to the amount necessary for the purposes of each, viz:

Against the power of The City of New York to become indebted by virtue of the exemption from the debt limit of corporate stock issued for rapid transit purposes, pursuant to section 10 of article 8 of the Constitution, and chapter 276 of the Laws of 1910, and the determinations of the Appellate Division of the Supreme Court, First Department, at any time made, the entire amount available from that source.

Against the power of The City of New York to become indebted by virtue of the exemption from the debt limit of corporate stock issued for dock investment, pursuant to section 10 of article 8 of the Constitution, and chapter 276 of the Laws of 1910, and the determination of the Appellate Division of the Supreme Court, First Department, as embodied in the order of that Court, dated January 31, 1913, in the amount of fifty-four million, nine hundred and forty-three thousand, fifty-three dollars and fifty-five cents ($54,943,053.55).

Against the general borrowing capacity and borrowing power of The City of New York, whatever additional amount of such corporate stock it may be necessary to authorize and issue for the purposes of such contracts.

By the Comptroller:

Mr. Mayor, I am not prepared to vote for this segregation of $15,000,000 for dock purposes. I do not believe it is a wise thing to do at this time. My reason for not thinking so is I do not believe we should tie ourselves up to the extent this $15,000,000 represents. I believe to segregate $7,500,000 for dock purposes at this time represents all that the City should obligate itself to for this particular purpose, and represents all that the City should contract to spend during this year.

[fol. 1794] We must consider that there are other purposes for which we will require money during the year

which come as near to our homes as even rapid transit and docks.

Our legal debt limit at the present time is $162,743,000. There are already appropriations or authorizations against that debt limit of $40,164,000, which, deducted from the amount of the debt limit, leaves a balance of $122,579,000.

There are authorizations for rapid transit purposes upon the pending contracts; that is contracts 1 and 2, amounting to $4,104,000; deducting which leaves an available net balance of $118,475,000.

The amount required to certify the contracts now before us will represent $91,000,000, leaving a balance at present available for all purposes of $27,475,000.

After looking over all of these existing authorizations, we are of the opinion that, as many have been in existence for a long time and no work has been done by the departments on them, it may be possible to rescind authorizations amounting to $10,000,000 already voted for general purposes, and $4,200,000 of the existing rapid transit authorizations; a total of $14,200,000. You add that $14,200,000 to the balance available for all purposes, namely, $27,475,000, and it give you a total of $41,675,000. You can add to that possibly $5,000,000 which will become available during the balance of the present year, and you have at the outside $46,675,000 available for all character of purposes during 1913 for which the City of New York must obligate itself.

My proposition is we should appropriate $7,500,000 for dock purposes at this time. Looking over the general field of the City's requirements, I believe they represent necessary authorizations of at least $28,000,000. A part of this is represented by the amount which must be charged against the debt limit as soon as title is vested in the City to the site for the new County Court House in the Borough of Manhattan. In addition to that we must appropriate at least $7,000,000 for school purposes, and for all other general purposes I have put down $4,000,000. For repaving I am assured by the Borough authorities we should appropriate at least $3,000,000 more for this year, or a total of two millions less than the authorization last year for that purpose. In addition there then are other requirements which must be taken care of.

When you add this $28,000,000 to the $7,500,000 I believe we should appropriate for dock purposes, you have a total of $35,500,000. You deduct that from the amount apparently available this year, and you have a balance of $11,175,000. And that $11,175,000 represents all that the City will have at its disposal for every character of purpose, no matter how urgent it may be, during the balance of the year.

If you appropriate $15,000,000 for docks, you still have to make every other appropriation I have referred to, and you cut down the City's available borrowing capacity for all purposes of an urgent character, after making such appropriations as are necessary, to $3,675,000.

I believe that is too close to the mark. We have tried during this administration too keep the City's borrowing [fol. 1795] capacity so that we would never have to ge below a $20,000,000 reserve, and we should never have to contemplate going as low as this outlook, which is a conservative one, suggests we should go.

If I thought we ought to spend $15,000,000 for docks, it might to some extent modify my opinion. I do not think we can. I think a very good beginning can be made on the west side for long piers and for the South Brooklyn terminal for at least $7,500,000. A beginning in these matters represents all we can possibly do this year.

Why tie ourselves up to this extent? Why go so near the danger mark of financial limitation? We have not done it before, and there is no pressing necessity of doing it now.

By the President of the Board of Aldermen: Just a word on the dock situation. The reason for reserving $15,000,000 is this: The $69,000,000 exempted by the Appellate Division was for dock purposes; no other; merely dock investments. For three years we have been holding down authorizations of corporate stock for the Dock Department to bare living requirements. Now, in point of fact, the Dock Department is in a condition to contract against a much larger sum than $15,000,000. Immediate requirements for the South Brooklyn terminal; the construction necessary to join the upper and the lower divisions together and for construction in the intervening section, demand upwards of $7,000,000 alone. An appropriation of $15,000,000 then will mean that that comprehensive improvement will have

to be indefinitely postponed because money is appropriated for other purposes that ought to go to docks. For the construction of one and one-half long piers in the Forty-fourth street section of Manhattan and for other improvements more than $13,000,000 will be required. Then you have not done a single thing for the west side of Manhattan and for the east side, where new piers and the reconstruction of existing piers are both urgently required. It seems to me it would be extremely injudicious for this Board to curtail port development and port improvement because a situation has been crated here which results in a very narrow margin of borrowing capacity for the City. I do not believe port development should be made to suffer.

I am going to vote for the resolution because my vote for this resolution is necessary to reserve $15,000,000 for the purposes of port development, which I regard as absolutely vital.

By the President of the Borough of The Bronx: I think this Board is committed to the development of the Port of New York. For three years it has not been possible to dispose of this definitely because we have been busy with subway matters. Maritime and commercial interests have requested us many times to proceed with this work, but we have been unable to do it. Now we have come to a place where we can do it, and I think it more important to devote a considerable sum to the development of the port in profit bearing securities rather than in some things which might be very desirable, but are not so necessary. For that reason I offer and support the resolution.

[fol. 1796] By the President of the Borough of Manhattan: I would like to call the attention of the Board to this fact: That last May, when we proceeded to adopt the subway plans, it was definitely understood and stated in the report of the committee that we were then depending on a margin of $100,000,000 to take care of the start of the work. It was stated also that we would rely on increases in the borrowing capacity, accruing in the year 1913 and the following years, to make up the additional $35,000,000 required to realize the subway plans. We have been informed since the date of that report that it is necessary to charge againts the debt limit at once the entire amount of the City's commitment, and we are drawing from the dock funds to

make that possible. We are committing ourselves and our successors to the use of that sum of money for dock purposes instead of drawing it out for the next three or four years for subways. It seems to me absolutely unnecessary to commit ourselves to a figure that will impair our borrowing capacity for other municipal purposes. The Commissioner of Docks could not put under contract for this year anything like $15,000,000. We do not agree as to the exigencies of the situation. In beginning the work in South Brooklyn and in some work around the Desbrosses street section, it would be difficult to put more than $10,000,000 under contract this year. Following that we will have other resources to draw upon.

I think, as I have stated, that $7,500,000 is perhaps low. But I think to vote more than $10,000,000 spells poor business and will embarass the City in ways that are absolutely unnecessary. If I cannot vote for $10,000,000 I will vote against the resolution.

The resolution offered by the President of the Borough of The Bronx was adopted by the following vote:

Affirmative—The Mayor, the President of the Board of Aldermen and the Presidents of the Borough of Brooklyn, The Bronx and Queens—10.

Negative—The Comptroller and the Presidents of the Boroughs of Manhattan and Richmond—6.

Public Service Commission—Issue of $60,000,000 Corporate Stock for Construction of Rapid Transit Railroad under Contract No. 4

The Secretary presented the following:

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District in pursuance of a resolution duly adopted by the said Commission transmits to you herewith a requisition for the authorization by you of corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000), which with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) hereto-

fore registered on account of the railroads to be constructed under the contract known as contract No. 4 between the City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway [fol. 1797] Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by issue of corporate stock, of executing said contract No. 4.

This requisition covers the estimated expense of executing such contract so far as the City's obligations to be defrayed by the issue of corporate stock are concerned. There are not included in the above amount the expenses of the Commission for administration, superintendence, legal expenses and engineering. The Board of Estimate and Apportionment has already appropriated an amonut for such expenses for the current year and such expenses have always been met by the issuance of special revenue bonds under the provisions of section 10 of the Rapid Transit Act. In conformity with such practice the Commission purposes to make requisitions from time to time for appropriations of such sum or sums of money as may be requisite and necessary to meet these expenses. These appropriations under said section 10 are met by the sale of special revenue bonds, and they therefore are not included in a requisition for the issue of corporate stock.

From the amount of corporate stock so requisitioned the Commission from time to time will make sub-requisitions for the City's share of any contracts or obligations necessary to execute the main contract.

Public Service Commission for the First District,
by Edward E. McCall, Chairman. (Seal.)
Attest: Travis H. Whitney, Secretary.

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York

March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

In pursuance of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, the Pub-

lic Service Commission for the First District hereby makes requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to be issued and sold by the Comptroller to the amount of sixty million dollars ($60,000,000) which, with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 4, between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 4.

In witness whereof the Public Service Commission for the First District has caused this requistion to be subscribed by its Chairman and its seal to be hereto affixed and attested by its Secretary this 18th day of March, 1913.

Public Service Commission for the First District,
by Edward E. McCall, Chairman. (Seal.)

[fol. 1798] Attest: Travis H. Whitney, Secretary.

Resolved, That the Public Service Commission for the First District make requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000) which, with the sum of forty million five hundred one thousand nine hundred ninety-one dollars ($40,501,991) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 4 between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 4, and that the Chairman and Secretary be authorized to execute and transmit under the seal of the Commission said requistion and a communication both in the form herewith presented.

STATE OF NEW YORK,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above resolution with the original adopted by the said Commission on March 18, 1913, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the said Commission, this 18th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The following resolution was offered:

Resolved, That pursuant to the provisions of section 37 of Chapter 4 of the laws of 1891 as amended, known as the Rapid Transit Act, and section 45 of the Greater New York Charter and the requisition of the Public Service Commission for the First District duly made under the seal of the said Commission by the Chairman and Secretary thereof on March 18, 1913, the Comptroller be and hereby is authorized and directed to issue corporate stock of The City of New York to the amount of sixty million dollars ($60,000,000), at such rate of interest as the Commissioners of the Sinking Fund shall prescribe, the proceeds thereof to be applied to the purposes specified in said requisition, as explained by the communication of the said Commission transmitting the same, in respect of the contract known as contract No. 4 between The City of New York, acting by the Public Service Commission for the First District, and New York Municipal Railway Corporation.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

[fol. 1799] Public Service Commission—Issue of $28,200,000 Corporate Stock for Construction of Rapid Transit Railroad Under Contract No. 3

The Secretary presented the following:

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York

March 18, 1913.

To the Board of Estimate and Apportionment of The City of New York:

The Public Service Commission for the First District in pursuance of a resolution duly adopted by the said Commission transmits to you herewith a requisition for the authorization by you of corporate stock of The City of New York to the amount of twenty-eight million two hundred thousand dollars ($28,200,000) which, with the sum of thirty-five million one hundred thirty-five thousand six hundred thirty-seven and 84/100 dollars ($35,135,637.84) heretofore registered on account of the railroads to be constructed under the contract known as contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 3.

This requisition covers the estimated expense of executing such contract so far as the City's obligations to be defrayed by the issue of corporate stock are concerned. There are not included in the above amount the expenses of the Commission for administration, superintendence, legal expenses and engineering. The Board of Estimate and Apportionment has already appropriated an amount for such expenses for the current year and such expenses have always been met by the issuance of special revenue bonds under the provisions of section 10 of the Rapid Transit Act. In conformity with such practice the Commission purposes to make requisitions from time to time for appropriations for such sum or sums of money as may be requisite and necessary to meet these expenses. These appropriations under said section 10 are met by the sale of special revenue bonds and they, therefore, are not included in a requisition for the issue of corporate stock.

From the amount of corporate stock so requisitioned the Commission from time to time will make sub-requisitions for the City's share of any contracts or obligations necessary to execute the main contract.

Public Service Commission for the First District,
By Edward E. McCall, Chairman. (Seal.)

Attest: Travis H. Whitney, Secretary.

State of New York, Public Service Commission for the First District, 154 Nassau Street, New York

March 18, 1913.

[fol. 1800] To the Board of Estimate and Apportionment of the City of New York:

In pursuance of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, the Public Service Commission for the First District hereby makes requisition upon the Board of Estimate and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to be issued and sold by the Comptroller to the amount of twenty-eight million two hundred thousand dollars ($28,200,000) which, with the sum of thirty-five million one hundred thirty-five thousand six hundred thirty-seven and 84/100 dollars ($35,135,637.84), heretofore registered on account of the railroads to be constructed under the contract known as contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 3.

In witness whereof the Public Service Commission for the First District has caused this requisition to be subscribed by its Chairman and its seal to be hereto affixed and attested by its Secretary this 18th day of March, 1913.

Public Service Commission for the First District,
by Edward E. McCall, Chairman. (Seal.)

Attest: Travis H. Whitney, Secretary.

Resolved, That the Public Service Commission for the First District make requisition upon the Board of Estimate

and Apportionment of The City of New York for the authorization of corporate stock of The City of New York to the amount of twenty-eight million two hundred thousand dollars ($28,200,000), which, with the sum of thirty-five million one hundred and thirty-five thousand six hundred and thirty-seven and 84/100 dollars ($35,135,637.84), heretofore registered on account of the railroads to be constructed under the contract known as Contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, for additional rapid transit railroads, will be sufficient to meet the entire estimated expense to the City, to be defrayed by the issue of corporate stock, of executing said contract No. 3, and that the Chairman and Secretary be authorized to execute and transmit under the seal of the Commission said requisition and a communication both in the form herewith presented.

State of New York,
County of New York, ss:

I, Travis H. Whitney, Secretary of the Public Service Commission for the First District, do hereby certify that I have compared the above resolution with the original adoption by the said Commission on March 8, 1913, and that it is a correct transcript therefrom and of the whole of the original.

[fol. 1801] In testimony whereof I have hereunto subscribed my hand and affixed the seal of the said Commission this 18th day of March, 1913.

Travis H. Whitney, Secretary. (Seal.)

The following resolution was offered:

Resolved, That pursuant to the provisions of section 37 of chapter 4 of the Laws of 1891 as amended, known as the Rapid Transit Act, and section 45 of the Greater New York Charter and the requisition of the Public Service Commission for the First District, duly made under the seal of the said Commission by the Chairman and Secretary thereof on March 18, 1913, the Comptroller be and hereby is authorized and directed to issue corporate stock of The City of New York to the amount of twenty-eight million, two hundred thousand dollars ($28,200,000), at such rate of interest

as the Commissioners of the Sinking Fund shall prescribe, the proceeds thereof to be applied to the purposes specified in said requisition, as explained by the communication of the said Commission transmitting the same, in respect of the contract known as contract No. 3, between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—13.

Negative—The President of the Board of Aldermen—3.

HH. Thereafter, on March 19, 1913, the said Certificate so authorized for additional tracks of the elevated railroads was executed by Public Service Commission, for the First District, and on the same date accepted by the Manhattan Railway Company; which said Certificate is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "C" and made a part hereof.

II. Thereafter, on March 19, 1913, the said Certificate so authorized for elevated railroad extensions was executed by Public Service Commission for the First District, and on the same date accepted by Interborough Rapid Transit Company; which said Certificate is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "D" and made a part hereof.

[fol. 1862] JJ. Thereafter, on March 19, 1913, the supplementary agreement so authorized for trackage rights, Seventh Avenue-Lexington Avenue Line, White Plains Road and Steinway Tunnel, was duly executed by The City of New York, acting by the Public Service Commission for the First District and Interborough Rapid Transit Company (plaintiff herein); which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "E" and made a part hereof.

KK. Thereafter, on March 19, 1913, the supplementary agreement so authorized for trackage rights over Steinway Tunnel was duly executed by The City of New York, acting by the Public Service Commission for the First District,

Interborough Rapid Transit Company (plaintiff herein) and New York Municipal Railway Corporation; which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "F" and made a part hereof.

LL. Thereafter, on March 19, 1913, said Contract No. 3 between The City of New York, acting by the Public Service Commission for the First District, and Interborough Rapid Transit Company, so authorized as aforesaid was duly executed; which said agreement is a public record and a copy thereof is deemed to be hereunto annexed marked Exhibit "G" and made a part hereof.

MM. In pursuance of its obligations under the aforesaid contract #1, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of Fifty-four million five hundred thirty-four thousand five hundred ninety-four and 89/100 dollars ($54,534,594.89), prior to the commencement of this action.

In pursuance of its obligations under the aforesaid contract #2, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of Six million six hundred sixty-seven thousand five hundred seventeen and 14/100 dollars ($6,667,517.14), prior to the commencement of this action.

[fol. 1803] In pursuance of its obligations under the aforesaid contract #3, and amendments and modifications thereof hereinbefore mentioned and described, the City of New York expended and paid the sum of One hundred thirty-nine million three hundred seventy-seven thousand seven and 33/100 dollars ($139,377,007.33) prior to the commencement of this action.

NN. Under and in pursuance of its obligations under contract #3 Interborough Rapid Transit Company, the plaintiff herein, prior to the commencement of this action, contributed toward the cost of construction of the Railroad, the sum of Fifty-seven million eight hundred fifty-seven thousand seven hundred sixty-one and 96/100 dollars ($57,857,761.96); for the cost of additions to the construction it

has contributed One hundred eighty-nine thousand one hundred thirty-eight and 39/100 dollars ($189,138.39).

It provided equipment for initial operation costing Twenty-two million dollars ($22,000,000.00); and it provided equipment for initial operation which cost in excess of the said $22,000,000.00, to the extent of Twenty-seven million nine hundred fifty-three thousand one hundred sixty-six and 62/100 dollars ($27,953,166.62); it provided additions for equipment, after the commencement of initial operation, costing Twelve million nine hundred thirty-seven thousand eight hundred six and 32/100 dollars ($12,937,806.32).

OO. From January 1, 1919, to January 31, 1928, Interborough Rapid Transit Company, plaintiff herein, received operating revenues under Contract #3 amounting to $343,036,399.50. From the foregoing it deducted for rentals, taxes, operating expenses (exclusive of maintenance), maintenance, and depreciation (being the matter specified in subdivisions 1-(a), (b), 2, 3, 4 and 5 of Article XLIX of Contract #3, $223,386,817.70. It has also deducted from the foregoing revenues for its preferential of $6,335,000 per year (subdv. 6 of Article XLIX) $57,542,916.67; for six per cent. per annum on its contribution to cost of construction of railroad, $30,465,732.22; for six per cent. per annum on its cost of equipment of railroad (subdv. 7 of Article [fol. 1804] XLIX) $11,990,000; for its interest on cost of additional equipment, $15,872,405.32; for one per cent. per annum on its cost of additional equipment to provide for sinking fund (subdv. 8 of Article XLIX), $2,382,526.57; for its interest on cost of additions to construction $37,874.21; for one per cent. per annum on its cost of additions to construction to private sinking fund $7,574.81.

Included in the deductions made by the plaintiff from the revenues as aforesaid are items which, with the interest thereon from the time of deduction to December 31, 1927, aggregate $7,519,741.03; as a consequence of which the plaintiff has unjustly deducted from the revenues for its own purposes, and withheld from this defendant, the sum of at least $3,682,980.12, more than it is entitled to claim or receive under the terms of such Contract #3.

PP. This defendant alleges that plaintiff has breached, violated and failed to fulfill, comply with and live up to the

terms, conditions, obligations and requirements of said Contracts Nos. 1, 2 and 3 in many respects including the following: it has on many occasions and for a number of years last past failed and is now failing and neglecting to provide cars, motors and other equipment adequate for the requirements of the traveling public and sufficient for the traffic requirements of the railroads operated pursuant to said contracts and has failed and neglected and is now failing and neglecting to provide such cars, motors and other equipment necessary to permit the operation of said railroads at their full attainable capacity; it has operated and is now operating trains on said railroads even during the non-rush hours of the day with excessive overloading; it has failed and neglected to keep and maintain its signaling system according to the highest standards of railway operation and with due regard to the safety of the passengers and employees of said plaintiff and of other persons, and it has failed and neglected and is now failing and neglecting to keep and maintain its cars properly painted both inside and outside and to keep said cars and the stations of said railroads in a clean and sanitary condition and adequately heated and lighted and in other respects in thoroughly good order and condition.

[fol. 1805] That the plaintiff has withheld from the defendant, The City of New York, revenues which it is entitled to have and receive under the terms of said Contract #3; that the plaintiff has made improper and illegal charges against the said revenues for the purpose of withholding from this defendant the sums to which it is entitled under said contract, and has applied such revenues to its own uses and purposes in contravention of the uses of said contract; that the plaintiff has in the operation of the railroads of this defendant caused expenditures to be made for material and supplies at an excessive cost, and without competitive bidding; and has thereby swollen the charges against such revenues and deferred and withheld from this defendant participations in such revenues to which it is lawfully entitled under said Contract #3. The precise amount of the sums so illegally charged and withheld by the plaintiff is unknown to this defendant, but upon information and belief the defendant alleges that it is at least and may exceed Five million dollars ($5,000,000).

The plaintiff delayed the provision of equipment that it was obligated to provide under Contract #3, for approximately three years; such delay was deliberate and intentional and intended to postpone the time when, pursuant to the provisions of said contract, operations under such lease should begin and pooling of the revenues should take place; and by reason of which postponement the plaintiff, Interborough Rapid Transit Company, was enabled to retain for itself all of such revenues.

Under the provisions of said Contract #3, the lease was to begin on January 1, 1917. At that time, Interborough Rapid Transit Company, the plaintiff herein, had scarcely begun the provision of material parts of its equipment. The conduits connecting the power house at 59th Street & 12th Avenue with Lexington Avenue at 57th Street & Lexington Avenue were laid in the late winter of 1918, under conditions of weather and ice at greatly increased cost. Much of the work done in laying such conduits was the cutting away of the solid ice overlaying the surface of the streets, as the result of intermittent snow, sleet and rainstorms, which were frozen solid.

[fol. 1806] Interborough Rapid Transit Company, plaintiff herein, not having furnished such equipment so that the operations under such lease could begin on January 1, 1917, it was necessary to postpone the effective date thereof, which was done pursuant to action of the Board of Estimate and Apportionment taken August 2, 1918, by which the said lease became effective on January 1, 1919, and its expiration was extended to December 31, 1967.

It was the duty of the plaintiff, among other things, to furnish track alignment plans, in conformity with which the construction of certain parts of the new subways was to be done. The plaintiff deliberately delayed the furnishing of such plans for the purpose of deferring the time when operations under the lease were to begin. It did this for the purpose of unjustly and unlawfully enriching itself, at the expense of the City of New York.

In 1916 the plaintiff's revenue from the old lines was $19,357,252, of which the sum of $6,852,646 was available for dividends. This latter sum would have been reduced by $2,850,000 had the lease of the new lines been then in effect.

In 1917 the plaintiff's revenue from the old subway lines was $21,454,892, of which the sum of $7,255,691 was available for dividends. Had the lease been then in effect this sum would have been reduced by $3,260,000.

In 1918 the plaintiff's revenue from the old subway lines was $21,840,447, of which the sum of $4,939,045 was available for dividends. Had the lease been then in effect such sum would have been reduced by the sum of $940,000.

In 1919, the first year in which the lease actually was in effect, the plaintiff's revenue was $24,632,207, but nothing was available for dividends. Had the lease not gone into effect there would have been available to the plaintiff in that year for the payment of dividends, $4,200,000.

Besides the unjust enrichment that the plaintiff obtained for itself by its default in delaying construction and equipment of the new subways, it subjected the City of New York to liabilities for damages for delay to construction [fol. 1807] contractors, aggregating several millions of dollars, which delays were caused by the plaintiff herein withholding and delaying track alignment plans, indispensable for the progress of construction work, and by other breaches of its obligations in the construction and equipment of new lines.

By reason of such conduct on the part of the plaintiff, the cost of equipment for the initial operation was increased by the sum of upwards of $20,000,000.

Wherefore this defendant demands judgment dismissing the cross-petition herein, with costs and disbursements of this action, and that this defendant shall have such other and further relief as to the Court may seem just and proper.

George P. Nicholson, Corporation Counsel, Solicitor for Defendant, The City of New York, Office and Post Office Address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 1808] Exhibit "A"

Lease Manhattan Railway Company to Interborough Rapid Transit Company

This indenture, made this first day of January, one thousand nine hundred and three, between Manhattan Railway

Company, hereinafter called the "Lessor," party hereto of the first part, and Interborough Rapid Transit Company, hereinafter called the "Lessee," party hereto of the second part, domestic corporations, organized under the Laws of the State of New York, witnesseth:

Whereas, the Lessor is a railroad corporation and also is a corporation which owns or operates railroads or railroad routes within the City of New York; and

Whereas, said Lessor also owns, in fee simple or by leasehold estate, pieces and parcels of land, with the buildings and improvements thereon, situated, lying and being rolling stock, equipment, tools, machinery, implements, rolling stock, equipment, tools, machinery, implements supplies, money, bonds, credits, securities and personal property all of which property real, personal or mixed, schedules, with valuations of the personal property, have been or are able to be prepared as of the date hereof, to such an extent as is practicable, and are to be identified by the signatures thereon of the Secretaries of the Lessor and of the Lessee respectively; and has also acquired and expects to acquire in future from or against owners of property abutting upon the lines of its railroads or routes, privileges, easements and rights to construct, maintain and operate its railroads now constructed or hereafter to be constructed or acquired; and

Whereas, the Lessee is a railroad corporation duly organized under and in pursuance of chapter 565 of the Laws of 1890, known as "The Railroad Law," and the acts amendatory thereof and supplemental thereto, and pursuant to provisions of chapter 544 of the Laws of 1902, being an Act to amend chapter 4 of the Laws of 1891; and also is a corporation which owns or operates railroads or railroad routes within the city of New York; and

Whereas, the Board of Railroad Commissioners of the State, or a majority of such Board, has duly consented to these presents;

Now, therefore, the parties hereto, for and in consideration of the sum of one dollar ($1.00) by each to the other in hand paid, the receipt whereof is hereby acknowledged, and for and in consideration of the covenants and agreements hereinafter contained, to be kept and performed on the part of each party hereto, by and with the other, and

other valuable considerations, have covenanted and agreed as follows:

The Lessor has leased and demised, and doth by these presents lease and demise to the Lessee and its successors and assigns, all its right, title and interest in and to the property hereinafter described, that is to say:

All the railroads owned or operated in the city of New York by the Lessor, and constructed or to be constructed [fol. 1809] or acquired under its charter or in its right, during the continuance of this lease, and all the railroad routes of the Lessor hereinbefore mentioned or now or hereafter acquired; together with all switches, side-tracks, sidings, connections and turn-outs belonging to or appurtenant to said railroads or routes and all extensions or branches of or from said railroads, now owned, constructed or operated, and which may hereafter be owned, constructed or operated, by the said Lessor, and all and singular the emoluments, revenues, income, rents, issues and profits of said railroads, extensions and branches, together with all the franchises, rights, powers and privileges of the Lessor now owned or hereafter acquired, to construct, acquire, maintain and operate railroads now owned or hereafter acquired by the Lessor; and also all the lands, privileges, easements, rights, and tenements above described or referred to, and all and any real estate or interest therein, privileges, easements, rights, or leasehold estates hereinafter acquired, and also all cars, locomotives, engines, tools, implements, supplies, machinery, railroad equipments, power stations, electrical appliances and equipments, office furniture and office fixtures, and all privileges, easements, rights, fixtures, personalty and property real, personal or mixed, of every nature or description, of the Lessor, now or hereafter acquired, which franchises, rights and property so leased and demised are taken by the Lessee subject to the various burdens and conditions under which they are respectively held by the Lessor; and the Lessor doth hereby assign, transfer, and set over unto the Lessee, its successors and assigns, all the benefits and rights now or hereafter arising from any and all contracts, leases or agreements which the Lessor now has or may hereafter be entitled to; provided, however, that money derived from the sale of shares of capital stock, bonds or property of the Lessor, and credits and securities, shall remain, until

January 1, 1906, under the control of the Lessor, and shall only be expended or applied as hereinafter provided;

Excepting from the effect of this indenture only such of its franchises, rights and privileges as are or may be necessary to preserve its corporate existence, charter, powers of organization, and its interest in the reversion of the demised property and in the covenants, agreements and conditions of this indenture.

This lease includes all the right, title and interest of the Lessor during the term or existence of this indenture in and to all the property, real, personal and mixed, of the Lessor on the date when the same takes effect, all subsequent additions, all connections, extensions and branches of its existing railroad or railroads now constructed or which may hereafter be constructed or acquired, and all leased lines connecting therewith, and all rights and franchises of the Lessor now owned or hereafter acquired, to make connections, extensions, branches and leases of other lines, and to construct, maintain and operate new or other lines of railroad upon routes now owned or which may hereafter be acquired by or for the Lessor.

And subject to the provisions of this indenture, and the control herein reserved to the Lessor until January 1, 1906, the Lessor does hereby grant to the Lessee the control of the expenditures of any moneys belonging to the Lessor [fol. 1810] at the time of the taking over of the property of the Lessor under the lease, which are in the treasury of the Lessor, or to which the Lessor is or may be entitled, and the control of all rights of action for the collection of money or for the enforcement of all rights of action for the collection of money.

To have and to hold the said railroads, railroad routes and other property, real, personal and mixed, and appurtenances unto the said Lessee and its successors and assigns for the full term of nine hundred and ninety-nine years from the date of the organization of the said Lessor, to wit: November first, one thousand eight hundred and seventy-five (A. D. 1875), or so long as the Lessee and its successors shall continue to exist as a corporation and be capable of exercising all the functions herein stipulated on its behalf; the Lessee yielding and paying unto the Lessor, its successors and assigns, the yearly rent of ten thousand dollars ($10,000), payable semi-annually on the first

days of October and April, during the said term, and keeping and performing all and singular the covenants and agreements hereinafter mentioned to be by the said Lessee kept and performed.

Article First. It is covenanted and agreed that the authorized capital stock of the Lessor at the time this lease takes effect shall be $60,000,000, of which $55,200,000 shall then be outstanding, and that after April 1, 1906, the balance of new stock to the amount of $4,800,000 will be issued by the Lessor if permitted by law, and may be sold by the Lessee, but not otherwise than in the market at public or private sale, for the best price obtainable.

Article Second. It is further mutually covenanted and agreed that all moneys derived from the sale of shares of capital stock, bonds or property, real or personal, of the Lessor, and from any credits or securities, and from any excess of the amounts heretofore charged against income account for the purpose of meeting taxes, over and above the amounts necessary to liquidate such taxes with interest and penalties, shall be used, applied and expended only for one or more of the following purposes, to wit, the extinguishment of claims of owners of property abutting upon the railroads and railroad routes of the Lessor; the acquisition of the right to construct, maintain and operate the railroads of the Lessor upon said routes, and any necessary expenses connected therewith; making payments from time to time upon present and outstanding contracts of the Lessor other than those connected with operating expenses, restoration to income account of all money heretofore charged in operation expenses for the purpose of paying accrued taxes and, during the pendency of litigations, actually applied to purchase of property or to betterments; to complete the construction, alteration and equipment of the said railroads for operation by electrical motive power, and in payment of the cost of additions, improvements, extensions, branches and equipments of the said railroads and properties of the Lessor, other than those necessary to keep said railroads and properties in good condition and repair, and other than those necessary to preserve and procure efficiency in the operation of said railroad or railroads, which said additions, improvements, extensions, branches and equipments, and all other property, real, personal or

mixed, paid for out of the proceeds of the sale of shares [fol. 1811] of capital stock, bonds or property of the Lessor, shall be the property of the Lessor, provided, that, until January 1, 1906, and not afterwards, all the moneys, credits and securities aforesaid shall remain under the control of the Lessor and may be, and, at the request of the Lessee, shall be expended, paid or applied by the Lessor for or to the purposes aforesaid, and after January 1, 1906, the same shall be expended, paid or applied for such purposes, and no others, by the Lessee, provided, further, that in all cases in which it be essential, the consent of the Trustees of any mortgage upon any of the property herein referred to, be first had and obtained.

It is agreed that after January 1, 1906, the Lessee, within a reasonable time after the close of each fiscal year, shall render to the Lessor an itemized account of the aforesaid treasury assets on hand at the close of such fiscal year, and of the credits and debits pertaining thereto during the said preceding fiscal year.

It is agreed that all reasonable expenses incident to the issue, sale and disposition of shares of capital stock, bonds and property of the Lessor, shall be paid out of such proceeds of sale as can be so applied, otherwise by the Lessee.

Article Third. The Lessor covenants and agrees that the Lessee shall have all the right of the Lessor from time to time to sell and dispose of all cars, rolling stock, machinery, equipments and other personal property which shall not be required for further use in the construction, maintenance and operation of said railroads, and to apply the proceeds realized upon any such sale to the purchase of such machinery, real or personal property, and the construction of such additions, impovements, extensions, branches and equipments of the said railroads and properties of the Lessor, other than those necessary to keep said railroads and properties in good condition and repair, and other than those necessary to preserve or secure efficiency in the operation of said railroad or railroads, which said machinery, real or personal property, additions, improvements, extensions, branches and equipments shall be the property of the Lessor, provided that until January 1, 1906, the Lessor shall have the right and at the request of the Lessee shall sell property and apply the proceeds as in this

article hereinbefore provided, the necessary consent of any trustee of any mortgage having first been obtained.

Article Fourth. The Lessor further covenants and agrees that it will, and the Lessee covenants and agrees that it may, at least six months before the date fixed for the redemption or payment of any bonds issued by it and payment of interest on which shall have been assumed by said Lessee, which are not provided for in the consolidated mortgage of the Lessor to be taken up by the issue of bonds secured by said mortgage, including among others, bonds issued under said consolidated mortgage, either extend the time of payment of any such bonds falling due at the best rate of interest obtainable and, if deemed advisable by the Lessor, issue new coupon sheets for such extended bonds, or issue, at the highest price obtainable therefor, a new series of bonds to refund the same secured by mortgage or mortgages covering its franchises, rights, privileges and [fol. 1812] property, which said mortgage or mortgages shall be for an amount equal to but not greater than the principal of the bonds to be redeemed and paid, and which said bonds shall bear the lowest rates of interest at which the same can be sold or disposed of at not less than par.

The Lessor further covenants and agrees that it will apply the proceeds realized upon the sale of said extended or refunding bonds to the payment and redemption of the bonds falling due, and not otherwise, and that any surplus of the proceeds realized on any such issue of such bonds shall be paid to the Lessee, to be by it applied to the purposes set forth in article second of this lease.

It is covenanted and agreed that any mortgage hereafter issued by the Lessor to secure bonds issued for extending or refunding those secured by said consolidated mortgage, no matter how often extended or refunded, shall be a lien upon the mortgaged property prior to this lease, and that such priority of lien shall attach to every mortgage securing bonds that represents the debt at any time secured by said consolidated mortgage, no matter how often replaced or renewed.

The Lessor further covenants and agrees that it will on or after the first day of July, 1908, at the request of the Lessee, issue at the highest price obtainable therefor, a new series of bonds bearing four per centum interest per annum,

payable semi-annually, to the amount of principal of $5,409,000, secured by a mortgage covering, if deemed advisable by the Lessee, either a portion or the whole of its franchises, rights, privileges, and property and it is agreed that the proceeds of the sale of such bonds shall be applied to the purposes set forth in article second hereof.

All expenses incident to the making of any such mortgage, and the issue, sale and disposition of any such bonds, under the provisions of this article fourth, shall be borne and paid out of such proceeds of sale as can be so applied, otherwise by the Lessee.

Article Fifth. The Lessor further covenants and agrees that whenever required by the Lessee during the continuance of this lease it will do and perform every corporate act which may be necessary, useful or appropriate to secure to the Lessee or its successors the full enjoyment of the railroads, property and franchises hereby demised or intended to be, and any and all extensions, branches and other railroads hereafter constructed or acquired, and which shall become a part of the demised premises; that it will use every effort to retain and preserve its corporate existence and organization during the continuance of this lease, and will take any and all proceedings authorized by law for the extension of its charter or charters, and for the purpose of acquiring by the exercise of the right of eminent domain, any real property or interest therein which the Lessor shall be requested to acquire by the Lessee, and that it will endeavor to obtain the right to construct such extensions of the route of its railroads, such additional tracks and railroad facilities, and such branch or branches therefrom, as shall be approved by the Lessor and Lessee, or required by law, and to that end will take such proceedings as may be authorized by law. The expense of doing all acts to be done by the Lessor under this article fifth, shall be borne and paid by the Lessee except as provided in article second of these presents.

[fol. 1813] Article Sixth. The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine years aforesaid, and upon the terms and conditions in this lease

expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees, that prior to the date of payment of each of the installments of rent provided for in this article, it will declare a dividend equal to such instalment, payable upon the date of payment of such instalment, and after or simultaneously with such declaration of dividend, will close its transfer books of stock for a reasonable time prior to such date of payment, and that such dividend shall be payable to the owner of record of its stock, who shall be such, on the date of closing of its transfer books aforesaid. The said dividend rentals payable to all such owners of record for each of the first two years and the remaining nine months comprised in said two years and nine months shall be an amount equal in the aggregate to the net earnings of the Lessor, for each of said three periods respectively, but shall not exceed seven per centum (7%) per annum upon the outstanding capital stock of the Lessor; and shall be not less than six per centum (6%) per annum upon such stock; said net earnings shall, among other things, include all interest earned by the Lessor, and shall be ascertained by the system of accounting heretofore employed by the Lessor, and by deducting from the gross earnings, among other things, operating expenses, taxes accrued and proportionately chargeable to the period aforesaid, interest upon the bonds described or mentioned in article seventh of this lease; repairs, replacements, expenses of litigation and all judgments recovered, except judgments recovered by owners or parties otherwise interested in property abutting upon the lines of railroad of the Lessor, for damages to said abutting property, or the rental value thereof, arising from the construction, maintenance or operation of the said railroads and their interference with easements of light, air and access, and the expenses of the Lessor in litigations connected therewith.

Proper books of account according to the system of accounting heretofore employed by the Lessor shall be kept by the Lessee until January 1, 1906, showing the gross

earnings, and an itemized account of the proper and reasonable charges against the same, which shall at all times be open to the inspection of the officers and agents of the Lessor.

No reduction of the guaranteed annual dividend rental or in the term of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor; provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January 1, 1906, the Lessee hereby [fol. 1814] covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) on his holding of the capital stock of the Lessor.

The Lessee hereby covenants and agrees, that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free of all charges, in quarterly payments on the first days of January, April, July and October in each year, which after January 1, 1906, shall be equal quarterly payments; the first of such payments to be made on the first day of July, 1903; and the Lessee will from time to time execute in proper form a guarantee to the above effect, printed or engraved upon the certificates of stock of the Lessor; and as such stock certificates are surrendered for cancellation and issuance of new certificates in place thereof, will from time to time, upon request of the holder renew such guarantee upon all such new certificates.

The form of such guarantee shall be as follows:

"Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January 1, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Man-

hattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.

"Interborough Rapid Transit Company, by ——
——, Treasurer."

Payment of dividends as above provided by Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor.

Article Seventh. The Lessee hereby assumes and covenants and agrees to pay to the Lessor as rent, as the same respectively becomes due, the interest on the outstanding debenture bonds of the New York Elevated Railroad Company, now merged in and with the Lessor, of which one million dollars ($1,000,000) of principal are now outstanding, and also the interest on the first mortgage bonds of the Metropolitan Elevated Railway Company, now merged in and with the Lessor, of which there are outstanding of principal ten million eight hundred and eighteen thousand dollars ($10,818,000), and also the interest on the consolidated mortgage four per cent. bonds of the Lessor, of which there are now outstanding of principal twenty-eight millions and sixty-five thousand dollars $28,065,000); and also the interest on all bonds that may hereafter be issued by the Lessor in extension or substitution of or for the purpose of retiring any of the aforesaid or any renewal mortgage bonds; and also the interest on all the bonds of the Lessor which may hereafter be issued in pursuance with the terms of the con- [fol. 1815] solidated mortgage of the Lessor; and also the interest on all bonds of the lessor which may hereafter be issued either as an original issue or as extension of renewal bonds, as provided by the terms of this lease; and the Lessee further covenants and agrees to keep the Lessor safe and harmless at all times from all claims and demands against it for interest arising from or under the said bonds, or any of them.

Payment of any of such interest by the Lessee to the bondholders of the Lessor shall constitute payment of rent,

in compliance with the foregoing covenants to pay the same to the Lessor.

The Lessee hereby further covenants and agrees to keep and perform all the conditions, covenants and agreements that may be contained in all or any of the aforesaid mortgages to be kept and performed by the Lessor, except the agreement to pay the principal of the bonds respectively secured thereby.

For all of the payments in this lease provided on the part of the Lessee, well and truly to be made during the term by this lease demised, the said Lessee hereby binds itself and its successor or successors firmly by these presents.

Article Eighth. The railroads hereby leased shall be deemed to have been operated from twelve o'clock and one second on the morning of the first day of April in the year one thousand nine hundred and three, by the Lessee, and all such operation from and after that time shall be for the account of the said Lessee; provided, however, to the end that the present plans of improvement and financial administration of the leased property may be completed, the present Vice-President, Treasurer and Auditor of the Lessor shall be appointed as the Executive Officer, Treasurer, and Auditor, respectively, of the Lessee with respect to the leased property, until January 1, 1906, and in the event of the inability of any of such officers to act, by resignation or otherwise, his successor shall be selected by the Lessee, with the approval of the Lessor.

Article Ninth. The Lessee covenants and agrees, at its own proper cost and expense, to maintain, operate and run the demised railroads and property during the said term in the same manner as the Lessor is now or shall at any time hereafter be required or authorized by law to do; and shall and will keep all insurable property insured in reasonable amounts and rebuild all buildings and replace all property destroyed or deteriorated by fire or otherwise, to such an extent as to be unfit for use; and shall and will maintain, preserve and keep the railways and property hereby demised, including all property hereafter acquired, and every part thereof, in thorough repair, working order and safe and efficient condition, and supplied with rolling stock and equipment, so that the business of the said demised rail-

ways shall be preserved, encouraged and developed, the business thereof be done with safety and expedition, the public be accommodated in respect thereto, with all practicable convenience and facilities, and the future growth of such business as the same may arise or be reasonably anticipated be fully provided for and secured.

The Lessee further covenants and agrees, at the expiration or termination of this lease for any cause, to return and deliver the said railroad and railroads, real estate, and [fol. 1816] properties by this lease demised, including among other things, all property, additions, improvements and equipments which shall be furnished, constructed or completed out of the proceeds of sale of the stock, bonds or property of the Lessor, to the Lessor in as good order, condition and repair as they were at the date this lease takes effect, or at the date when the same came into the possession of the Lessee, and to surrender said franchises, rights and privileges, easements and properties unimpaired by any act of the Lessee; excepting, however, all property of the Lessor sold pursuant to the terms hereof, the proceeds of which shall have been applied as herein provided.

The Lessese further covenants and agree that it will at all times during the continuance of this lease, at its own expense, keep the said rolling stock, and tools, equipment, machinery and implements necessary for the operation of the road, in good order, condition and repair, and will, as the same shall be worn out and rendered unserviceable, replace the same at its own expense, so that the said railroad and railroads shall always be kept, maintained and equipped in good and safe condition and effective working order.

The Lessee further covenants and agrees that it will at all times during the continuance of this lease, at its own expensse, comply with all lawful requirements with respect to the construction, maintenance and operation of said railroads, extensions or branches thereof.

Article Tenth. The Lessee covenants and agreess, at its own proper cost, from time to time, and whenever necessary for the use of the Lessor, to make out and furnish to said Lessor in duplicate any and all reports and statements which the latter shall or may hereafter be required by law

to make and file; and to do and perform any and every act which the Lesssor may from time to time be required by law to do and perform during the term of this lease.

Article Eleventh. The Lessee covenants and agrees that, in addition to the rentals herein elsewhere provided, it will pay and discharge as rent, as and when the same have or may become due, any and all taxes, assessments, license fees, water rents, duties, imposts, dues and charges whatsoever, whether ordinary or extraordinary, which previously to this lease have been or hereafter during the said term shall be levied, confirmed, assessed or imposed upon the Lessor, its capital, or shares of capital stock, or dividends, or upon the demised railroad or railroads, premises, real estate, personal property, franchises, easements, or any part thereof, or the business, earnings or income of the Lessor, or for the use or enjoyment thereof, by the United States, State, municipal or other lawful authority; provided, always, that the Lessee shall have the right before making such payment to contest the validity, legality or amount of any such tax, assessment, license fee, water rents, duty, or charge upon any reasonable ground; and in case the same shall be contested as aforesaid, the time occupied in such contest shall not be deemed a part of a reasonable time within which the Lessee is required to make such payment aforesaid. Should the Lessee fail to make any such payment aforesaid within the time herein required, then the Lessor may, after the expiration of said time, pay [fol. 1817] the same, with all accrued penalties, interest, costs and other charges connected therewith, and the Lessee agrees to repay as rent to the Lessor on demand the amount so paid.

The Lessee further covenants and agrees to pay as rent all rentals accruing or becoming payable during the continuance of this lease, under the terms of any contract or lease then existing between the Lessor and person or corporation for the use of any real estate or property leased by the Lessor.

Article Twelfth. Possession of the demised railways and premises shall be given by the Lessor to the Lessee at twelve o'clock and one second on the morning of the first day of April, nineteen hundred and three, and upon deliv-

ery of such possession, the Lessor shall transfer and deliver to the Lessee, for use upon or in connection with the said demised railways and premises, all moneys belonging to income account (except moneys necessary to pay dividends previously declared), rolling stock, equipment, machinery, tools, implements, furniture, fuel, material or other railroad supplies belonging to the lessor which shall have been procured for the use of said railways.

The Lessee covenants and agrees to take over the leased property as a going concern, and agrees to pay all operating expenses due or to become due at or after the time of taking possession.

The Lessee shall at all times during this lease have the full and exclusive right to manage, use and control the demised property, and shall have, use and enjoy all the rights, powers and authority of the Lessor in that behalf, and all rights, powers, easements and privileges now possessed or which may hereafter be acquired by the Lessor necessary or convenient to the construction, maintenance, use, operation, possession and enjoyment of said railroad or railroads and any and all connections, extensions and branches thereof, which can or may be lawfully exercised and enjoyed under its charter and the laws applicable thereto, in, about or in connection with said demised property and in the maintenance and operation thereof.

The Lessee may from time to time, in its discretion, change, rebuild or duplicate the location or character of the whole or any part of any present or future line of railroad of the Lessor or change the motive power now used, or hereafter used, upon any such line, or the roadbed or structure of any such line, the consent of the Lessor having first been obtained, which consent the Lessor hereby agrees to give, provided the proposed action of the Lessee be reasonable and lawful.

Article Thirteenth. The Lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, and making all other improvements now contracted for, according to the present plans and contracts of the Lessor, but without assuming any liability under any of such contracts, and the Lessor covenants that it will

facilitate and further such work by every means of its power, and will provide the funds therefor, by the sale of its capital stock, bonds or other property, real or personal, according to the provisions of Article Second hereof.

[fol. 1818] Article Fourteenth. The Lessee further covenants and agrees that at the expiration of this lease, or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Lessee out of its own funds to the said railroad or railroads otherwise than in compliance with the provisions of this Indenture, shall remain for use upon or as part of said demised property, and shall be and become the property of the Lessor upon the payment by the Lessor of the reasonable value thereof.

Article Fifteenth. The Lessee further covenants and agrees upon the expiration or any sooner termination of this lease, to surrender, transfer and deliver to the Lessor, all tools, machinery, materials and supplies on hand for use in the construction, maintenance or operation of said railroads of value at least equal to that of such property delivered to the Lessee by the Lessor, and upon payment by the Lessor of the amount, if any, that the value of such property then delivered may exceed the value of such property delivered at the date this lease takes effect. And the Lessee further covenants and agrees at the expiration of this lease or any sooner termination thereof, that it will execute and deliver to the Lessor a good and sufficient deed conveying to the Lessor any real estate acquired and paid for by the Lessee for use in connection with the construction, maintenance or operation of said railroad or railroads and property, upon payment by the Lessor of the reasonable value thereof.

Article Sixteenth. The Lessee further covenants and agrees that the Lessor, its officers and its duly authorized committee or agent may at all times during the term by this lease demised, enter in and upon and have free access to the railroads and properties by this lease granted and demised, that it will keep full, true and correct books of account, to which books, and to all contracts, vouchers, and agreements, the Lessor's officers, committee or agent aforesaid shall have free access at all reasonable times, and that

all deeds, muniments of title, agreements and other papers, relating to settlements with abutting owners, papers evidencing franchises and charters, stock books, transfer books, and the seal of the Lessor shall remain in the custody of the Lessor, whose approval until January 1, 1906, shall be necessary to the purchase of any real estate or interests therein with its money, and to all settlements with abutting property owners, and that it (the Lessee) shall have access to such papers at all reasonable times, and that said Lessee will furnish to such officers, committee or agent every facility to examine into the condition of the said railroads and will pay all expenses incident to an examination and report upon the condition of the railroads and equipment of the Lessor, to be made by an expert or experts of its selection not oftener than once in three years, and will when and as required properly mark for identification all rolling stock of the Lessor and all replacements thereof, and will also from time to time pay all expenses of transfer and registration of stock and of printing or engraving stock certificates.

Article Seventeenth. The Lessee further covenants and agrees that it will at the expiration or any sooner termination of this lease for any cause, transfer, deliver and return [fol. 1819] to the Lessor, moneys belonging to income account, equal in amount to such moneys received at the inception of this lease, also rolling stock, equipment, power stations, electrical appliances and equipments, implements, furniture, fuel, office furniture and office fixtures, and all other property of like kind or nature then owned or possessed by it for use in the construction, maintenance and operation of said demised railroad and railroads, and the said property so returned shall be equal in quantity and value to similar property received by it at any time from the Lessor under the terms of this lease; excepting, however, all property sold pursuant to the terms hereof the proceeds whereof shall have been applied in accordance with the provisions of this lease.

Article Eighteenth. The Lessee further covenants and agrees to hold, save and keep harmless and indemnify the Lessor from and against the costs and expenses of the defense of any and all actions, legal or equitable, or special

proceedings, involving the validity of this lease, or the validity of the franchises, rights or easements of the Lessor, or the title of the Lessor to any real estate, property or premises covered by the terms of this lease; and further agrees to notify the Lessor in writing of the commencement of any such action or proceeding against the Lessee involving like questions, and to allow the Lessor to interplead therein without objection and to assist it in the effort to do so; and further to hold, save and keep harmless and indemnify the Lessor from and against the costs and expenses of the defense of any and all actions, legal or equitable, or special proceedings, which shall be pending against the Lessor on the date this lease takes effect, or which may hereafter, during the said term of the continuance of this lease, be brought against the Lessor for injuries or damages to persons or property in the construction, maintenance or operation of said railroads, or for causing the death of any persons, and from and against any judgment or decree of injunction or other nature existing against the Lessor upon causes of action referred to in this Article on the date this lease takes effect, or at any time thereafter during the continuance of this lease; also from and against the costs and expenses of any such action or proceeding upon any other cause of action now pending or which may be hereafter brought by or against the Lessor and against any judgment or decree of injunction or any other nature rendered in any of said actions or proceedings.

And the Lessee further covenants and agrees to hold, save and keep harmless and indemnify the Lessor from and against the expenses and costs of the defense of any such action or proceeding which shall be pending at the date of the expiration or any sooner termination of this lease, or which shall thereafter be brought against the Lessor or the Lessee for injuries or damages to persons or property in the construction, maintenance or operation of said railroad during the continuance of this lease, or for causing the death of any person, and from and against any judgments or decrees of injunction or any other nature that may be rendered in any such actions or proceedings, less any amounts which shall have been paid by the Lessee, under or by reason of the preceding indemnity clause, upon causes of action of a character referred to in this Article

arising prior to the date of this lease; provided, however, [fol. 1820] that the Lessor or Lessee shall be at liberty to appropriate as provided in Article Second hereof, out of and from any moneys derived from the sale of shares of capital stock, bonds or property of the Lessor, whether on hand on the date the lease takes effect or subsequently received, amounts necessary to pay and discharge any and all judgments that may have been or shall be recovered for injuries or damages to property abutting upon any of the lines of railroad or railroad routes of the Lessor, or to the rental value thereof, and also all sums of money that may be necessary or advisable to be paid pursuant to decrees of injunction or any other nature already obtained or hereafter obtained by owners of such abutting property or for the purpose of acquiring either by negotiation, settlement of action or claims or by condemnation or other proceedings from the owners of such abutting property, the right to construct, maintain and operate any of the railroads of the Lessor, together with the costs and expenses thereof, and of litigating the claims of any such alleged owners, and all such necessary amounts over and above those referred to in said Article Second shall be furnished and paid by the Lessee.

Article Nineteenth. The Lessee further covenants and agrees to deposit, or cause to be deposited, with the Guarantee Trust Company of New York as trustee, or such company or companies, as may be designated as trustee or trustees by the Lessor and Lessee, prior to the date of delivery of possession thereunder, the sum of four million dollars ($4,000,000) as a guarantee and security for the performance by it of each and every covenant and agreement contained in this lease on its part to be kept and performed, which sum of four million dollars ($4,000,000) shall be held or invested upon such terms or in such manner as shall be agreed upon by the Lessor and the Lessee, and all of the securities and mortgages in which any part of such fund may be invested shall be deposited with the said trustee or trustees.

It is further covenanted and agreed that if the Lessee shall not at the time be in default in the performance of any of its covenants or agreements in this lease contained, the said sum of $4,000,000, and the securities and mort-

gages in which any part of such fund may be invested may be delivered by the trustee to the Lessee upon its demand in writing when, and not until, the said Lessee for five years next preceding the date of such demand shall have regularly and punctually paid all principal and interest due on all its own mortgage indebtedness and in addition thereto for five years next preceding the date of such demand shall have regularly and punctually paid dividends upon all its own outstanding capital stock at the rate of not less than four per cent. per annum, provided that at the time of the termination of the existing lease to the Lessee from the city of New York and of any renewal thereof the Lessee shall renew the deposit of $4,000,000 herein provided for upon the same conditions herein stated, unless said deposit shall then exist.

The securities and mortgages in which said guarantee fund is invested may from time to time be changed with the consent of the Lessor and the Lessee, and the said Lessee covenants and agrees, upon the request in writing of said Lessor, whenever the market value of any of said [fol. 1821] securities and mortgages shall have so depreciated as to diminish said guarantee fund by such depreciation below four million dollars ($4,000,000), to make good such diminution by the deposit of cash or securities approved by the Lessor, or to substitute securities or mortgages approved by the Lessor, in place of the depreciated securities and mortgages, and in the event that said fund has been diminished by payments therefrom, to deliver to the trustee, either cash or other securities and mortgages approved by the Lessor, which shall be of a market value sufficient to restore said fund to four million dollars ($4,000,000), within ninety days after being requested as aforesaid in writing so to do.

Article Twentieth. It is mutually covenanted and agreed between the Lessor and Lessee that the interest received upon said four million dollars ($4,000,000) shall be paid by the trustee or trustees to the Lessee as the same shall from time to time accrue and be collected, until such time as the trustee or trustees shall have been notified in writing by the Lessor that the said Lessee is in default in the payment of any rent reserved in this lease, or any part thereof, or is in default in making any payment on its part agreed or

provided or required to be made by any provision of this lease, or in the performance of any covenant and agreement by said Lessor to be kept and performed, requiring the expenditure of money.

When the Lessee shall be so in default as aforesaid, then the said trustee or trustees, upon the request in writing of the said Lessor, and without any further action of the Lessee, shall from time to time apply the interest of the said four million dollars ($4,000,000), as the same shall accrue and be collected, and the principal of the said guarantee fund, or so much thereof as may be necessary, to the payment of any amount necessary to be paid by the Lessee in performance of its covenants and agreements herein contained, as the same becomes due, and to that end the trustee or trustees may, if necessary, sell said securities at public or private sale, and convert them into money.

Article Twenty-first. The Lessee further covenants and agrees that in case of default by it in the payment of the cash or dividend rentals in this lease reserved and agreed to be paid, and if said rentals, or any part thereof, shall remain unpaid for the space of ninety days from and after the time when they shall become due and payable, or if the said Lessee shall be in default in the performance of any of the covenants or agreements in this lease contained and on its part to be kept and performed as aforesaid, and such default shall continue for the period of ninety days after notice and demand of performance by the Lessee, given in writing by the Lessor to the Lessee, or if the Lessee shall fail or refuse to comply with any decision of arbitrators appointed as herein provided, for sixty days after service of notice of such decision upon it, then, and in any of said events, the term by this lease created, granted and demised shall at the option of the said Lessor expire and cease and determine, and the Lessor shall have the right to enter upon and take possession of all and singular the property by this lease granted and demised, and the same have and possess and enjoy as of its former estate, and without such entry may recover possession thereof in the [fol. 1822] manner provided by statute, by summary proceedings; it being covenanted and agreed that the term hereby granted shall expire after continued default as aforesaid, at the election of the Lessor and upon written

notice of such election being served on the Lessee, and that all right of any further demands or re-entry other than that above specifically referred to is hereby waived by the Lessee. The foregoing remedies are cumulative and shall not be construed to take away or abridge any other remedy, or right existing by law, or under any other provision of this lease.

Article Twenty-second. It is mutually covenanted and agreed between the parties hereto that the trustee or trustees holding said guarantee fund may from time to time be changed by the consent of the Lessor and Lessee, and that in case said trustee, or any of such trustees, shall be dissolved or cease to exist, or refuse or become for any cause incapable to act, and the Lessor and Lessee shall be unable to agree upon a successor in the trust, that then and in that event either party hereto, upon eight days' notice to the other, may apply to the Supreme Court for the appointment of a successor to such trustee or trustees with like powers and duties. The compensation of the trustees shall be fixed and be paid by the Lessee, and the Lessee may, with the consent of the Lessor, agree with any trustee with respect to the liability of any trustee and in respect to other proper details of the trust aforesaid.

Article Twenty-third. It is mutually covenanted and agreed between the Lessor and Lessee that no waiver of any breach or default of the other by either shall extend to or be taken to affect any subsequent default or to impair the rights arising thereunder unless such subsequent breach or default shall itself be waived.

Article Twenty-fourth. The Lessee further covenants and agrees that nothing in this lease contained is intended or shall be construed as authorizing the Lessee to increase the indebtedness of the Lessor, or to mortgage or create any lien upon the railroad or railroads, franchises and property by this lease demised without consent of the Lessor, and it is covenanted and agreed that the Lessor will at the request of the Lessee, from time to time, execute and deliver to the Lessee for issue for new mileage and sale at not less than par and at the best price obtainable, bonds secured by the consolidated mortgage of the Lessor, whose proceeds shall be used only in accordance with its terms.

Article Twenty-fifth. It is mutually covenanted and agreed between the Lessor and Lessee that if the continued use of any real or personal estate included in or covered by the terms of this lease, or replacements thereof, shall not be necessary or required for the construction, maintenance or operation of said railroad or railroads, extensions or branches, then in that event, the Lessor, prior to January 1, 1906, may, and after that date at the request of the Lessee shall, sell and dispose of said real or personal estate, and the proceeds realized therefrom may or shall be expended for the same purposes and under the same conditions as in the second article of this lease are provided for the expenditure of the proceeds of the sale of stock, bonds and property of the Lessor. Provided, further, that in all [fol. 1823] cases in which it be essential, the consent of the trustee of any mortgage upon any of the property herein referred to, be first had and obtained.

Article Twenty-sixth. It is further mutually covenanted and agreed between the Lessor and Lessee that in case of any disagreement between them concerning the performance of any of the conditions, covenants and stipulations in this lease contained on the part of the other party to be kept and performed, or concerning their respective rights, duties and obligations under the provisions of this lease, such disagreement shall be submitted to arbitration as follows: In case either the Lessor or Lessee shall desire the appointment of arbitrators and arbitration, the party so desiring the appointment of arbitrators shall state to the other in writing the point or points of difference to be submitted to arbitration, and shall within ten days thereafter select an arbitrator to act upon its behalf, and notify the other party in writing thereof, and thereupon said other party shall within ten days thereafter select its arbitrator and notify the party demanding said arbitration of its selection. The arbitrators thus selected shall, within five days thereafter, meet, and may adjourn from time to time, and after hearing the respective parties and taking evidence, which shall be committed to writing shall, within ten days after the last hearing, render their award in writing, and their decision shall be binding and conclusive upon the Lessor and Lessee. If the arbitrators so selected are unable to agree, they shall, within fifteen days after

their last hearing, select a third arbitrator, to whom all the evidence taken shall be submitted, with such further evidence as either party may give, and after such further hearing as the arbitrators or a majority of them shall permit, the decision of a majority of the three shall be binding and conclusive upon the Lessor and Lessee. If the two arbitrators first chosen cannot agree upon the selection of a third arbitrator, then such arbitrator may be appointed by any person selected by the Lessor and the Lessee for that purpose. If the Lessor and the Lessee cannot agree upon a person to select said third arbitrator, then either of them may, upon notice of eight days to the other, apply to any judge of the Supreme Court in the First Department to appoint a third arbitrator. If, upon notification, either party hereto shall fail, within the time designated, to select an arbitrator, as required by the terms hereof, then, in that event, the arbitrator appointed by the other party shall have the right to proceed and fully determine the matters submitted, and render his decision and award in writing, which award and decision when made in writing and served upon either party by the other shall be binding and conclusive upon the Lessor and Lessee. Either party against whom the arbitrators report shall have sixty days within which to comply with the decision of said arbitrators, and said arbitrators shall have power for good cause shown from time to time to extend the time for such compliance for a reasonable time, upon such party giving security approved by the arbitrators that it would comply with the requirements of the award.

Article Twenty-seventh. It is mutually covenanted and agreed between the Lessor and Lessee that this lease shall not be binding or valid as to either of the parties hereto, nor shall this lease go into effect nor shall the Lessee be entitled to enter into possession of the premises and prop-
[fol. 1824] erty by this lease demised until said four million dollars ($4,000,000) shall have been actually deposited either in cash or in securities, or both, pursuant to the terms of this lease, with said Guaranty Trust Company of New York, or company or companies designated by said Lessor and Lessee, nor until a certificate of said Guaranty Trust Company or such companies to that effect is endorsed hereon or attached hereto, which certificate shall be duly

executed by said Trust Company or companies under its or their corporate seals, and shall state the said four million dollars ($4,000,000) or such portion thereof as they respectively hold, is held upon the trusts and subject to the terms, covenants and stipulations and conditions in this lease contained in respect thereto.

Nothing herein contained shall prevent the delivery by the Lessor to the Lessee of this lease and of possession of the hereby demised premises at any time prior to the 1st day of April, 1903, which may be agreed upon by the Board of Directors of the respective parties, and in the event that any such delivery should be had, the property shall be deemed to have been operated for the account of the Lessee from twelve o'clock and one second of the morning of January 1, 1903, from which date the rental dividends shall accrue at the rate provided for the quarter commencing April 1, 1903; and all the other provisions of this lease wtih respect to payment of rent shall take effect as of said January 1, 1903, and in every other respect said lease shall be effective from the date of said delivery of possession of the demised premises and wherever in this lease its date is referred to, the same shall be construed to mean the date of delivery of possession of the demised premises.

Article Twenty-eighth. The Lessor hereby covenants and agrees that it shall and will, at any time when requested by the Lessee or its successors, execute, acknowledge and deliver to it or its successors, at their proper cost and expense, any and all such other or further instruments and assurances in the law for the better granting, demising and leasing of all its rights, title and interest in and to said railways and premises to the said Lessee and its successors, upon and subject to all and singular the rents, covenants, agreements and conditions hereinbefore reserved and mentioned, as by the said Lessee or its successors, or by its or their counsel learned in the law, shall reasonably be advised, devised or required; and the Lessee covenants and agrees to and with the Lessor, its successors and assigns, that it and its successors shall and will, whenever thereunto requested by the Lessor, its successors or assigns, execute, acknowledge and deliver any and all instruments for

the more effectually assuring unto the Lessor, its successors or assigns, the payment of the cash rentals and dividends hereinbefore reserved or agreed to be paid, and the performance of the promises and agreements hereinbefore set forth on the part and behalf of the Lessee to be performed, as by the Lessor, its successors and assigns, or by its or their counsel learned in the law, shall be reasonably advised, devised or required.

Article Twenty-ninth. This lease, the covenants and agreements herein contained, the term, property and franchises hereby granted and demised, shall not nor shall any part of the same be re-leased, transferred, sublet, assigned [fol. 1825] or encumbered, except with the written assent of the Lessor thereto first had and obtained; and in the event that the Lessee should re-lease, transfer, sublet, assign or encumber said lease or any interest therein, without such consent, then this lease shall, at the option of the Lessor, cease and determine as to said Lessee, and all rights of the Lessee thereunder or in the term hereby demised, or any part thereof, shall be at an end; but nothing in this article contained shall extend to the case of a disposition by the Lessee of any equipment or supplies, as hereinbefore provided, or to the case of a continuance or renewal of the corporate existence of the Lessee.

Article Thirtieth. Nothing in this indenture, anything herein contained to the contrary notwithstanding, is intended by the parties or shall be construed to deprive the Lessor of the right to discharge and perform at all times any duty which the law requires it to discharge or perform, or to authorize the Lessee to do any act in violation of the charter of the Lessor or of any law of the United States or of the State of New York applicable to the Lessor or to the Lessee. If any clause or provision herein contained should be adjudged invalid or ultra vires the same shall not affect the validity of any other clause or provision of this indenture or constitute any cause of action in favor of either party to this indenture.

In witness whereof the said Lessor and Lessee have each caused this indenture to be duly executed and its corporate

seal to be hereunto affixed and attested by its Secretary the day and year first above written.

Manhattan Railway Company, by Geo. J. Gould, President. Attest: D. W. McWilliams, Secretary. (Seal.) Interborough Rapid Transit Company, by Augustine Belmont, President. Attest: Frederick Evans, Secretary. (Seal.)

[fol. 1826] Guaranty Trust Company of New York hereby acknowledges the receipt from Interborough Rapid Transit Company under and pursuant to the provisions of a certain contract of lease dated January first, one thousand nine hundred and three, between Manhattan Railway Company, as Lessor, and the Interborough Rapid Transit Company, as Lessee, of the sum of four million dollars ($4,000,000) in lawful money of the United States of America, which money is held upon the trusts and subject to the terms, covenants, stipulations and agreements in said contract of lease contained with respect thereto.

In witness whereof, the said Guaranty Trust Company of New York has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, this 16th day of January, one thousand nine hundred and three.

Guaranty Trust Company of New York, by W. G. Oakman, President.

Attest: E. C. Hebbard, Secretary. (Seal.)

[fol. 1827] *Duly sworn to by George P. Nicholson. Jurat omitted in printing.*

[fols. 1828 & 1829] In United States District Court

[Title omitted]

Answer of Transit Commission to Cross-Bill of Defendant Manhattan Railway Company

John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public

Service of the State of New York, denying the jurisdiction of this Court and saving and reserving to themselves the benefit of their objections and defenses, hereinafter made, that the Answer and Cross-Petition of the defendant, Manhattan Railway Company, states no cause of action or any cause of action within the jurisdiction of this Court, answering and explaining said Answer and Cross-Petition, or such parts thereof as they are advised it is material to answer, say:

1. They admit the allegations of Article I thereof, except that they deny that the Manhattan Railway Company has [fol. 1830] been, since July 1, 1907, and now is subject to all provisions of the Public Service Commission Law, (and that the said elevated railroad routes were laid out by the Rapid Transit Commission).

2. They admit the allegations of Article II thereof, except that they deny upon information and belief that the Interborough Rapid Transit Company was in any way incorporated pursuant to the provisions of Chapter 4 of the Laws of 1891, as amended, and has been since July 1, 1907, and now is subject to all provisions of the Public Service Commission Law, and except that they have no knowledge as to whether the different railroads operated by said Interborough Rapid Transit Company are parts of a comprehensive system of elevated and subway rapid transit railroads.

3. They admit the allegations of Article III thereof, except that they deny upon information and belief that these defendants and defendant Prendergast were appointed under and by virtue of Chapter 343 of the Laws of 1926 of the State of New York, and except that they have no knowledge as to the citizenship and residence of defendants other than themselves.

4. They admit that The City of New York is a municipal corporation existing under the Laws of the State of New York; and they have no knowledge as to the other allegations of Article IV.

5. They have no knowledge as to the allegations of Articles V and VI.

6. They admit that the Manhattan Railway Company has leased all its rights, franchises, and property in its elevated railroads to the Interborough Rapid Transit Company, and that the Interborough Rapid Transit Company has for [fol. 1831] many years been engaged in the operation and management of the elevated railroads in the Boroughs of Manhattan and The Bronx; but they have no knowledge as to the other allegations of Article VII.

7. They deny the allegations of the last two paragraphs of Article VIII; and they have no knowledge as to the other allegations thereof.

8. They deny the allegations of Article IX.

9. They admit that the Legislature of the State of New York enacted the chapters and sections referred to in Articles X, XI, XII, XIII, XIV and XV thereof; but they have no knowledge as to the other allegations of said articles; and they refer to the said statutes themselves in full for a complete and accurate presentation of said statutes.

10. They admit that the Public Service Commission for the First District made certain orders prescribing the form of schedules to be filed, as required by law, by street railroad corporations subject to the jurisdiction of said Commission, showing the fares and charges of such corporations, namely: Order No. 708, adopted on or about August 28, 1908; and order in Case No. 1670, adopted on or about April 15, 1913; and an order in Case No. 1670, adopted on or about February 18, 1928, to which orders they beg leave to refer for a complete and accurate statement of their contents. They admit that plaintiff notified the said Commission that it accepted and would obey the said Order of February 18, 1918; and that plaintiff filed with the Transit Commission, or its predecessors, tariff schedules showing the rates, fares and charges for the transportation of passengers on the rapid transit lines operated by it; and that in these tariff schedules the rates of fare were shown to be five cents per passenger.

[fol. 1832] They deny upon information and belief that it has been judicially determined by the Courts of the State of New York that orders and regulations prescribed by this Commission or its predecessor under Section 28 of

the Public Service Commission Law, to regulate the form of schedules, have the force of law; and they deny that plaintiff and the defendant, Manhattan Railway Company, were each required and obligated by the provisions of the Public Service Commission Law and/or by said orders of the Public Service Commission for the First District to observe and charge, demand and collect a rate of fare on its rapid transit railroads of five cents per passenger or was prohibited from charging, demanding, collecting or receiving a greater or different compensation for transportation of passengers than five cents per passenger; and they explain and show that plaintiff was obligated to charge said rate of five cents and was prohibited from charging a higher rate solely by certain contracts entered into with The City of New York and not by statute, and that the provision for tariff schedules merely gives publicity to the rates otherwise fixed.

They have no knowledge as to the other allegations of Article XVI.

11. They admit that on March 19, 1913, the Public Service Commission for the First District, with the approval of the Board of Estimate and Apportionment of the City of New York, duly granted to the Manhattan Railway Company the right to construct certain additional tracks and facilities on its elevated railroads, the same to be constructed, maintained and operated by and at the expense of the grantee, by a certificate, to which they beg leave to refer for a complete and accurate statement of its contents; and they have no knowledge as to the other allegations [fol. 1833] of Article XVII.

12. They have no knowledge as to the allegations of Article XVIII.

13. They admit the allegations of Article XIX.

14. They admit that the Certificate of March 19, 1913, for elevated additional tracks, was executed by the Public Service Commission for the First District, acting for and in behalf of The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891, as then amended, with the approval of the Board of Estimate and Apportionment of The City of New York, acting pursuant to like

authority, subsequent to the enactment of the Public Service Commission Law, by Chapter 429 of the Laws of 1907, and subsequent to Chapter 480 of the Laws of 1910; and they deny the other allegations of Article XX.

15. They have no knowledge as to the allegations of Article XXI.

16. They have no knowledge as to the allegations of Article XXII or as to the statements contained in the schedules said to be annexed thereto and sought to be made a part thereof.

17. They admit that there is an existing order of the Transit Commission, for the installation of signals, in 1936 and 1937, on local tracks of the elevated lines; but they have no knowledge as to the cost of such signals or as to whether the prices of material and the wages paid for labor by the plaintiff will be materially reduced from those now prevailing; and they deny the other allegations of Article XXIII.

18. They have no knowledge as to what properties are embraced in the summaries set forth in Article XXIV or in subsequent tables, if any, or as to what was included [fol. 1834] in or excluded from such summaries or tables, or as to what deductions were made from such summaries, computations or tables, or as to what the purported computations would be, if additional fixed charges were incurred; and they deny the other allegations of Article XXIV.

19. They deny the allegations of Articles XXV and XXVI.

20. They deny the allegations of Article XXVII, except that they admit that plaintiff on February 1, 1928, filed and posted tariff sheets showing a rate of seven cents to become effective March 3, 1928, and that the Transit Commission took no action rejecting such sheets because of defects in form; and they explain and show that such sheets were unlawful and ineffective because the seven-cent rate therein shown was higher than the lawful rate of five cents, fixed by contract, and that the said sheets were formally rejected by the Transit Commission on this ground, after

the original complaint in this action had been served on these defendants.

21. They admit that on February 1, 1928, plaintiff filed an application to the Transit Commission, under Section 29 of the Public Service Commission Law, asking that the Transit Commission approve the revised tariff sheets mentioned in Article XXVIII, and that it grant permission to plaintiff to put the said tariff sheets into effect as to each the subway and the elevated divisions upon not more than five days' notice after publication at stations and filing with the Commission. They admit that said Article XXVIII sets forth, in substance, the portion of said application, marked "III"; but they have no knowledge as to whether this portion is correctly quoted from said appli- [fol. 1835] cation. They deny the other allegations of Article XXVIII, and the statements contained in the portion purporting to be quoted from said application.

22. They admit that on or about February 8, 1928, J. L. Quackenbush sent to the Transit Commission a letter substantially in the form set forth in Article XXIX; but they have no knowledge as whether this letter in Article XXIX is a correct copy of the original; and they deny the other allegations of Article XXIX, and the statements in the letter of J. L. Quackenbush therein set forth.

23. They admit that on February 14, 1928, these defendants held a special meeting of the Transit Commission and adopted a resolution directing its Counsel to commence a summary proceeding for the purpose of having stopped and prevented plaintiff's threat to charge a fare of seven cents upon its elevated, and other, lines; that the Transit Commission also made an order rejecting as unlawful the tariff sheets filed by plaintiff on February 1, 1928; that such action was taken by the Transit Commission, notwithstanding that the tariff sheets had been filed with it and had been kept in its files since February 1, 1928; and notwithstanding that Section 16 of the Public Service Commission Law provides that all documents and records in the possession of the Transit Commission shall be public records; that said resolution and order were adopted and made by the Transit Commission without its having given

prior notice to the plaintiff or to the Manhattan Railway Company; and that the direction given by the Transit Commission to its Counsel at its meeting on February 14, 1928, to commence an action or proceeding in the Supreme Court of the State of New York was not given until after these defendants had been served with a subpœna ad respond-dendum. They have no knowledge as to the time of filing [fol. 1836] the original bill of complaint in this action, or as to the time of service of the defendants other than themselves; and they deny the other allegations of Article XXX.

24. They admit that after the service of the subpœna ad respondendum upon these defendants, the Transit Commission and The City of New York brought two, the civil actions and the summary proceeding referred to in Article XXXI. They have no knowledge as to the time of service of the defendants other than themselves; and they deny all other allegations of Article XXXI.

25. They have no knowledge as to the allegations of Article XXXII; and for a correct and accurate statement thereof they beg the Court to consult the Civil Practice Act and the judicial decisions of the Courts of the State of New York.

26. They deny the allegations of Article XXXIII, except that they admit that said summary proceeding and said actions brought by defendants were commenced on February 14, 1928, after the subpœna and the original complaint had been served upon these defendants; and they explain and show that copies of the petition in the summary proceeding and of orders therein and copies of the summons and complaint in the action entitled "The City of New York, acting by the Transit Commission—Metropolitan Division, Department of Public Service of the State of New York, Plaintiff, against Interborough Rapid Transit Company, Defendant," and of an order to show cause with stay were served upon plaintiff by delivery of copies thereof to the Secretary and Treasurer of the plaintiff.

27. Upon information and belief, they deny the allegations of Article XXXIV.

[fol. 1837] 28. They admit that the action brought by the Transit Commission on behalf of The City of New York was brought without any authorization by the Board of Aldermen of the City of New York. They have no knowledge as to what authorization was obtained by the Corporation Counsel from other City authorities. They deny the other allegations of Article XXXV.

29. They admit that, after service of the said subpœna upon these defendants, the Transit Commission and The City of New York, acting by their respective attorneys, counsel, agents, or representatives, applied to one of the Justices of the Supreme Court of the State of New York without giving any notice to plaintiff or to the Manhattan Railway Company, for, and secured, orders to show cause for preliminary injunctions, which orders contained temporary restraining orders; that in and by one order in the said summary proceeding, the plaintiff is directed to make answer to the petition and serve a copy of its answer upon the petitioner's attorney not later than February 17, 1928; that said order provides that after answer or in default of answer the Court will, on February 20, 1928, at Special Term, Part I, inquire into the fact and circumstances, to the end that final judgment may be rendered therein; that, by another order in said special proceeding, the plaintiff is directed to show cause why an interlocutory injunction should not be granted, and plaintiff is temporarily restrained pending the determination of the proceeding; that said summary proceeding brought by the Commission is alleged to be, and is, brought under Section 57 of the Public Service Commission Law; and that the orders to show cause granted in the two actions brought by the defendants in the New York State Courts are returnable before the said State Court on February [fol. 1838] 20, 1928, and require plaintiff to show cause why an injunction pendente lite to the same effect should not be granted, and contain similar temporary restraining orders. They deny that there is no provision of law authorizing the granting of a preliminary injunction or a restraining order in, or in aid of, such summary proceeding; and they have no knowledge as to the other allegations of Article XXXVI.

30. They deny the allegations of Article XXXVII.

31. They admit that on or about March 22, 1922, plaintiff presented to the Transit Commission an application, verified March 22, 1922, requesting the said Commission to fix and determine the just and reasonable rate collectible by plaintiff upon the elevated and subway lines operated by it, and to authorize an immediate temporary increase in fare; that on March 28, 1928, the Transit Commission made an order in Case No. 2632, denying said application for want of jurisdiction; and they deny the other allegations of Article XXXVIII.

32. They admit that Sections 57 and 58, respectively, of the Public Service Commission Law provide for summary proceedings against common carriers and for penalties for other than common carriers; and they have no knowledge of the other matters alleged in Article XXXIX.

33. They have no knowledge as to the allegations of Article XL.

34. They have no knowledge as to what has been announced through or stated by the press, or as to statements made by others than themselves; and they deny the other allegations of Article XLI.

35. They have no knowledge as to what the Manhattan Railway Company is advised and believes, or as to the [fol. 1839] reasons on account of which it invokes the jurisdiction of this Court; and they deny the other allegations of Article XLII.

36. They have no knowledge as to the allegations of Article XLIII.

37. They deny that the Manhattan Railway Company is in need of relief or that it can obtain relief only in a court of equity.

And for a further and additional defense to the Alleged Cause of Action and as grounds for dismissing said Alleged Cause of Action, these defendants say:

1. For some time prior to January 1, 1903, the elevated railroads, known as the Manhattan Division of the plain-

tiff, were owned and operated by the defendant Manhattan Railway Company; but on or about that date the defendant Manhattan Railway Company executed and delivered a lease, at an agreed rental, of all the rights, franchises and property in its elevated railroads, to be for a period of 999 years from November 1, 1875; and the defendant Manhattan Railway Company thereupon ceased operating said elevated railroads, and plaintiff entered into possession of, and has since been and now is engaged in the operation and management of said elevated railroads.

2. That pursuant to Chapter 4 of the Laws of 1891 and acts amendatory thereof and supplemental thereto, the Public Service Commission, acting on behalf of The City of New York, on or about March 19, 1913, issued to the plaintiff a certificate known as the Elevated Extension Certificate, relating to the terms and conditions upon which [fol. 1840] plaintiff should build certain extensions to the then existing elevated railroads, and inspecting the terms and conditions upon which the plaintiff should operate all the elevated railroads now known as the Manhattan Division of the plaintiff.

3. That it was expressly provided by law that this certificate, upon its acceptance by plaintiff, should be deemed to constitute a contract between the plaintiff and The City of New York.

4. That the parties had been expressly authorized to by the Legislature of the State of New York and did agree in said Certificate upon the rate of fare to be charged by plaintiff in its operation of the said elevated railroads; and it was agreed that the rate of fare should be five cents and no more for each passenger for one continuous trip in the same general direction.

5. The authorization of the Legislature and the making of the contract, together, suspended the rate-making powers of the State of New York during the period of the existence of the contract, and said rate is now immune from interference by the rate-making power of the State of New York; nor has the rate-making power attempted to interfere with same.

6. That as defendant Manhattan Railway Company has ceased to operate its elevated railroads it has no standing in Court to complain of the rate of fare charged thereon by agreement between its lessee and The City of New York or otherwise.

[fol. 1841] Wherefore defendants demand judgment dismissing the complaint herein, together with costs and disbursements.

Clarence M. Lewis, Solicitor for Defendants Constituting the Transit Commission. Office and P. O. address: 270 Madison Ave., Borough of Manhattan, City of New York.

[fol. 1842] *Duly sworn to by Charles C. Lockwood. Jurat omitted in printing.*

[fol. 1843] In United States District Court

[Title omitted]

Order Denying Motion Striking Out Parts of Complaint —April 10, 1928

This cause came on to be heard at a term of this Court, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed as follows; viz:

That the motion of the defendant The City of New York, as set forth in the order to show cause dated March 24, 1928, and made by Honorable Thomas D. Thacher, U. S. D. J., why an order should not be made striking out specified portions of the complaint as impertinent, unrelated to the issues and scandalous, which motion was referred by the Court on the return day to the undersigned, be and the same hereby is in all respects denied.

Enter:

Wm. Bondy, J. S. D. J.

[fol. 1844] In United States District Court

[Title omitted]

Order Denying Motion Striking Out Parts of Complaint —April 10, 1928

This cause came on to be heard at a term of this Court, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed as follows, viz:

That the motion of the defendants, John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, constituting the [fol. 1845] Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, as set forth in the order to show cause dated March 24, 1928, and made by Honorable Thomas D. Thacher, U. S. D. J., why an order should not be made striking out specified portions of the complaint as impertient, unrelated to the issues and scandalous, which motion was referred by the Court upon the return day to the undersigned, be and the same hereby is in all respects denied.

Enter:

Wm. Bondy, U. S. D. J.

[fol. 1846] In United States District Court

[Title omitted]

Order Denying Motion Striking Out Parts of Answer and Cross-bill of Defendant Manhattan Railway Company—April 19, 1928

This cause came on to be heard at a term of this Court, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed as follows, viz:

That the motion of the defendants, John F. Gilchrist, Leon G. Godley, Charles C. Lockwood, constituting the

Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, as set forth in the order to show cause dated [fol. 1847] March 24, 1928, and mdae by Honorable Thomas D. Thacher, U. S. D. J., why an order should not be made striking out specified portions of the answer and cross-bill of the defendant Manhattan Railway Company as impertinent, unrelated to the issues and scandalous, which motion was referred by the Court upon the return day to the undersigned, be and the same hereby is in all respects denied.

Enter:

Wm. Bondy, U. S. D. J.

[fol. 1848] In United States District Court

[Title omitted]

Order Denying Motion Striking Out Parts of Answer and Cross-bill of Defendant Manhattan Railway Company—April 26, 1928

This cause came on to be heard at a term of this Court, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed as follows, viz:

That the motion of the defendant The City of New York, as set forth in the order to show cause dated March 24, 1928, and made by Honorable Thomas D. Thacher, U. S. D. J., why an order should not be made striking out specified portions of the answer and cross-bill of the defendant Manhattan Railway Company, as impertinent, unrelated to the issues and scandalous, which motion was referred by the Court upon the return day to the undersigned, be and the same hereby is in all respects denied.

Enter:

Wm. Bondy, U. S. D. J.

[fols. 1849-1851] In United States District Court

[Title omitted]

Opinion—Filed May 2, 1928

Motion for an Injunction Pendente Lite on a Bill of Complaint and an Ancillary Complaint

Before Martin T. Manton, Circuit Judge; John C. Knox, and William Bondy, District Judges, Pursuant to §380 of the United States Code

James L. Quackenbush, Esq., Solicitor for Plaintiff; William L. Ransom, Esq., Jacob H. Goetz, Esq., Harry L. Butler, Esq., of Counsel.

[fol. 1852] George P. Nicholson, Esq., Corporation Counsel, City of New York; Charles L. Craig, Esq., Joseph A. Devery, Esq., Edgar J. Kohler, Esq., of Counsel.

Clarence M. Lewis, Esq., General Counsel for Transit Commission; Samuel Untermyer, Esq., Irwin Untermyer, Esq., Robert S. Johnstone, Esq., C. D. Williams, Esq., G. H. Stover, Esq., of Counsel.

Murray, Aldrich & Roberts, Esqs., Solicitors for Manhattan Ry. Co.; William Roberts, Esq., of Counsel.

Manton, Circuit Judge:

The original bill in this suit was field in the forenoon of February 14, 1928. It seeks to restrain the members of the Transit Commission of the Metropolitan Division of the Department of Public Service of the State of New York, from enforcing various rate limitations, restricting the rate of fare charged by the plaintiff on its rapid transit railways, operated in the City of New York, to five (5) cents per passenger, upon the theory that such limitations have become confiscatory under the Fourteenth Amendment to the Federal Constitution. It asks that they be restrained from interfering with the plaintiff, which proposes to charge seven (7) cents per passenger or such other fare in excess of five (5) cents as is not confiscatory. The court is asked to restrain the Transit Commission from carrying out threats to do various things which deny to the plaintiff its day in court, for an adjudication of its rights as to

rates and from attempting to obstruct and defeat steps taken by the plaintiff from time to time, which it claims it is authorized to do under the statutes to obtain relief from the alleged confiscatory five (5) cent fare. After this suit [fol. 1853] thus commenced, and on the same day, the Transit Commission and the City of New York, in three suits in the New York State courts, asked for injunctive relief in substance requiring the plaintiff to charge but five (5) cents for each passenger and to restrain it from carrying out its proposed increase of fare per passenger. On February 17, 1928, the plaintiff filed an ancillary complaint in this court praying that the defendants be enjoined and restrained from further prosecuting or causing prosecution of their respective suits in the State court and restraining them from in any wise interfering with the prosecution of the original action in this court. A judge of the district court granted an order which enjoined and restrained the defendants from further prosecuting the suits in the Supreme Court of the State. An application was made and granted for convening a court of three judges pursuant to §380 of the United States Code.

A public service corporation which is being actually subjected to a confiscatory limitation of its rates, whether that be imposed by an order of a regulatory state body or an act of the legislature, even though there be pending in the state court proceedings for the revision of the order, may seek injunction relief from a federal court when it appears that it is suffering daily from confiscation under the rate to which it is limited, and particularly where it appears that it has done all it could under the state law to obtain relief without success. Springfield Gas & El. Co. v. Barket, 231 Fed. 331, 335; Love v. A. T. & S. F. R. R. Co., 185 Fed. 321, 324. Rules of commity or convenience must give way to constitutional rights and there is no doubt of the duty of a district court to take and retain jurisdiction. Oklahoma Gas Co. v. Russell, 261 U. S. 290, 293; Monroe Gas Light [fol. 1854] Co. v. Michigan Public Utilities Co., 292 Fed. 139.

The suit is here upon causes of action stated in the complaint and supported by affidavits to which answers are field with accompanying affidavits in opposition. It is al-

leged generally that the Transit Commission and the City of New York are enforcing various rate limitations imposed by the legislature and by acts legislative in character, of the State of New York, restricting the rate of fare charged by the plaintiff on each of the elevated lines and the subway divisions of the rapid transit railways operated by the plaintiff within the City to five (5) cents per passenger in breach of the Fourteenth Amendment of the Constitution because such limitations have become confiscatory. Relief is sought (a) from limitation imposed by legislative acts of the State of New York, Chap. 743 of the Laws of 1894, upon rates chargeable on the elevated railroad lines operated by the plaintiff, which are in large part owned by the Manhattan Railway Company and are now operated under lease by the plaintiff; (b) from the rate provision in a certain elevated railroad extension certificate of March 19, 1913, granted by the Public Service Commission for the First District, acting in behalf of the City of New York to the plaintiff, and to permit the plaintiff in conformity with and in pursuance of the Public Service Commissions Law and the powers conferred and delegated to it by the legislature, including the plaintiff's tariff schedules, to establish an increase in fare chargeable by the plaintiff on the elevated lines and to secure a determination by the regulatory authority of the state; (c) as to limitations imposed by the legislature or acts legislative in character, of the State of New York, including the plaintiff's tariff schedules on the rates chargeable on the subways of the [fol. 1855] rapid transit railroads operated by the plaintiff which it owns in part and which are in part owned by the City, and also the rate provision in Contract No. 3, herein referred to, made March 19, 1913, between the plaintiff and the Public Service Commission of the State of New York for the First District, acting in behalf of the City for rapid transit railroad extensions within the City, in accordance with the steps taken by the plantiff in conformity with and pursuant to the provisions of the Public Service Commissions Law and the power and authority conferred upon and delegated to it by the legislature to establish an increase in fare chargeable on the subway divisions and to secure a determination by this regulatory authority of the state. Relief is sought not only as to fare

chargeable on the elevated and subway divisions of the rapid transit railways operated by the plaintiff, considered as separate unified systems under the legislation and acts legislative in character, but also upon all the rapid transit railways considered as a unified operation under the legislation and acts legislative in character and under the elevated extension certificate and Contract No. 3 for rapid transit railroad extensions of March 19, 1913.

The ancillary bill filed makes clear the denial, by the Commission, of a hearing as asked when schedules were filed on February 1, 1928, and moreover, that the defendants actively sought the aid of the state court in enjoining the plaintiff from proceeding to enforce its rates as provided in the schedules. It further appears in the original bill that two previous applications to the Commission and its predecessors asking for an increase in rate had met with denial, because the Commission considered itself without jurisdiction or power to grant such relief. From this it is manifest that the Commission intended never to accord [fol. 1856] the plaintiff a hearing on its application, whatever its merits might be. Denial of an application for a hearing, where the statute provides for such application, amounts to confiscation if the rate be too low. Prendergast v. N. Y. Tel. Co., 262 U. S. 43.

The Rapid Transit Act, Chap. 4 of the Laws of 1891, of the State of New York entitled "An Act to provide for rapid transit railways in cities of over one million inhabitants," provided for the appointment of rapid transit commissioners in such cities and that "They shall have and exercise the specific authority and powers hereinafter conferred, and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon the said board by this act." Section 4 provided for the determination of the necessity of railways, the fixing of routes, the approval and consent of the common council, and Section 6 provided that when the consent of the local authorities and property owners had been obtained, the board was required to prepare detailed plans and specifications, including equipment and safety devices. Section 7 provided for the sale of the right, privilege and franchise to construct, maintain and operate the railways, and the terms of sale "must also specify the amount of the capital

of any such corporation, the number of shares of capital stock, * * * and the maximum rates of fares and freight which such corporation may charge and collect for the carriage of persons and property." This act was amended by Chapter 729 of the Laws of 1896, §34 as added by Chap. 752 of the Laws of 1894, §34, and amended by §10, chap. 514 of the Laws of 1895, so as to provide that in case the people should determine that any railway shall be constructed for or at the expense of the city, the board shall consider routes and plans previously adopted and proceed therewith and that any contract for the construction of said [fol. 1857] route shall provide that the person or corporation so contracting shall, at his own cost and expense, equip, maintain and operate the said routes or roads for a term of years to be specified in the contract for not less than 35 or more than 50 years and upon "such terms and conditions as to rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interest, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board." By Chap. 472 of the Laws of 1906, the Board of Rapid Transit Commissioners was reconstituted so as to consist of the Mayor, the Comptroller, President of the Chamber of Commerce of the State of New York, and five persons named in the act, with vacancies to be filled by the Mayor. The Board so constituted had specific powers and duties therein provided for the "efficient performance of the duties imposed upon the said Board by this Act." By chap. 429 of the Laws of 1907, there was substituted for the act creating the rapid transit railroad commissioners, the Public Service Commission of five members of the First District to be appointed by the Governor. By §5, sub. div. 6 of that act, the commissioners of the First District were given all powers theretofore conferred upon the Board of Rapid Transit Railroad Commissioners under chap. 4 of the Laws of 1891, and the Board of Rapid Transit Railroad Commissioners was abolished by §83. By chap. 343 and 350 of the Laws of 1926 (§§431-433), the present Transit Commission was provided for and the duties of the Public Service Commission and Transit Commission were transferred to it. By chap. 498 of the Laws of 1909 and

chap. 504 of the Laws of 1910, various amendments were [fol. 1858] made to the Rapid Transit Act which are unimportant here.

Section 49 of the Public Service Commission Law (Chap. 429 of the Laws of 1907) provides that "whenever either commission shall be of opinion * * * that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons, freight or property within the state, or that the regulations or practices of such * * * street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provisions of law, or that the maximum rates, fares or charges chargeable by any such common carrier or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all common carriers * * * or street railroad corporations by whom such rates, fares and charges are thereafter to be observed." This may be done by complaint or upon the commission's own motion. By the same provision, the carrier is obliged to comply with and observe orders made by the commission as to rates of fare.

Plaintiff's subway division consists of lines which were constructed under Contract No. 1, dated February 21, 1900, Contract No. 2, dated July 21, 1902, and Contract No. 3, dated March 19, 1913. Contracts No. 1 and No. 2 were made prior to the act creating the Public Service Commis- [fol. 1859] sion and the effective regulatory power granted under §49 thereof. Contract No. 1 was made by the Board of Rapid Transit Commissioners on behalf of The City of New York with John B. McDonald for the construction by him at the expense of the City, and for lease to him for operation for a term of years, of a subway known as the Manhattan-Bronx Rapid Transit Railroad through the east side of Manhattan Island to the Bronx. He agreed to equip, maintain and operate the same. During the term, such

equipment was to be supplied as his property subject to the City's right of repurchase at the end of the term. That contract from time to time was modified and supplemented. Contract No. 2 was made by the Board of Rapid Transit Commissioners on behalf on The City of New York with the consent and approval of the Board of Estimate and Apportionment of The City of New York with the Rapid Transit Subway Construction Company for the construction by it at the expense of the City, for lease to it for a number of years, of a certain railway known as the Brooklyn-Manhattan Rapid Transit Railroad connecting the southern end of the Manhattan-Bronx Railroad so as to form a continuous railway over the route running southerly from the Post Office in the Borough of Manhattan under the East River and to the Flatbush Avenue station of the Long Island Railroad in Brooklyn, with an agreement on its part to equip, maintain and operate the same during the said term. The equipment so supplied was to be the property of the contractor subject to the City's right to purchase at the end of the term. This contract was likewise modified and supplemented from time to time. On July 10, 1902 and August 10, 1905, McDonald and the Rapid Transit Subway Construction Company, respectively, assigned, with the consent of the Board of Rapid [fol. 1860] Transit Commissioners, to the plaintiff so much of the No. 1 and No. 2 Contracts as applied to the lease of the railways. On July 11, 1911, so much of Contract No. 1 as applied to the construction was duly assigned to the Rapid Transit Subway Construction Company. On January 30, 1913, so much of Contracts No. 1 and No. 2 as applied to construction were respectively assigned to the plaintiff. Contract No. 1 contained an agreement for lease by the City to the contractor for a term of 50 years, at a rental of an annual sum equal to the annual interest payable by the City upon all bonds which it should issue in order to provide means for construction, and a further annual sum equal to 1% upon the whole amount of the bonds with certain abatements during the first ten years. Contract No. 2 contained an agreement for leasing, by the City to the contractor, at a rental consisting in general of an annual sum equal to the annual interest payable by the City upon all bonds issued by it in order to provide means

for construction; an annual sum equal to 1% of the whole amount of the bonds with certain abatements during the first ten years and a further annual sum equal to the amount of the annual interest payable by the City upon bonds issued to provide means to pay for the acquisition of rights of way.

On March 19, 1913, the city, acting by the Public Service Commission for the First District, entered into a contract with the plaintiff for the construction by the City, and the equipment, maintenance and operation by the plaintiff, of rapid transit railways along the routes known as 7th Avenue-Lexington Avenue Line, Eastern Parkway Line, Steinway Tunnel Line and White Plains Road Line. The contract provided for the construction by the City, under separate construction contracts, a contribution by the plaintiff [fol. 1861] toward the cost of the construction and the equipment of the railway by the plaintiff at its own expense and for a lease by the City of the railway and equipment to the plaintiff for operation in conjunction with the existing railways and existing equipment provided for in contracts No. 1 and No. 2 "for a single fare * * * of 5c but no more" for a term beginning January 1, 1917 and expiring December 31, 1965—subject, however, to earlier termination as therein provided. The original terms of contracts No. 1 and No. 2 were modified as to the expiration of the lease and in other particulars. By the terms of contract No. 3, it was provided that the plaintiff should pay as long as the existing railroads were operated in conjunction with the new extensions, an additional rental to that contained in Contracts No. 1 and No. 2. In consideration of the operation of the railways and existing railway in conjunction with each other for a single fare and of the contribution by the plaintiff to the cost of construction of the railways and of the agreements to modify the terms of contracts No. 1 and No. 2, upon the commencement of the operation of the portions of the railway specified in the contracts, the gross receipts from whatever sources derived, directly or indirectly, by the plaintiff in connection with the operation of railways and the existing railways during the term of the contract, were to be disbursed to meet obligations therein specified, after which the City and plaintiff shared the balance in equal parts.

Contracts No. 1 and No. 2 provided for a single fare in the sum of five (5) cents but no more. Contract No. 3 in its terms superseded the provisions of contracts No. 1 and No. 2 as to the rate of fare. It provided for a single fare over the entire system of the railways to be built and the existing railways of "5c but not more."

[fol. 1862] The Manhattan Railways Company, incorporated under the provisions of the Rapid Transit Act (Chap. 606 of the Laws of 1875) was authorized to construct, maintain and operate elevated railroads along routes laid out and designated by the Rapid Transit Commission under the authority of that act. It was engaged as a common carrier for many years and owned elevated rapid transit railways lying within the City of New York and leased them to the plaintiff which operated them as part of its general system. The lease dated January 1, 1903, was for a period of 999 years, and as a rental, the plaintiff guaranteed interest on mortgage bonds, paid a cash rental and guaranteed 7% dividends on sixty millions of the Manhattan Railway Company's stock, and this lease was effective when on March 19, 1913, by the terms of Contract No. 3, the elevated extension certificates were provided for. The routes under the certificate to the Manhattan Railway Company were formally added to the property leased to the plaintiff for operation. The certificates granted to the plaintiff provided for (1) elevated railroad extensions and (2) additional tracks, and that the plaintiff was entitled to charge a single fare for each passenger for one continuous trip in the same general direction of five (5) cents but not more. The Additional Contract Certificate of the same date, granted to the Manhattan Railway Company, contained no provision fixing a rate of fare to be charged thereon.

The Rapid Transit Act was amended in 1912 (Chap. 226, Laws of 1912, sub. Div. 3, sec. 8) so as to give additional authority for Contract No. 3. Section 7 of the original act had long provided that the contract should contain such terms and conditions as to rates of fare to be charged as said Commission shall deem to be best suited to the pub-
[fol. 1863] lic interest. This provision was part of the act several years before 1907 when the Public Service Commission Law was adopted. The Extension Certificate was

granted under the authority of § 34 of the Rapid Transit Act (as amended by chap. 752 of the Laws of 1894) and it is not claimed to have been given by the amendment of 1912, but it is claimed to have the authority of § 32 (a) enacted by Chap. 472 of the Laws of 1906, adopted one year before the Public Service Commission Act. The section did not authorize the Commission to condition an extension certificate upon a stipulation as to fare. It (§ 34) designates the subjects to be embraced in the certificate but without reference to fare provisions. This challenges legislative purposes to authorize the insertion or making of a fare provision of any kind. Prior to 1894, no provision of fare of any kind below ten (10) cents and no restriction upon fares had been imposed by legal authorities as a condition of constitutional consent. Ten cent limitations were statutory. By Chap. 743 of the Laws of 1894, the five (5) cent limitation was established unless the extension certificate of March 19, 1913 or the resolution of the Board of Estimate, formally approving the proposed certificate and consenting to the construction and operation of the extensions in accordance therewith, be a constitutional consent to a different fare. We hold that the five (5) cent limitation as to the elevated railway company is statutory under Chap. 743 of the Laws of 1894. The resolution, even if treated as a consent of the legal authority under § 18, art. 3 of the Constitution of the State, is ineffective to create any contractual fare limitation because § 34 of the Rapid Transit Act provided only for such consents as were necessary to be fulfilled in such cases of extensions under § 18 of art. 3, which by no means requires fare regulations but only con- [fol. 1864] sent to construct and operate. Under authoritative decisions of the State of New York, where consents were granted after July 1, 1907 (the effective date of the Public Service Commissions Law) municipalities were precluded from conditioning their consent upon a fare provision which should be exempt from the application of the Public Service Commissions Law. People ex rel. City of New York v. Nixon, 229 N. Y. 356.

A provision for fare in contract No. 3, as such, does not apply to elevated railways. The phrase of the certificate that the fare limitations shall apply to one continuous trip in the same general direction over the railways (which are

defined as including only additional tracks and the extension of certain trackage rights provided for by the certificate) of the Manhattan Railway express service indicates an intent that the fare shall apply to the latter only where the trip is, in whole or in part, over the railways and should not be applicable to trips originating and ending on the lines of the then existing Manhattan Railway Company. No fare provision is embraced in the Additional Contract Certificate granted to that company on the same day which lends support to the same view.

The grant of the regulatory power over rates by the legislature to a commission or municipality must be strictly construed and must not be extended by inference. The suspension of police power over rates cannot be accomplished by implication. The legislative authority must be plain and the intention must clearly and unmistakable appear. Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 273.

The provisions of Contracts No. 1 and No. 2 as to fares were supervised by the provisions of contract No. 3 providing for a rate of fare to be charged in the operation of [fol. 1865] new and existing railroads as one completed system. Article 1 of contract No. 3 provided that the new subway lines shall be operated in conjunction with the old for a single fare and in accordance with the contract. The terms of contract No. 3 specifically modified and changed the provisions of contracts No. 1 and 2 so as to provide a single fare; it extended the ride over the entire system and for a fare of five (5) cents and no more. The railroad is being presently operated under contract No. 3, at least so far as the fare charge is concerned. The State Court of Appeals in considering the validity and power to make the contract has construed No. 3 to supersede the leases of contracts No. 1 and No. 2, saying: "But by the proposed contract (No. 3) this lease is to be modified and superseded by a new agreement whereby the city becomes re-invested with a substantial control thereof and relets them in connection with its new subways under one contract for operation as a single and entire system." Admiral Realty Co. v. City of N. Y., 206 N. Y. 110, 133. It is not as argued, merely a continuation and extension, supplementary of contracts No. 1 and No. 2. Comparing contracts No. 1 and No. 2 with No. 3 makes it clear that there were many modi-

fications as to rentals payable to the city under contracts No. 1 and No. 2. In No. 3 a single fare was intended to be operative not only over the lines covered by No. 1 and No. 2, but over the new subway and during the longer life of the contract. The fare provisions of No. 1 and No. 2 could not be continued in effect since each was intended to apply to a different period and had a different scope of operation. Therefore, the fare provisions of the three contracts could not stand together because they apply to different things. Contract No. 3 was a modification and a [fol. 1866] waiver of fare provisions of contracts No. 1 and No. 2.

If plaintiff's right to charge a fare in excess of five (5) cents—assuming that rate to be confiscatory—were to be determined solely upon the provisions of contracts No. 1 and No. 2, which were made pursuant to specific authority granted by the State Legislature to the Board of Rapid Transit Commissioners to contract for a five (5) cent fare, and were such determination to be unaffected by the enactment of the Public Service Commissions Law in 1907, and the execution of contract No. 3 the plaintiff would not now be entitled to judicial relief. In such case, only by securing the waiver of the contract rates by an authoritative commission speaking for the state would the railway company have any standing to ask for a change of rates in excess of the contract provision. Columbus Power & Light Co. v. City of Columbus, 249 U. S. 399; St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352. But when contract No. 3 was made, the Public Service Commissions Law had been in force and effect since 1907 and the fare provisions of that lease are subject to regulatory revision in the manner prescribed by the Public Service Commissions Law. The Rapid Transit Act, which was a special city law (Admiralty Realty Co. v. City of New York, 206 N. Y. 110, 140) provided that the rapid transit lines shall be a part of the system of street and highways of the city and the contract declared it to be a matter of public interest. The exercise by a municipality of its proprietary powers over streets is public in its nature. Contract No. 3 was made in the present of and with knowledge of the Public Service Commissions Law, which law the authoritative decisions of the New York courts have held was a new and comprehensive policy of state-wide regulation and

[fol. 1867] which was in terms applicable to rapid transit railways. Contract No. 3 must be regarded as qualified by the existing restrictions of the Public Service Commissions Law which, among other things, expressly required that rates should be just and reasonable and expressly prohibited rates which should be unjust and unreasonable, whether excessive or because noncompensatory and it expressly provided that rates not conforming to this legislative standard should be unlawful and it empowered railway carriers to change rates by filing and publishing tariffs in order to conform to the standard and imposed the duty, as well as conferred the power, upon the commission to apply and enforce the standard upon application of the utilities as well as of the public under Sections 26 and 49 of the Public Service Commissions Law. For effect and construction of this act by the State Court of Appeals see: People ex rel. City of New York v. Nixon; 229 N. Y. 356; People ex rel. Garrison v. Nixon, 229 N. Y. 576; Town of North Hempstead v. Public Service Corp., 231 N. Y. 447; Public Service Comm. v. Pavilion Natural Gas Co., 232 N. Y. 146; Matter of Evans v. Public Service Comm. 246 N. Y. 224; People ex rel. N. Y. Steam Co. v. Straus, 186 App. Div. 787, affd. 226 N. Y. 704; Matter of Internatioanl Railway Co. v. Public Service Comm., 226 N. Y. 474.

The public policy of the State of New York in its regulatory power over utilities was announced in People ex rel. City of New York v. Nixon, 229 N. Y. 356, 358, by the Chief Judge speaking for a unanimous court, as follows:

"At the date of this franchise, the public service commission was empowered by statute to increase 'the maximum rates, fares, or charges chargeable by any * * * street railroad corporation' when found to be inadequate to yield [fol. 1868] a fair return (section 49, Public Service Commission Law; Consol. Laws, chap. 48). That power came to the commission through the amendment of the Public Service Commissions Law in June 1911 (L. 1911, chap. 546; People ex rel. Ulster & Del. R. R. Co. v. Public Service Commission, 171 App. Div. 607; 218 N. Y. 643), if it did not already exist under the law as first enacted in 1907 (L. 1907, chap. 429, sec. 49. Cf. the statutes construed in People ex rel. Vil. of South Glens Falls v. Pub. Service Comm., 225 N. Y. 216, 223 People ex rel. N. Y. Steam Co. v. Straus,

186 App. Div. 787, 793; 226 N. Y. 704, and Arlington Board of Survey v. Bay State Street Ry. Co., 224 Mass. 463). Contracts fixing rates, if made before the enactment of those statutes, were subject at the utmost to the possibility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a realty. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had already done, drawing upon sources of energy, reserves of power, till then patent and potential, and manifesting its will in law. A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at nought. The state through its delegate, the commission, would lower the charges if too high. It would raise them if too low. (People ex rel. N. Y. Steam Co. v. Straus, supra; Arlington Board of Survey v. Bay State Street Ry. Co. supra; Postal Tel.-Cable Co. v. Associated Press, 228 N. Y. 370, 375; Armour Packing Co. v. U. S., 209 U. S. 56; Union Dry Goods Co. v. Georgia Pub. Service Corp., 248 U. S. 372). Ratemaking was to be no longer an affair of predominantly [fol. 1869] private interest, in which the state would interfere without system and with spasmodic and intermittent action. A superintending agency of government had taken the matter in hand.

"The question soon arose whether the new rule was retroactive, and annulled existing contracts in conflict with its terms. Indisputably it annulled such contracts between carriers and passengers, or carriers and shippers (Louisville & Nashville R. R. v. Mottley, 219 U. S. 467; People ex rel. N. Y. Steam Co. v. Straus, supra; Producers' Transp. Co. v. R. R. Comm. California, 251 U. S. 228). 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter' (Hudson County Water Co. v. McCarter, 209 U. S. 349, 357; Union Dry Goods Co. v. Georgia P. S. Corp., supra, p. 375.)"

Later in Town of Hempstead v. Public Service Commission, 231 N. Y. 447, 450, the court said, speaking of the provisions of the Public Service Commission's Law:

"These provisions were in force when the plaintiff gave its consent to the defendant to maintain and operate its gas mains within the town; entered by implication into the terms of such consent; formed part of its obligation; and were notice to the town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service."

The police power is an attribute of sovereignty and is primarily vested in the legislature. The state may authorize a municipality to establish by an inviolable contract the [fol. 1870] rates to be charged by a public service corporation for a definite term not grossly unreasonable in point of time, and the effect of such a contract is to suspend during the life of the contract, the governmental power of fixing and regulating the rates. The surrender by contract, however, of this governmental power as well as the authority to make it, must be closely scrutinized for such a contract has the effect of extinguishing pro tanto an undoubted power of government; both its existence and authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power. Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 273. If the parties have not thus agreed to a five (5) cent fare, when that fare becomes unreasonable, because it is non-compensatory or because it is excessive, the contract furnishes no obstacle to the exercise of jurisdiction by the Public Service Commission, and when it fails to act there is jurisdiction in the Federal Courts to protect the corporation against confiscation. Southern Iowa El. Co. v. Chariton, 255 U. S. 539; City of San Antonio v. San Antonio Pub. Service Co., 255 U. S. 547; City of Houston v. So. W. Bell Tel. Co., 259 U. S. 318; Chicago v. O'Connell, 278 Ill. 591; City of St. Louis v. Public Service Comm., 276 Mo. 569, 207 S. W. 799. We find nothing in the amendment of the Rapid Transit Act in 1912 which excludes the plain-

tiff from the application of the regulatory plan and that act contains no clear and unmistakable evidence of effort to delegate to the city authority to establish by contract in 1913 unchangeable rates to be charged by the plaintiff. While contract No. 3 provides for a five (5) cent fare to be charged in 1913 there is no delegation in any part of the act of the regulatory power of the state legislature. Nor was the Public Service Commissions Law on the subject of [fol. 1871] regulation in any wise changed. An intention of the parties that the rates then in question should be subject to modification under the Public Service Commissions Law was not affirmatively expressed, but the state courts have announced that there must be read into the contracts made after 1907, the authoritative regulation provided for by the Public Service Commissions Law. People ex rel. Garrison v. Nixon, 229 N. Y. 576. If these regulatory powers of the Public Service Commission were not intended to apply to the contractual rates of the rapid transit railways, express provision to that effect would be expected. Moreover, the legislation governing the service and the rates of fares of railroads or street railways provided for by statutes passed since 1907, places the power in the Public Service Commission to regulate such rates, indicating that the regulatory power has been reserved. Chap 481 of the Laws of 1910, §57; formerly the Railroad Law of 1890, §37 as amended by chap 676 of the Laws of 1892; §229 of the Railroad Law; Laws of 1910, chap. 481, formerly part of the Rapid Transit Act of 1875; Laws of 1875 chap. 606. In construing and giving effect to the provisions of the state statute, we look to the decisions of the State Court of Appeals. St. Cloud Pub. Service Co. v. City of St. Cloud, 265 U. S. 352, 357.

Terms of a contract may be affected by the exercise of sovereign power, as where an injured person received a free pass on a line of a railroad for life under a contract, and later Congress, in regulating interstate commerce, forbade the issuance and use of free passes except to certain persons designated and forbade the charging of any rate other than that designated in published schedules. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467. There it was said at page 483:

[fol. 1872] "After the commerce act came into effect no contract that was inconsistent with the regulation established by the act of Congress could be enforced in any court."

See Hunter v. Pittsburg, 207 U. S. 161; Worcester v. Worcester Consolidated St. Ry. Co., 196 U. S. 539. To change a contract rate under the state regulatory plan does not impair contract rights under the Federal Constitution. Union Dry Goods Co. v. Ga. Public Service Corp., 248 U. S. 372.

When in 1912 the legislature of the state amended the Transit Act to give authority for Contract No. 3, Sec. 8 of the act provided that the contract should contain "such terms and conditions as to rate of fare to be charged * * * as said commission shall deem to be best suited to the public interest." Indeed, this was in substance part of the act prior to 1907, when the Public Service Commissions Law was adopted. As pointed out, the law had changed the policy existing when the rate provision was brought into the Rapid Transit Act. By express terms and by construction of the Court of Appeals of the State, the legislation resulting in the Public Service Commissions Law was applicable to rapid transit rates and established a public policy prohibitive of permanent rates of fare. It declared in effect that no contract provision for a fixed continuing fare was "best suited" to or consistent with "public interest" and by Sec. 26 it provided that "every unjust or unreasonable charge made or demanded for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by the order of the commission is prohibited." And 49 of the Act established the legislative policy that a rate was unjust and unreasonable if insufficient to yield a reasonable compensation for the services rendered. Thus the law cre-[fol. 1873] ated the duty of the Public Service Commission to administer and enforce the new state policy. That regulatory body had turned over to it all contractual powers of the former board under the Rapid Transit Act. It in effect limited the contractual capacity for a continuing fixed fare, for it made it the duty of the Public Service Commission to make the fare sufficient to yield reasonable compensation for the services rendered and no more. Undoubtedly this

new public policy applied to rapid transit railroad carriers as well as other public utilities. With this policy thus established when the legislature in 1912 amended the Rapid Transit Act, if it wanted to depart from the Public Service Commission Law, to amend it or modify it or if it intended to grant regulatory powers under the Rapid Transit Act, it would have been an easy matter for the legislature to have written into that act a statement excepting the rapid transit rates from the operation of the Public Service Commissions Law. It refrained from doing so by word or fair implication. It left the fare provision of the Rapid Transit Act as it was before the adoption of the regulatory law which established the new policy. It in no clear and unmistakable phrase expressed an intention to nor did it delegate regulatory powers to the Commission under the Rapid Transit Act. That had been cared for by the Public Service Commissions Law. Merely permitting the fare provision of the Rapid Transit Act to continue in the same phrase in which it existsed prior to the adoption of the new policy in 1907 did not repeal the provisions of the Public Service Commissions Law as to rate making in any particular. The more reasonable assumption is that such nonaction involved no clear and unmistakable purpose on the part of the legislature (City of Peducah v. Paducah Ry. [fol. 1874] Co., 261 U. S. 267, 272) to exclude the application of the Public Service Commissions Law. The fare provision of the Rapid Transit Act, as amended by the legislature in 1912, did not purport to grant unqualified authority to contract for a fixed fare for the entire life of the contract. The more reasonable view is that there should be contained in the contract "such terms and conditions as to rates of fare to be charged as the Commission shall determine to be best suited to the public interest." Such "terms and conditions" should be consistent with the limitations and provisions of the Public Service Commissions Law and be the contractual authority, thus confined to the establishing of temporary rates, and should not foreclose either party, if and when it became unjust and unreasonable either because it was excessive or uncompensatory, to apply for a change. This does not destroy all right to fix a fare; it merely limits the contractual powers within the

confines of the established public policy, which prohibited the suspension of the police power of the state over rates. It means that the contractual determination as to what terms and conditions as to rates of fare that are best suited to public interest must be in harmony and not in defiance of the standard of public interest which the legislature had itself declared and established in a law which it made applicable to all street railways and utilities. Such a construction takes no undue liberty with the fare provision of the Transit Act. It restricts general and uncertain language and prevents non-action of the legislature with respect to the transit act from operating as an amendment to the Public Service Commissions Act. By the language employed in the amendment of the Transit Act in 1912, it is inconceivable that it was the intent to vest the city with unrestrained discretion to suspend the police power over rates and leave it within its uncontrolled discretion to bur-[fol. 1875] den the city for an unlimited period with an exorbitant or extortionate fare, or to condemn it to an inefficient service which would result from a non-compensatory rate.

Indeed, §8 of the Act provides:

"Every such contract shall contain such terms and conditions as to rates of fare to be charged and the character of services to be furnished and otherwise as said Commission shall deem to be best suited to the public interest and subject to such public supervision, conditions, regulations and requirements as may be determined upon by said commission with like approval."

There was no commission, other than the Public Service Commission to then or thereafter exercise this power and duty, both as to fares and services. Indeed, the Commission has ever since been constantly exercising supervision as to service but has refused to act in the matter of fares.

There has been no contracting away of the right to a reasonable return as in Southern Utilities Co. v. City of Palatka, 268 U. S. 232 and Columbus Ry. &c. Co. v. City of Columbus, 249 U. S. 399. In the latter case, a franchise was granted a railroad company which sought to surrender it and then brought an action to restrain the city authorities from compelling it to operate its lines of street railway

under the franchises and to charge only rates of fare prescribed by the franchises. The court held that equity cannot relieve the company from a bad bargain. At the time the railroad company sought relief the legislature of Ohio had not, like in the instant case the legislature of New York had, in the exercise of state sovereignty, established a regulatory plan by which franchises and contract rates may be regulated upward or downward as conditions jus-
[fol. 1876] tify. In Henderson Water Co. v. Corporation Com. &c., 269 U. S. 278, the parties were * * * bound by the contract made before the state had adopted its Corporation Commission Law and thereby exercised its regulatory power. The corporation applied for an increase in rates to the Corporation Commission and was allowed one-half the amount asked for. It was not content, but proceeded in the federal court asking protection against confiscation. The Supreme Court affirmed the District Court in its view that the water company should have applied for resumption of the hearing after a test of six months on the new rates and exhausted its remedy there before it resorted to a rate suit. There the State Supreme Court sustained the power of the commission to fix rates different from the rates stipulated in the franchise. The claim of the plaintiff here is that the contract rates could be changed only by restoring to the procedure of the regulatory plan of the state which delegated power to the commission under §49 of the Public Service Commissions Law and power to the plaintiff under §§28-29 to change the rates by the methods therein prescribed. This it had sought without avail previous to the institution of this suit. In Southern Utilities Co. v. Palatka, 268 U. S. 232, the Florida legislature had vested the city with power to make a rate by contract but the legislature had no commission and no regulatory procedure which the corporation could invoke to bring about an increase which it sought. The Supreme Court held that the corporation was bound by its contract but pointed out that "There is nothing in this decision inconsistent with Southern Iowa Electric Co. v. Chariton, 255 U. S. 539; San Antonio v. San Antonio Public Service Co., 255 U. S. 547, and Ortega Co. v. Triay, 260 U. S. 103." In City of Cleveland v. Cleveland Ry. Co., 194 U. S. 517, in sustaining
[fol. 1877] the contract, the court held that the provisions

as to the rate of fares were fixed in the ordinance for a stated time and "no reservation was made of a right to alter." In Georgia Ry. & Power Co. v. Town of Decatur, 262 U. S. 432, when the contract was made, the general assembly had never exercised authority to fix rates and the State Supreme Court held that there was nothing in the constitution of the state which precluded the municipality from contracting as to fares, and that "while the matter was one falling within the police power whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the state had not exercised and was not seeking to exercise its police powers over the subject, and that this contract would remain effective until there should be conflicting legislative action." In Tampa Water Wks. v. Tampa, 199 U. S. 241, the state constitution provided that "The legislature is vested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing service of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures." Pursuant to this clause, an act was passed empowering the city authorities to pass an ordinance to prescribe maximum charges for water "such charges to be just and reasonable; provided, that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made." After the constitution but *before* this act, the city made [fol. 1878] a contract with the water company giving the company the right to charge certain rates. Thereafter, pursuant to the constitutional provision and the act referred to, the city passed an ordinance lowering the maximum rates to be charged. The court sustained the validity of the ordinance. It followed the interpretation of the constitution, act and ordinance so construed by the state court, and said:

"But so far as it expressed a power of the legislature, of course, as soon as the constitution went into effect, that power existed at once, and contracts afterwards were made subject to the possibility of its exercise, as it was exercised by the subsequent statute. * * *

"The single question is whether the city of Tampa is bound for 30 years from the date of its agreement to permit certain specified rates to be charged, even if they ceased to be reasonable. We are not prepared to say that the Supreme Court of Florida was wrong in deciding that it was not bound under the Florida constitution and laws."

It further held that under the interpretation of the constitution given by the Florida courts, the legislature was not at liberty to give up the duty of preventing excessive charges. It was an inalienable power. To like effect see San Antonio Traction Co. v. Altgelt, 200 U. S. 304; Puget Sound Traction &c. Co. v. Reynolds, 244 U. S. 574; City of Houston v. S. W. Bell Tel. Co., 259 U. S. 318.

The rule is well established that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. Milwaukee Electric Ry. & Light Co. v. R. R. Comm. of Wisconsin, 238 U. S. 174, 180; Home Tel. Co. v. Los Angeles, 211 U. S. 265, 273. This construction is consistent with the State Court [fol. 1879] decisions to which we should give sanction. Denny v. Pacific Tel. & Tel. Co., 48 Supreme Court, 233 (decided Feb. 1928).

It is argued that the Commission, as a state agency, could exercise or not in its discretion this power, but that meanwhile it lies as dormant as though no public service law had been adopted. Constitutional limitations require the legislature itself to determine the public policy as to rates and itself to establish a legislative standard to be applied and executed by the delegated agency. That was what the legislature did in the Public Service Commissions Law. It declared a public policy as to rates and established a standard in the law itself (26). The commission was created by the law not to initiate or establish a public policy or standard, but to administer and execute

that established by the legislature. Section 26 expressly prohibited the carrier itself from charging or collecting an unreasonable rate, thereby directly requiring that rates should at all times be kept reasonable in fact. Section 49 imposes upon the commission a duty to apply or execute that mandate of the law. The guarantee of due process of the Fourteenth Amendment protects the right of a public utility to a fair return. There is but one limitation upon the right, namely, that it has not been contracted away pursuant to clear and unmistakable legislative authority to suspend the police power over rates. That condition does not obtain here. As said by Chief Justice White in So. Iowa El. Co. v. Chariton, 255 U. S. 539, 546:

"And indeed the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the Court of last resort of the State is urged by municipal corporations [fol. 1880] whose every power depends upon the state law."

We therefore hold that the provisions of the lease in Contract No. 3 "the lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroads and Existing Railroads the sum of five (5) cents but not more," was subject to the regulatory law and power of the Public Service Commission as effectively as though written in the contract, which means that when this fare of five (5) cents became unjust and unreasonable, it was subject to the Commission's regulation. This marked the extreme limit of the power of the parties to contract as to the fare. When this provision of the contract bound the plaintiff to a five (5) cent fare and the same became confiscatory, it contravened the express prohibition against the charging or collecting of unjust and unreasonable rates under §26, and in turn the public policy which thus inhibited the suspension of the police power.

The complaint and affidavits in support thereof, show that for the year ending June 30, 1927, the plaintiff carried 1,173,646,256 passengers; of these 359,019,660 were carried by the elevated railroads. During the year the daily average was about 3,215,469 passengers. The plaintiff's railway

system is divided into the Manhattan Division and the Subway Division. The total value (1927) of the property used in the system operated by the plaintiff is alleged by it to be $898,793,648 of which $142,894,000 is provided by the Manhattan Railway Company; $140,579,474 is owned by the plaintiff and it has provided in addition $272,940,174; $342,380,000 is provided by the City. There is a total, as alleged, of $556,413,648 of property provided by the plaintiff. The plaintiff has thirty-five million par value of common stock; [fol. 1881] $162,700,000 refunding mortgage bonds; $44,331,560 in notes and $2,890,000 in Equipment Trust Certificates which, together with other items, make an aggregate of its liabilities $403,950,373, which has not been substantially reduced since June 30, 1927. On that day, the charges of the plaintiff to its fixed capital, as defined by the uniform system of accounts, as ruled by the Public Service Commission, amounted to $413,312,720, which has not been substantially reduced since then. On January 31, 1928, the Manhattan Railway Company had outstanding $60,000,000 of common stock; $40,671,000 in Consolidated bonds; $4,523,000 in Second Mortgage bonds, and other liabilities of $1,851,159 making a total of $107,045,159. At that date the fixed capital of the company was $112,943,654. The operation by the plaintiff upon a computation based on the plaintiff's present value figures of property provided by the companies, and on the Transit Commission figures for the City provided property, shows an actual earned return of 2.65% in 1926 and 2.52% in 1927. The earnings available at the present rate of fare are $22,622,761. Using the value of the property thus computed in 1927 at $898,793,648 an 8% return (McCardle v. Indianapolis Co., 272 U. S. 419; Bluefield v. Galveston 262 U. S. 692; Bklyn. Union Gas Co. v. Prendergast, Fed. (2d) 672 affd. 272 U. S. 580) would require at least $71,903,492, which would leave a deficit of $49,280,731. Using this property, the actual return was as low as 1.92% in 1921 and never higher than 2.65% in 1926. A computation based upon the present value of the property provided by the plaintiff, exclusive of City provided property, shows a 3.61% return actually earned in 1927; this is reached upon the assumption that the present value of the company-owned and company-provided property [fol. 1882] amounts to $554,413,648 with a balance of $24,-

490,775 available as a return, leaving a deficit of $24,335,899 in earnings below an 8% return. A computation based alone upon the present value of the company-owned property, exclusive of the city-owned property and company-provided property, shows a 4.05% return actually earned in 1927.

It is argued that if the plaintiff prevails and there is daily confiscation, the City-owned property may not be taken into consideration. The return guaranteed by the constitution is upon the property devoted to public use. The determination of what rate should be prescribed, which will yield a return that is fair and reasonable, depends upon the present value of the property used. Ottinger v. Bklyn. Union Gas Co., 272 U. S. 579; State of Missouri ex rel. So. W. Bell Co. v. Public Service Comm., 262 U. S. 276; Wilcox v. Consol. Gas Co., 212 U. S. 19, 52; Minnesota Rate Cases 230 U. S. 352. In Wilcox v. Consol. Gas Co., supra, the court said:

"and we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase."

And in the Minnesota Rate Cases, supra, "the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property and not the original cost of it, of which the owner may not be deprived without due process of law." Property leased by the operating company and used in making a return is included in the valuation. Minn. Rate Cases, [fol. 1883] 184 Fed. 765, affd. 230 U. S. 352. In Bd. of Public Utility Commrs. v. N. Y. Tel. Co. 271, U. S. 23, 21, the court said:

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory. (Citing cases.) Constitu-

tional protection against confiscation does not depend on the source of the money used to purchase the property; it is enough that it is used to render the service. * * * "

The City's property is earning the return as well as the plintiff's and the plaintiff's leased railway. All must be considered in calculating the capital making the return and rendering the service.

The denial by the Commission of a change of rate of fare is a denial of due process of law. The Commission did more than refuse to act. On February 14th, rejecting the proposed new rates, it instituted injunction proceedings to forbid their operation. A forced continuance of confiscatory rates amounts to a denial of due process of law. (Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; Alton Water Co. v. Ill. Commerce Comm., 279 Fed. 869.) Under the present rate of fare, it is established that upon the investment there would be a continuous confiscation and this amounts to taking property without due process of law in contravention of the Fourteenth Amendment of the Federal Constitution. (Newton v. Consolidated Gas Co., 258 U. S. 165; Oklahoma Operating Co. v. Love, 252 U. S. 331; La. Water Co. v. Public Service Comm., etc., 294 Fed. 954; Streator Aqueduct Co. v. Smith, 295 Fed. 385; Augusta-Aiken Ry. & Electric Corp. v. R. R. Comm. of So. Carolina, 291 Fed 977.) The plaintiff, having established [fol. 1884] its claim of confiscation of its property, is entitled to the injunctive relief it seeks.

In conclusion we take notice of the views expressed by counsel on the argument who criticized the plaintiff for proceeding in the District Court, as said, in an effort to defeat the state court of its jurisdiction. This court takes jurisdiction, not as a matter of discretion or comity, but as a matter of duty, and it is not important whether the state court might have heard the case. There is no discretion or comity. A federal court when appealed to in protection of constitutional rights over which it has, by law, jurisdiction, may not avoid assuming jurisdiction. (Cohens v. Virginia, 6 Wheat. 264.) When it properly assumes jurisdiction, the court may not be spoken of as precipitate in its conduct. Because the case is one of local interest only is entirely immaterial. If the parties are

citizens of different states or there is brought into question constitutional protection, the right of a plaintiff to choose the Federal Court, where there is a choice, cannot properly be denied. (Wilcox v. Consolidated Gas Co., 212 U. S. 19.) Plaintiff did all it could under the state law to obtain administrative relief and its two applications, even prior to the present effort to obtain relief, were denied, the claim of the Commission being that the contract forbade its acting in regulation of the rates. This squarely raised the question of the plaintiff's constitutional right to protection and this it pressed in the familiar form of a rate suit and it has established its claim of daily confiscation.

An injunction will issue against the defendants and their successors, restraining them and each of them, their officers, agents and employees, from in any way enforcing or attempting to enforce against the plaintiff a rate of fare [fol. 1885] of five (5) cents per passenger for the transportation of passengers upon the rapid transit railroad lines operated by it or upon it and the Manhattan Division and the Subway Division, or from enforcing, or attempting to enforce against the plaintiff orders, directions, tariff schedules or certificates in so far as they prohibit or have been or are construed by any of the defendants or their predecessors, to prohibit the plaintiff from charging for the transportation of passengers on its railroad lines, a fare per passenger in excess of five (5) cents, and the plaintiff, until the report of the master to be appointed to take proofs and report to this court, may charge seven (7) cents per passenger over its rapid transit railway lines operated by it without interference or prohibition by the defendants, their officers, agents, servants or employees.

The order will provide that the plaintiff shall file with the clerk of this court a good and sufficient bond in a sum to be approved by this court, conditioned upon the prompt payment to the defendants, of all costs and damages which may be incurred or suffered by any party to this suit who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned so that, in the event that this preliminary injunction order shall be hereafter dissolved, the plaintiff will repay to its several passengers affected thereby, with interest, in such manner and

to such extent as the court may direct, any sums paid by them for transportation furnished by the plaintiff from the date of the entry of the order and pending the suit in excess of the sums now chargeable to them of five (5) cents per passenger. A master will be appointed to take proofs and report to this court.

If the defendants feel aggrieved and wish to appeal from the order to be entered herein, a stay will be granted upon [fol. 1886] condition that a bond of the city in a sufficient sum be furnished indemnifying the plaintiff against further daily confiscation of its property, or if it be otherwise advised, and the defendants wish to apply to the Supreme Court for a stay of the order to be entered until that court hears the appeal, a stay for a reasonable time will be granted to enable the defendants to make such application to the Supreme Court.

Dated May 24, 1928.

Martin T. Manton, Circuit Judge. John C. Knox, District Judge. William Bondy, District Judge.

[fol. 1887] In United States District Court

[Title omitted]

Affidavit of Wm. L. Ransom

United States of America,
State and County of New York, ss:

William L. Ransom, being duly sworn, says:

I am of counsel for the plaintiff and have been familiar with the proceedings had in this action.

On Thursday, May 3rd, 1928, Mr. James L. Quackenbush, solicitor for the plaintiff, and I, sent the following telegram:

"Honorable Harlan F. Stone, Justice of Supreme Court of United States, the Capitol, Washington, D. C.:

We are informed that various public officers and counsel are in Washington or on their way there to make an application to Supreme Court as to yesterday afternoon's

decision of Special Statutory Court in Interborough Rapid Transit Company case in which order for preliminary in- [fol. 1888] junction has not yet been entered or submitted stop In behalf of plaintiff we respectfully ask that any such application be deferred until we can be present and be heard stop Opinion of Statutory Court contains provisions for stay and assures ample opportunity for defendants to make application in orderly course."

In reply thereto, I received the following letter:

"May 3, 1928.

"Messrs. William L. Ransom, Esq., James L. Quackenbush, Esq., 120 Broadway, New York City.

"DEAR SIRS: I beg to acknowledge receipt of your telegram of even date, stating that you desire to be heard on any application to be made to the Supreme Court affecting the decision of the Special Statutory Court in Interboro Rapid Transit Company v. Gilchrist, et al. handed down yesterday.

"Counsel representing the City of New York and the Transit Commission have indicated to me that they desire to present an application to the Supreme Court for a stay pending appeal, and I have today advised them that such an application would be entertained and will be referred to the full Court, which will sit Monday, May 14th, at twelve o'clock noon. You will be given opportunity to present your opposition to such application at that time.

"Counsel for the City of New York and for the Transit Commission have asked me to issue a temporary stay pending the motion. As the order of the Special Statutory Court has not been entered, and as the opinion provides that it may contain such temporary stay without bond pending application to the Supreme Court, I conclude that action on my part will not be necessary unless an effort should be made to put in force the 7*c* fare pending the application and hearing on the 14th.

"I have stated to counsel for the City and for the Transit Commission, however, that if any effort is made to put into [fol. 1889] effect the 7*c* fare prior to the hearing of the motion by the full Court, I will immediately entertain an ap-

plication for a temporary stay, in which event telegraphic notice will be sent to you.

Yours very truly, Harlan F. Stone."

On Friday, May 4th, 1928, Mr. Quackenbush and I sent the following letter:

"Honorable Harlan F. Stone, Justice of Supreme Court of United States, the Capitol, Washington, D. C.

"Interborough Rapid Transit Company v. Gilchrist et al.

"DEAR SIR: We beg to acknowledge receipt of your letter of yesterday's date, advising that counsel for the defendants in this action have been advised that you will refer to the full Court for hearing on May 14th the proposed application for a stay pending appeal from the preliminary injunction order to be entered by the Special Statutory Court for the Southern District of New York upon its decision of May 2, 1928.

"Counsel for the plaintiff will serve upon counsel for the defendants, and submit to the Special Statutory Court, tomorrow or Monday, a proposed form of order, to the end that the Special Statutory Court will have opportunity to settle and determine the form of order, and accomplish its entry, in time to permit the motion for a stay to be heard on the date you have so kindly fixed for the appearance and argument of counsel for the respective parties thereon.

"The opinion of the Special Statutory Court advised the defendants that if they wished to make application to the Supreme Court for a stay pending appeal from the injunction order to be entered, such order would stay the taking effect of the injunction for a reasonable time to enable the [fol. 1890] defendants to make such application. The opinion also indicated terms on which the Special Statutory Court would itself grant a stay pending appeal. As has repeatedly been stated in open Court by counsel for the plaintiff, there is not, and there has not at any time been any thought or intention on the part of the Interborough Rapid Transit Company to charge or collect an increased fare in any precipitate manner, and of course no thought of doing any such thing in advance of the date to be fixed by the Special Statutory Court in the order to be entered or there-

after until the determination of any orderly application which the defendants might make for a stay pending appeal. We are glad to be advised of Your Honor's view that action on your part, in respect of the application made by the defendants to you for such a stay, will not be necessary until counsel for all the parties have been heard by the Court on May fourteenth.

"With great respect, we remain

"Very truy yours, Wm. L. Ransom, James L. Quackenbush."

William L. Ransom.

Subscribed and sworn to before me this 7th day of May, 1928. Catherine Dunne. Catherine Dunne, Notary Public. Queens County Clerk's No. 2261. Queens County Register's No. 4698. Certificate filed in New York County. New York County Clerk's No. 443. New York County Register's No. 9318. Certificate filed in Kings County. Kings County Clerk's No. 92. Kings County Register's No. 9184. Commission Expires March 30, 1929. (Seal.)

[fol. 1891] In United States District Court, Southern District of New York

In Equity. No. 44225

Interborough Rapid Transit Company, Plaintiff,

against

John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, Constituting the Transit Commission, the Same Being the Metropolitan Division of the Department of Public Service of the State of New York; Manhattan Railway Company, and the City of New York, Defendants

Before Manton, C. J., and Knox and Bondy, D. J. J., Holding Court Pursuant to Section 380 of the Judicial Code of the Code of Laws of the United States.

Order Allowing Interlocutory Injunction—May 10, 1928

This cause came on to be heard under an order to show cause granted February 28, 1928, upon the application of

the plaintiff, and was argued by counsel; and thereupon, upon consideration thereof;

And the opinion of the Court having been filed herein on May 2, 1928;

And it appearing to this Court that the present maximum rate of fare of five (5) cents per passenger upon the rapid transit railroad lines operated by the plaintiff, and upon each the Manhattan Division and the Subway Division thereof, has been, and now is, and will continue to be, insufficient to yield a reasonable compensation for the service rendered and to provide a fair return upon the fair and reasonable value of the property used by the plaintiff in the [fol. 1892] public service, and unjust, unreasonable and confiscatory of the property used by the plaintiff in the public service, and will inflict a continuing daily confiscation of its property, against which the plaintiff is entitled to be protected or indemnified, during the pendency of this suit; that the enforcement of such maximum fare of five (5) cents and of the legislative acts or acts legislative in character of the State of New York imposing or requiring the observance of such rate of fare, contravene the guarantees of the Fourteenth Amendment of the Constitution of the United States; that the enforcement or the attempting of the enforcement in any way against the plaintiff of a rate of fare of five (5) cents per passenger for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division thereof, or the enforcement or the attempting of the enforcement against the plaintiff of legislative acts of the State of New York, and, particularly, the provisions of the Public Service Commission Law (Chapter 429 of the Laws of 1907, made Chapter 48 of the Consolidated Laws by Chapter 480 of the Laws of 1910, as amended and supplemented), Chapter 743 of the Laws of 1894, the Rapid Transit Act (Chapter 4 of the Laws of 1891, as amended and supplemented), and the Railroad Law (Chapter 481 of the Laws of 1910, as amended and supplemented); of orders or directions of the Transit Commission and or the Public Service Commission for the First District of the State of New York; of the tariff schedules published and filed by the plaintiff, of the Contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902, and March 19, 1913, and their modifi-

cations, and or of the Certificates for elevated extensions and third-tracking, dated March 19, 1913, in so far as the said statutes, orders, directions, schedules, contracts, and/or [fol. 1893] certificates, or any of them, prohibit, or have been or are construed by any of the defendants or their predecessors to prohibit, the plaintiff from charging for the transportation of passengers on the rapid transit railroad lines operated by it, or any thereof, a fare per passenger in excess of five (5) cents, will result in immediate, continuing and irreparable loss and damage to the plaintiff unless a preliminary injunction is granted herein, as hereinafter set forth:

It is ordered, adjudged, and decreed as follows:

First. Pending the final decree in this action, and until the further order of this Court, the defendants John F. Gilchrist, Leon G. Godley and Charles C. Lockwood, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, and the defendant The City of New York, and their successors, and each of them, and their privies, and each of their respective officers, agents, counsel, servants and employees, and any and every person acting or attempting to act under and by virtue of the authority of the acts of the Legislature of the State of New York, the orders or directions of the said Transit Commission or its predecessors, the tariff schedules filed by the plaintiff with the said Transit Commission or its predecessors, the Contracts Nos. 1, 2 and 3, dated respectively February 21, 1900, July 21, 1902, and March 19, 1913, with their respective modifications, or the Certificates for elevated extensions and third-tracking, dated March 19, 1913, or of any of them, or of any other provision of statute of the State of New York, be and are hereby enjoined and restrained

(1) From in any way enforcing, or attempting to en- [fol. 1894] force, against the plaintiff, a rate of fare of five (5) cents per passenger for the transportation of passengers upon the rapid transit railroad lines operated by it, or upon each the Manhattan Division and the Subway Division thereof;

(2) From in any way enforcing, or attempting to enforce, against the plaintiff, the provisions of the said acts, orders, contracts, tariff schedules or certificates, in so far as they prohibit, or have been, or are construed by any of the defendants or their predecessors, to prevent the plaintiff from charging for the transportation of passengers on its rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division thereof, a fare per passenger in excess of five (5) cents;

(3) From bringing and or prosecuting any suit, action or proceeding to enforce any penalties or forfeitures, under the said Public Service Commission Law, the said Railroad Law, the said Rapid Transit Act, Chapter 743 of the Laws of 1894, or any other law, the said orders or directions, the said Contracts Nos. 1, 2 and 3, or the said elevated railroad certificates, against the plaintiff; or by mandamus, injunction, summary proceeding, or otherwise to compel compliance by the plaintiff with the provisions of the said acts, orders, tariff schedules, contracts or certificates, or any of them, in so far as they, or any of them, impose a maximum rate of fare of five (5) cents per passenger, or prohibit the plaintiff from charging a rate of fare of seven (7) cents per passenger, or any rate in excess of five (5) cents per passenger, upon the said rapid transit railroads or upon each the Manhattan Division and the Subway Division;

[fol. 1895] (4) From doing any act or thing interfering with the right or authority of the plaintiff forthwith to charge or receive for the transportation of passengers by it, upon the said rapid transit railroad lines, or upon each the Manhattan Division and the Subway Division, a rate of fare of seven (7) cents per passenger.

Second. This injunction is granted, and will be continued, upon condition that, pending final decree in this action or until the further order of this Court

(a) The plaintiff shall, from and after the entry of this decree except as hereinafter provided, charge and collect a rate of fare of seven (7) cents per passenger upon the rapid transit railroads operated by it, as shown by its tariff schedules on file with the Transit Commission and

posted in its several stations, and shall issue to each passenger paying such fare a refund ticket for each fare paid, such refund ticket to read and be conditioned as hereinafter provided;

(b) Within five days after the entry of this order, the plaintiff shall file with the Clerk of this Court, in form and tenor first approved by one of the Judges of this Court, a good and sufficient bond or bonds of a surety company or companies, in the sum of Five million dollars ($5,000,000.—), conditioned upon the prompt payment by the plaintiff to the defendants, upon the direction of the Court, of all costs and damages which may be incurred or suffered by any of them, respectively, who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned so that in the event that this preliminary injunction order shall hereafter be dissolved and it shall be [fol. 1896] finally decided that the plaintiff was and is not entitled to relief in this action, the plaintiff shall promptly repay to its several passengers affected thereby, to such extent as the Court may direct and in the manner hereinafter provided and/or as the Court may further provide and direct, any sums paid by such passenger for transportation upon the rapid transit lines operated by the plaintiff, pending the final determination and decree in this suit, in excess of the sums now chargeable to them at the rate of five (5) cents per passenger; any such repayments to passengers to carry and include interest upon such excess sums from and after the 16th day of the month in which any such fares in excess of five (5) cents were paid by any such passenger;

(c) As and when the excess of the amount collected by the plaintiff over the rate of five cents per passenger shall aggregate the said sum of the bond or bonds so given by the plaintiff, the plaintiff shall furnish and file a similar bond or bonds in a like sum and upon the same approval and conditions, or in such sum and/or upon such conditions as the Court by further order, upon its own motion or the application of any party hereto upon notice, may direct;

(d) During the pendency of this action, the plaintiff shall cause to be placed and kept posted on its bulletin board or other conspicuous place, in each of its subway

and elevated stations, and in or near all places where copies of its tariff schedules are posted, a notice in plain and conspicuous type and color, in substantially the following form:

[fol. 1897] "Keep Your Refund Tickets in Order to Protect Your Rights

"Pursuant to the order entered by the United States District Court for the Southern District of New York on May —, 1928, the Interborough Rapid Transit Company has been authorized to charge and collect a fare of seven (7) cents per passenger, pending final decree in the action brought by the Company to enjoin the five-cent rate as confiscatory. The amounts collected by this Company in excess of five (5) cents per passenger will be subject to the further direction of the Court.

"Refund will be made as so directed, if it shall be finally decided that the Company was and is not entitled to charge and collect a fare of more than five (5) cents per passenger. The Company has filed a bond to ensure such repayment to its patrons.

"Each passenger, upon paying his fare, will therefore receive a refund ticket for the excess over five (5) cents. These tickets should be carefully preserved, as they will evidence the passenger's right to receive repayment of such sums as may be directed by the Court, pursuant to the said order, in the event the said action is finally decided against the Company.

"For a copy of the said order and further information as to the rates of this Company and the regulations applicable thereto, you may examine the copy of its tariff schedule, on file with each of its ticket agents and in the offices of the Transit Commission at No. 270 Madison Avenue, Borough of Manhattan, New York City.

"Frank Hedley, President Interborough Rapid Transit Company."

[fol. 1898] The plaintiff shall cause a copy of this order to be filed and kept with and as a part of its tariff schedule, during the continuance of this preliminary injunction, in all stations, offices and places where its said tariff schedule is now posted or filed.

(e) During the pendency of this action, the plaintiff shall cause to be placed, in red ink or other distinctive color or colors, conspicuously on one side of each such refund ticket issued by it to its passengers at a rate of fare in excess of five (5) cents per passenger, the figure and word "7 cents" and the words "Keep this slip to protect your rights"; and on the reverse side of each such refund ticket, the plaintiff shall cause to be printed a notice in substantially the following form:

"If it is finally determined that this Company is not entitled to charge more than five cents per passenger, refund upon this ticket will be made as directed by the order of the United States District Court."

(f) If the plaintiff shall, for the convenient operation of its said rapid transit lines at the said rate of fare of seven (7) cents per passenger during the pendency of this suit, issue and sell any tokens or other evidence of the right of a purchaser to a single and continuous ride upon the said lines as in the said tariff schedules provided, any such token or evidence of the right of the purchaser of such transportation shall be so accepted for such transportation only during the continuance of the seven-cent fare granted by this preliminary injunction, but shall be redeemed by the Company in cash, at any of its said stations, at any time upon the request of the holder thereof, upon the presentation of [fol. 1899] the same and of a like number of refund tickets, irrespective of whether this order is or is not in effect at the time of such presentation for redemption; other reasonable rules and regulations pertinent to any such tokens and refund tickets and not inconsistent with this order may be established as a part of the tariff schedules of the plaintiff.

(g) The plaintiff shall bring this cause to trial and to final decree with all convenient speed.

Third. During the pendency of this suit, the plaintiff shall file, on the 16th day of the month following and on the 16th day of each and every month thereafter, in the office of the Clerk of this Court, a statement verified by its President, Vice-President, Comptroller, Secretary, or other authorized officer, showing the amounts charged and

collected by it during the preceding calendar month, from passengers on the rapid transit railroads operated by it, in excess of a rate of fare of five (5) cents per passenger; such verified statement also to certify that the sum so shown is all that has been so charged and collected during such preceding calendar month.

Fourth. (1) The Honorable John Proctor Clarke is hereby appointed Special Master to take the testimony and evidence upon the issues herein, make all needed computations and fully hear the facts, and to report to the Court his findings of fact and conclusions of law, together with the evidence, for the advisement of the Court; provided that nothing herein contained shall be construed as meaning that the Special Master's findings of fact shall be final, but only that he shall find the facts for the purpose of aid-[fol. 1990] ing the Court and making his recommendations. The said Master shall, before submitting to the Court his final report, and in accordance with the practice in this Court, prepare and serve on the solicitors for the respective parties hereto a draft of such report.

(2) The said Special Master shall hold a session on May —, 1928, at 10.30 o'clock in the forenoon, at a place to be determined and announced by him, for the purpose of fixing at that time the date when he will proceed to the hearing of the testimony and evidence in this cause. After the Master shall have entered upon said hearing, he shall proceed as speedily as practicable.

(3) The said Master shall report to the Court, at the earliest practicable date, all the testimony and evidence received by him, together with his findings of fact and his recommendations as to the facts and the law.

Fifth. At any time while the preliminary injunction hereinbefore granted remains in force, any party hereto, or his or its successors or assigns, may apply, upon notice, to vacate, modify or change the terms of this order, because of any change of circumstances since the entry hereof; or for any additional relief to which he or it may deem himself or itself entitled by reason of any acts or events occurring after the entry of this order.

Sixth. (1) If an appeal from this order is taken by the defendants, or any of them, to the Supreme Court of the United States, then, upon condition that, on or before May 28, 1928, a good and sufficient bond or bonds of The City of New York and/or other responsible corporation be filed by or in behalf of the defendants or any of them, in the sum of Five millions of dollars ($5,000,000.—) and in a form and tenor to be approved by one of the Judges thereof, con-
[fol. 1901] ditioned for the indemnifying of the plaintiff against further daily confiscation of its property during the pendency of such appeal, a stay of the taking effect and operation of this injunction and of each of the various provisions of paragraph "Second" of this order, until the hearing and determination of such appeal, is hereby granted; and if it shall appear at any time before an appeal is heard and determined, that such bond is inadequate protection an application will be entertained for further indemnity.

(2) The dependants having given notice of intention to appeal from this order and having applied to one of the Justices of the Supreme Court of the United States for a stay of the taking effect of this order, when entered, until the Court hears and determines such appeal; and May 14, 1928, having been appointed by the Supreme Court when such application by the defendants for such a stay may be heard, it is hereby ordered that a stay of the taking effect of this injunction and of the several provisions of paragraph "Second" of this order is hereby granted to the defendants, until the hearing and determination by the Supreme Court of such application for a stay pending appeal from this order.

(3) The stay granted to the defendants by sub-division (2) of this paragraph is granted, and shall continue in force, only upon condition that the defendants, and each of them, shall make their application to the Supreme Court for a stay so that the same may be heard by the full Court on Monday, May 14th, 1928, or such other days as appointed by the Court, and shall seasonably submit all papers in support of such application within the times allowed by the Court; and the stay granted to the defendants by sub-division (1) of this paragraph shall be in effect only upon
[fol. 1902] condition that the defendants, and each of them,

appealing from this order, shall perfect and prosecute any such appeal and print and file the transcript of record and all necessary papers to that end, promptly and without unreasonable delay, and shall, with all convenient speed thereafter, serve a notice of application to the Supreme Court to advance the said appeal for early hearing upon the calendar of the said Court.

Dated at New York City, May 10th, 1928.

Enter:

Martin T. Manton, Circuit Judge. Jno. C. Knox, District Judge. Wm. Bondy, District Judge.

[fol. 1903] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the defendants, John F. Gilchrist, Leon Godley and Charles C. Lockwood, constituting the Transit Commission—being the Metropolitan Division of the Department of Public Service of the State of New York, and the City of New York, hereby appeal to the Supreme Court of the United States from the order for an interlocutory injunction herein made and entered in the office of the Clerk of this court on the 10th day of May, 1928, enjoining defendants, pendente lite, from enforcing provisions in statutes, orders of defendants and contracts between defendants and/or their predecessors in office acting on behalf of the City of New York, limiting the plaintiff to a fare of five cents for each passenger carried in the [fol. 1904] same general direction, and this appeal is taken from each and every part of said order.

Dated, New York, May 12th, 1928.

Yours, etc., Clarence M. Lewis, Solicitor for Defendants-Appellants Gilchrist, Godley and Lockwood, 270 Madison Avenue, Borough of Manhattan, City of New York. George P. Nicholson, Solicitor for Defendant-Appellant City of New York, Municipal Building, Borough of Manhattan, City of New York.

To James L. Quackenbush, Esq., Solicitor for Plaintiff-Appellee, 165 Broadway, New York City; Murray, Aldrich & Roberts, Solicitors for Defendant Manhattan Railway Company, 37 Wall Street, New York City; Alexander Gilchrist, Jr., Esq., Clerk of the District Court of the United States for the Southern District of New York.

[fol. 1905] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same

The petitioners, John F. Gilchrist, Leon Godley and Charles C. Lockwood, constituting the Transit Commission, being the Metropolitan Division of the Department of Public Service of the State of New York, and the City of New York, by their solicitors Clarence M. Lewis and George P. Nicholson, feeling aggrieved by the order made on the 10th of May, 1928, by this Court, enjoining defendants, pendente lite, from enforcing provisions in statutes, orders of defendants and contracts between defendants and or their predecessors in office acting on behalf of the City of New York, limiting the plaintiff to a fare of five cents for each passenger, do hereby appeal from the said order and decision of this Court to the Supreme Court of the United States and pray that this appeal may be allowed and that a transcript of the record of proceedings and papers upon which the said order and decision is made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, May 12th, 1928.

Clarence M. Lewis, Solicitor for Transit Commission.
George P. Nicholson, Solicitor for City of New York.

Appeal as prayed for is hereby allowed.

Dated May 12th, 1928.

Martin T. Manton, U. S. Circuit Judge.

[fol. 1906] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now come the said defendants, John F. Gilchrist, Leon Godley and Charles C. Lockwood, constituting the Transit Commission—being the Metropolitan Division of the Department of Public Service of the State of New York, and the City of New York, the appellants herein, and say that there is manifest error in the record in this cause and assign as errors the following:

1. The Court erred in taking jurisdiction of this case.

2. The Court erred in not holding that the Bill of Complaint does not state facts sufficient to constitute a cause of action, and in not refusing the injunction, and in not dismissing the suit and Bill of Complaint.

3. The Court erred in granting a preliminary injunction decreeing that the defendants be enjoined and restrained pending the determination of this cause from in any way enforcing or attempting to enforce against the plaintiff a [fol. 1907] rate of fare of five (5) cents upon the Rapid Transit Railroad Lines operated by it, or the Manhattan Division, or Subway Division thereof; and from in any way enforcing or attempting to enforce against the plaintiff the provisions of Contracts and Certificates to prevent the plaintiff from charging a fare in excess of five (5) cents thereon, and from bringing or prosecuting any suit, action or proceeding to enforce the said contracts, #1, #2 and #3, and the said Elevated Railroad Certificates, against the plaintiff, or otherwise to compel compliance by the plaintiff with the provisions thereof, for a five (5) cent fare, or to prohibit the plaintiff from charging a fare of seven (7) cents upon the said Rapid Transit Railroads, or any part thereof; and from doing any act, or in interfering with the plaintiff forthwith charging or receiving upon said Rapid Transit Railroads, or any part thereof, a fare of seven (7) cents per passenger.

4. The Court erred in holding that the plaintiff was not bound by the provisions of Contracts #1, #2 and #3, and

each of them, that during the term of such contracts and each of them, the plaintiff be entitled to charge for a single fare upon the Rapid Transit Railroad, constituting what is called the plaintiff's Subway Division, the sum of five (5) cents, but not more.

5. The Court erred in holding that the plaintiff was not bound by the provisions of the Elevated Railroad Certificates, and each of them, dated March 19, 1913, that it should be entitled to charge for a single fare the sum of five (5) cents, but not more, over the railroads mentioned, referred to [fol. 1908] or described therein, including parts of the municipal railroad over which the plaintiff was provided with trackage rights, and additional tracks, and the Manhattan Railroad.

6. The Court erred in not holding that Contract #3, the Elevated Railroad Certificates, and other agreements and instruments, authorized, executed and delivered on, or pursuant to action taken on March 19, 1913, or thereabouts, were not parts of a single transaction whereby the plaintiff was obligated to receive and charge a fare of five (5) cents, but not more, on all of the several lines constituting what the plaintiff denominates as its Subway Division, and Manhattan Division.

7. The Court erred in holding that Contract #3 in its terms superseded the provisions of Contracts #1 and #2 as to the rate of fare.

8. The Court erred in holding that the Elevated Extension Certificate was not granted under authority of the Rapid Transit Act, as amended in 1912.

9. The Court erred in holding that the five (5) cent fare limitation was established by Chapter 743 of the Laws of 1894, unless the Extension Certificate of March 19, 1913, or Resolution of the Board of Estimate and Apportionment formally approving the proposed Certificate and consenting to the construction and operation of the extensions, in accordance therewith, were a constitutional consent to a different fare.

[fol. 1909] 10. The Court erred in holding that the five (5) cent fare limitation as to the Elevated Railway Com-

pany is statutory under Chapter 743 of the Laws of 1894 and that the action of the Board of Estimate and Apportionment in relation to the Elevated Railroad Certificates was ineffective to create any contractual fare limitation.

11. The Court erred in holding that the provision for the fare in Contract #3 does not apply to elevated railroads.

12. The Court erred in holding that Contract #3 was a waiver of the fare provisions in Contracts #1 and #2.

13. The Court erred in holding that when Contract #3 was made the fare provisions thereof were subject to regulatory revision in the manner prescribed by the Public Service Commission Law.

14. The Court erred in holding that Contract #3 must be regarded as qualified by the restrictions of the Public Service Commission's Law.

15. The Court erred in holding that the Contracts #1, #2, and #3 furnish, and neither of them furnishes, no obstacle to the exercise of jurisdiction by the Public Service Commission to regulate the rates of fare therein provided.

16. The Court erred in holding that there was nothing in the amendment of the Rapid Transit Act in 1912 which excludes the plaintiff from the application of the regulatory plan, and that that Act contains no clear and unmistakable evidence of effort to delegate to the City author-
[fol. 1910] ity to establish by contract in 1913 unchangeable rates to be charged by the plaintiff.

17. The Court erred in holding that there was no delegation in any part of the act of the regulatory power of the State Legislature.

18. The Court erred in holding that the State courts have announced that there must be read into the contracts made after 1907 the authoritative regulation provided for by the Public Service Commissions Law.

19. The Court erred in holding that by express terms, and by construction of the Court of Appeals of the State of New York, legislation resulting in the Public Service Commissions Law established a policy prohibitive of permanent rates of fare, and that by the Public Service Com-

missions Law the contractual capacity for a continuing fixed fare was limited.

20. The Court erred in holding that the Rapid Transit Act as amended in 1912 did not grant unqualified authority to contract for a fixed rate of fare for the entire life of the contract, and that the contractual authority was confined by the Public Service Commissions Law to the establishment of temporary rates, not foreclosing either party against change.

21. The Court erred in holding that the provision of the lease in Contract # 3, "the lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroads and Existing Railroads the sum of five (5) [fol. 1911] cents but not more" was subject to the regulatory law and power of the Public Service Commission.

22. The Court erred in holding the total value of the property used in the system operated by the plaintiff to be $898,793,648.

23. The Court erred in holding that the operation by the plaintiff shows an actual earned return of only 2.65% in 1926 and 2.52% in 1927.

24. The Court erred in holding that the plaintiff was entitled to a return upon a valuation of $898,793,648.

25. The Court erred in holding that the plaintiff was entitled to a return of 8% upon the foregoing valuation, or any other valuation.

26. The Court erred in holding that the plaintiff was entitled to any return upon the subways owned by the City of New York and denominated by the plaintiff as its Subway Division, on any other basis than that provided in Contracts #1, #2 and #3, and each of them.

27. The Court erred in holding that the plaintiff was entitled to any greater return upon the lines embraced in what it denominates as its Manhattan Division, than is provided in the Elevated Railroad Certificates.

28. The Court erred in holding that the value of property owned by the City of New York could be taken as a basis of a return on operations by the plaintiff.

29. The Court erred in holding that the present value of property provided by the plaintiff, exclusive of City property, shows a return of 3.61% actually earned in 1927.

[fol. 1912] 30. The Court erred in holding that the present value of the Company owned and Company provided property, amounts to $554,413,648.

31. The Court erred in holding that the return guaranteed by the Constitution is upon all of the property devoted to the public use, including that of the City of New York.

32. The Court erred in holding that the return to which the plaintiff is entitled depends upon the present value of the property used.

33. The Court erred in holding that the denial by the Transit Commission of a change of rate of fare was a denial of due process of law.

34. The Court erred in holding that under the present rate of fare there would be a continuous confiscation amounting to taking property without due process of law.

35. The Court erred in holding that the plaintiff had established its claim of confiscation of its property and that it was entitled to the injunctive relief it seeks.

36. The Court erred in permitting the plaintiff to charge a seven (7) cent fare on the Rapid Transit Railroads operated by it, or any of them.

37. The Court erred in holding that upon the filing of a bond for $5,000,000, or for any other sum, the plaintiff might receive and withhold fares in excess of five (5) cents [fol. 1913] paid by the passengers riding upon its lines, or any of them.

38. The Court erred in appointing a Special Master to take testimony and evidence upon the issues herein.

39. The Court erred in holding that the defendants, or any of them, be required to file a bond of $5,000,000, or any other sum, to indemnify the plaintiff during the pendency of an appeal by the defendants, or any of them, as a condition of staying the collection of a seven (7) cent fare by the plaintiff, or any fare in excess of five (5) cents.

40. The Court erred in holding that there was a federal question in this case.

41. The Court erred in holding that the action of the defendants constituting the Transit Commission in refusing to alter the provisions as to rate of fare in Contracts #1, #2 and #3 and the Elevated Extension Certificate were subject to judicial review.

Wherefore said defendants-appellants pray that the order of the District Court of the United States for the Southern District of New York in this case be reversed and the cause remanded, and for such other and further relief in the premises as may be in accordance with law.

Dated, New York, May 12, 1928.

Clarence M. Lewis, Solicitor for Transit Commission. George P. Nicholson, Solicitor for City of New York.

[fols. 1914-1916] Bond on appeal for $250.00 approved; omitted in printing.

[fol. 1917] In United States District Court

[Title omitted]

Order re Transcript of Record—May 18, 1928

After hearing counsel, and due deliberation being had, it is hereby

Ordered that the transcript of the record of the appeal to review the interlocutory order of injunction herein shall contain copies of the following papers, and no others; in addition to notice of appeal, petition and allowance of appeal, assignment of errors and citation:

1. Bill of complaint verified February 14, 1928 and filed February 14, 1928.

2. Præcipe filed February 14, 1928.

3. Subpœna issued February 14, 1928.

[fol. 1918] 4. Marshal's returns as to services of subpœna filed February 15, 1928.

5. Notice of appearance by The City of New York filed February 29, 1928.

6. Amended and Supplemental Complaint verified March 3, 1928 and filed March 3, 1928.

7. Answer of Transit Commission verified April 2, 1928 and filed April 2, 1928.

8. Answer of the City of New York verified April 2, 1928 and filed April 2, 1928.

9. Reply of plaintiff to counter-claim of The City of New York verified April 12, 1928.

10. Plaintiff's application for interlocutory injunction and temporary restraining order, order to show cause, Judge Bondy's memorandum and affidavits in support of application:

(a) Order made by Bondy, D. J., February 28, 1928, and memorandum.

(b) Plaintiff's aplication for preliminary injunction and temporary stay verified February 25, 1928.

(c) Affidavit of Ralph Norton, verified February 25, 1928, in support of plaintiff's application.

(d) Affidavit of Henry T. Berry, verified February 25, 1928, in support of plaintiff's application.

(e) Affidavit of Earl E. Starbard, verified February 25, 1928, in support of plaintiff's application.

(f) Affidavit of William S. Gorsuch, verified February 25, 1928, in support of plaintiff's application.

(g) Affidavit of Henry T. Berry, verified February 25, 1928, in support of plaintiff's application.

(h) Affidavit of Charles W. Williams, verified February 25, 1928, in support of plaintiff's application.

11. Admission of service of plaintiff's application for temporary injunction and accompanying papers upon Gov- [fol. 1919] ernor and Attorney General of State on 3/10/28.

12. Defendant Transit Commission's affidavits in opposition to motion before Statutory Court for a temporary injunction.

(a) Affidavit of Clarence M. Lewis, verified March 12, 1928.

(b) Schedule "1" annexed to affidavit of Clarence M. Lewis, being opinion of Transit Commission in Case No. 2897 of February 14, 1928.

(c) Affidavit of Samuel Untermyer, verified March 12, 1928.

(d) Schedule "1" attached to affidavit of Samuel Untermyer, being a letter dated January 17, 1928, from Samuel Untermyer to the Board of Directors of the Interborough Rapid Transit Company.

(e) Further affidavit of Charles M. Lewis, verified March 12, 1928.

(f) Affidavit of Normal C. Hill, verified March 12, 1928.

(g) Affidavit of Isidor Spinrad, verified March 12, 1928.

(h) Schedule "L" and addenda and Schedule "2" attached to affidavit of Isidor Spinrad.

(i) Further affidavit of Isidor Spinrad, verified March 12, 1928.

13. Defendant City of New York's affidavits in opposition to motion before Statutory Court for interlocutory injunction.

(a) Affidavit of George P. Nicholson, verified March 12, 1928, together with Schedules 1, 2, 3, 4, and 5 attached.

(b) Affidavit of John Bauer, verified March 12, 1928.

(c) Affidavit of M. Maldwin Fertig, verified March 12, 1928.

Exhibits A to L annexed to affidavits of Transit Commission (No. 12) and of City (No. 13).

[fol. 1920] 14. Reply affidavits to plaintiff in support of motion for interlocutory injunction (filed March 15, 1928).

(a) Affidavit of Henry T. Berry, verified March 14, 1928.

(b) Affidavit of Frank Hedley, verified March 14, 1928.

(c) Affidavit of Ralph Norton, verified March 14, 1928.

(d) Affidavit of Arthur G. Peacock, verified March 14, 1928.

15. Reply affidavits of defendant Transit Commission in opposition to motion for interlocutory injunction (filed March 29, 1928).

(a) Affidavit of Isidor Spinrad, verified March 27, 1928.

(b) Affidavit of Henry S. Fischer, verified March 27, 1928.

(c) Affidavit of Paul S. L. Bolger, verified March 27, 1928.

(d) Affidavit of William P. Coleman, verified March 27, 1928.

(e) Affidavit of Norman C. Hill, verified March 27, 1928.
(f) Affidavit of Isidor Spinrad, verified March 27, 1928, together with Schedule "1," thereto annexed.
(g) Affidavit of Charles Dickerman Williams, verified March 27, 1928.

16. Rebuttal affidavit of plaintiff, in support of motion for interlocutory injunction—affidavit of Henry T. Berry, verified March 31, 1928.

17. Supplemental Agreement for trackage rights for Steinway Tunnel.

18. Supplemental Agreement as to Seventh Avenue, Lexington, White Plains Road Line, Steinway Tunnel Line, filed April 5, 1928.

[fol. 1921] 19. Answer and cross-petition of defendant Manhattan Railway Company, verified February 29, 1928.

20. Application in behalf of defendant Manhattan Railway Company for interlocutory injunction and restraining order, order to show cause and affidavits in support of application:
(a) Order to show cause dated March 9, 1928, made by Bondy, D. J.
(b) Application by defendant Manhattan Railway Company for preliminary injunction and preliminary stay, dated March 8, 1928.
(c) Affidavit of William Roberts, verified March 8, 1928, in support of defendant Manhattan Railway Company's application.
(d) Affidavit of James F. Hughes, verified March 8, 1928, in support of Manhattan Railway Company's application.

21. Reply affidavits in behalf of defendant City of New York in opposition to application of defendant Manhattan Railway Company.
(a) Affidavit of George P. Nicholson, verified March 14, 1928.
(b) Affidavit of John Bauer, verified March 14, 1928.

22. Reply affidavit in behalf of defendant Manhattan Railway Company, verified by James F. Hughes, March 20, 1928.

23. Ancillary complaint verified February 17, 1928 with attached Exhibits A, B, C & D.

24. Answer of defendant Transit Commission to Ancillary Complaint, verified April 2, 1928.

25. Answer of defendant City of New York to Ancillary Complaint, verified April 10, 1928.

26. Answer of defendant City of New York verified April 4, 1928, to Cross Bill of defendant Manhattan Railway Company.

[fols. 1922 & 1923] 27. Answer of defendant Transit Commission verified April 2, 1928 to Cross Bill of defendant Manhattan Railway Company.

28. Order made by Bondy, D. J., entered April 10, 1928, denying motion of defendant City of New York to strike out specified portions of complaint.

29. Order made by Bondy, D. J., entered April 10, 1928 denying motion of defendant Transit Commission to strike out specified portions of complaint.

30. Order made by Bondy, D. J., entered April 20, 1928, denying motion of defendant Transit Commission to strike out specified portions of Cross Bill of defendant Manhattan Railway Company.

31. Order made by Bondy, D. J., entered April 20, 1928, denying motion of defendant City of New York to strike out specified portions of Cross Bill of defendant Manhattan Railway Company.

32. Opinion of Special Statutory Court filed May 2, 1928.

33. Affidavit of William L. Ransom, verified May 7, 1928, as to defendants' application to Supreme Court for stay.

* * * * * * *

[fols. 1924-1926] 43. Preliminary injunction order dated May 10, 1928 by Manton, C. J., and Knox and Bondy, D. JJ.

Enter.

Manton, U. S. C. J.

[fols. 1927 & 1928] Citation, in usual form, showing service of J. L. Quackenbush et al., filed May 12, 1928, omitted in printing.

[fol. 1929] In United States District Court

[Title omitted]

Order Extending Time—May 28, 1928

On motion of Clarence M. Lewis, solicitor for the defendant Transit Commission, and George P. Nicholson, solicitor for the defendant City of New York, it is now

Ordered that the time within which the record on appeal is to be docketed in the Supreme Court in this case be extended to and including the 28th day of May, 1928, and it is further

Ordered that this order be entered nunc pro tunc as of May 14, 1928.

Wm. Bondy, U. S. D. J.

[fols. 1930-1932] In United States District Court

[Title omitted]

Affidavit of Charles Dickerman Williams

State of New York,
County of New York,
Southern District of New York, ss:

Charles Dickerman Williams, being duly sworn, deposes and says: I am associated with counsel for the Transit Commission.

The citation on appeal in this case was inadvertently made returnable on May 14, 1928. In order that the record may be filed properly, it is necessary that this time be extended.

Wherefore I pray for an order extending the return day of the citation to and including May 28, 1928 and further that this order be signed nunc pro tunc as of May 14, 1928.

Charles Dickerman Williams.

Sworn to before me this 26 day of May, 1928. Wm. E. Ahrens, Notary Public, New York Co. Clerk's No. 32, Reg. No. 0-63. Certificate filed in Kings County. Clerk's No. 44, Register's No. 155. Commission expires March 30, 1930.

[fol. 1933] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the record certified by the Clerk of this Court to the Supreme Court of the United States need not contain the following papers:

1. Exhibit B annexed to affidavit of Samuel Untermyer verified March 12, 1928—Contract No. 1 of February 21, 1900, with John B. McDonald.

2. Exhibit C annexed to affidavit of Samuel Untermyer verified March 12, 1928—Contract No. 2 of July 21, 1902, with Rapid Transit Subway Construction Company.

3. Exhibit D annexed to affidavit of Samuel Untermyer verified March 12, 1928—Contract No. 3 of March 19, 1913, with Interborough Rapid Transit Company.

4. Exhibit E annexed to affidavit of Samuel Untermyer verified March 12, 1928—Elevated Extension Certificate of March 19, 1913, to Interborough Rapid Transit Company.

5. Exhibit F annexed to affidavit of Samuel Untermyer verified March 12, 1928—Elevated Third Tracking Certificate of March 19, 1913, to Manhattan Railway Company.

[fol. 1934] 6. Exhibit G annexed to affidavit of Samuel Untermyer verified March 12, 1928—"Report and Recommendations" by Samuel Untermyer, Special Counsel of the Transit Commission, dated September 30, 1927.

7. Exhibit K annexed to affidavit of George P. Nicholson verified March 12, 1928—Resolution of the Board of Esti-

mate and Apportionment of the City of New York of March 18, 1923, as to Elevated Extension Certificate.

8. Exhibit L annexed to affidavit of George P. Nicholson verified March 12, 1928—Resolution of the Board of Estimate and Apportionment of the City of New York of March 18, 1913, as to Contract No. 3.

9. Supplementary Agreement with Interborough Rapid Transit Company for trackage rights on Seventh—Lexington Avenue Line, White Plains Road Line, and Steinway Tunnel Line, of March 19, 1913.

10. Supplementary Agreement with Interborough Rapid Transit Company and New York Municipal Railway Corporation for trackage rights over Steinway Tunnel Line, of March 19, 1913.

It is further stipulated and agreed that these papers may be handed up to the Supreme Court at the time of the argument of the appeal herein.

Dated New York, May 24, 1928.

James L. Quackenbush, J. H. G., Solicitor for Plaintiff. Clarence M. Lewis, Solicitor for Defendant-John F. Gilchrist, Leon G. Godley and Charles C. Lockwood. Geo. P. Nicholson, J. A. D., Solicitor for Defendant The City of New York.

[fol. 1935] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed by and between the respective parties hereto that the foregoing are true and correct copies of the papers ordered to be incorporated into the transcript of record on appeal from the interlocutory

order of injunction entered in the Office of the Clerk of this Court on May 10, 1928.

Dated New York, May 24, 1928.

James L. Quackenbush, J. H. G., Solicitor for Plaintiff. Clarence M. Lewis, Solicitor for Defendants John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood. Geo. P. Nicholson, J. A. D., Solicitor for Defendant The City of New York.

[fol. 1936] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed June 19, 1928

Come now the Appellants constituting the Transit Commission, and adopt the assignments of error as their statement of the points to be relied upon and represent that the whole of the record as filed is necessary for consideration of the case.

Clarence M. Lewis, Solicitor for the Transit Commission, No. 270 Madison Avenue, Borough of Manhattan, New York.

To James L. Quackenbush, Solicitor for the Interborough Rapid Transit Co., 165 Broadway, New York; Murray, Aldrich & Roberts, Solicitors for the Manhattan Railway Co., 15 Broad Street, New York; George P. Nicholson, Solicitor for the City of New York, Municipal Building, New York.

[fol. 1937] Affidavit of Personal Service

State of New York,
County of ——,
City of New York, ss:

John R. Hawthorne being duly sworn, deposes and says, that he is over the age of 21 years. That on the 16 day of June, 1928, at No. 15 Broad Street, in the Borough of Man-

hattan, City of New York, he served the foregoing Statement of Points upon Murray, Aldrich & Roberts in this action, by delivering to and leaving personally with Horace G. Wear, Jr., in charge of said office, a true copy thereof.

Deponent further says, that he knew the person served as aforesaid to be Horace G. Wear, Jr.

John R. Hawthorne.

Sworn to before me, this 18th day of June, 1928. Wm. E. Aherns, Notary Public, New York Co. Clerk's No. 32, Reg. No. 0-63. Certificate filed in Kings County. Clerk's No. 44, Register's No. 155. Commission expires March 30, 1930.

[fol. 1938] A copy of the within paper has been this day received at the Office of the Corporation Counsel.

Jun. 18, 1928.

George P. Nicholson, Corporation Counsel.

Copy this day received.

Jun. 18, 1928.

J. L. Quackenbush.

[fol. 1939] [File endorsement omitted.]

[fol. 1940] Certificate of Alexander Gilchrist, Jr., Clerk of D. C. U. S., Southern New York, to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,468. S. New York D. C. U. S. Term No. 159. John F. Gilchrist, Leon G. Godley, and Charles C. Lockwood, constituting the Transit Commission, etc., et al., appellants, vs. Interborough Rapid Transit Company and Manhattan Railway Company. Filed May 28th, 1928. File No. 33,468.